

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT: 85.
Connection with Work.



DECISION OF COMMISSION

In the Matter of

Fred R. Ashe, Claimant
[REDACTED]

VEPCO
Va. Beach, Virginia

Date of Appeal

To Commission: July 14, 1981

Date of Hearing: June 25, 1982

Decision No.: 16700-C

Date of Decision: July 1, 1982

Place: Richmond, Virginia

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This matter comes before the Commission on appeal by the employer from the decision of the Appeals Examiner (UI-81-6381), dated June 25, 1981.

ISSUES

Has the employer shown good cause to reopen the record and take additional evidence and testimony as provided in Regulation XI of the Rules and Regulations Affecting Unemployment Compensation?

Was the claimant discharged for misconduct in connection with his work as provided in Section 60.1-58 (b) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On July 14, 1981, the employer filed a timely appeal from a decision of the Appeals Examiner which held that the claimant was not subject to a disqualification effective May 3, 1981, based upon the circumstances surrounding his separation from work.

The claimant, prior to filing his claim for benefits, last worked for Virginia Electric and Power Company. He performed services for this company from April of 1973 until April 28, 1981. The claimant performed services as a meter servicer and was paid \$7.71 an hour. The claimant's job duties would require him to enter customer's homes, businesses or backyards, depending on the meter's location, in order for him to properly service it.

On August 3, 1980, the claimant was arrested by local police and charged with a number of serious felonies including murder, armed robbery, and breaking and entering. The arrest of the claimant and others generated a substantial amount of publicity and the area media reported the circumstances surrounding the crimes in great detail, identifying the suspects who had been arrested and, in the claimant's case, further identifying him as an employee of VEPCO. As a result of the charges placed against the claimant and the substantial amount of publicity surrounding these events, the employer suspended the claimant on August 8, 1980.

In December of 1980, criminal charges were brought against the claimant by the United States Government alleging violations of the U. S. Criminal Code regarding the possession of unregistered firearms. In early 1982, proceedings concerning both the state charges and the federal charges took place. Following a lengthy jury trial, the claimant was acquitted of all charges that had been brought against him by the Commonwealth of Virginia. The claimant entered a plea of guilty in federal court to a charge of possession of an unregistered firearm. This particular offense is a felony and the federal district judge presiding over this case placed the claimant on two years probation. On April 28, 1981, the employer advised the claimant that he was terminated as a result of his felony conviction.

On June 10, 1982, the Virginia Employment Commission issued a Notice of Commission Hearing For Oral Argument which was mailed to the claimant, the employer, and the attorneys representing the claimant and the employer. This Notice advised all parties that the Commission's hearing would be held on June 25, 1982 at 11:00 a.m. in Richmond, Virginia. On June 23, 1982, the employer's attorney requested that the record be reopened to accept additional evidence. The employer requested that the following items be introduced into evidence:

1. The decision and proposed award of neutral Arbitrator William Edgett on grievances VB-17 and VB-19, AAA Case No. 16-30-0116-81;
2. The dissenting opinion filed by the Company arbitrators in the same case;
3. The Company's motion to reconsider the proposed award;
4. The transcript of the arbitration hearing in this case, together with the related exhibits.

After the employer initiated their appeal on July 14, 1981, the Commission issued its standard Notice of Intrastate Appeal on July 21, 1981. The instructions contained on that notice advised all

parties that appeals to the Commission shall be decided on the basis of a review of the evidence in the record. If either party wishes a hearing to present additional testimony, evidence or oral argument, a written request setting forth the grounds must be submitted to the Director of Appeals within fourteen (14) days from the mailing of this notice.

The employer did not advise the Commission of an impending arbitration hearing or of their desire to incorporate into the Commission's record certain portions of the proceedings taken before the arbitrator. Although the complete record of the arbitration hearing was prepared and available to the employer in February of 1982, the employer's request that the record be reopened to accept these items into evidence was not made until two days prior to the Commission's hearing.

OPINION

Regulation XI B of the Rules and Regulations Affecting Unemployment Compensation provides, in part, as follows:

"Right of Reopening. Any party to an appeal before the Commission who was unable to appear for the scheduled hearing may request a reopening of the matter. The request shall be in writing to the Director of Appeals and it shall set forth the reasons for the reopening. If the Commission is of the opinion that the reasons given show good cause to reopen, the request for reopening shall be granted; provided, however, that once a decision is rendered and has become final, the case cannot thereafter be reopened for any reason."

This same regulation further provides that:

"Commission Review. Accept as otherwise provided by this rule, all appeals to the Commission shall be decided on the basis of a review of the evidence in the record. The Commission may, in its discretion, direct the taking of additional evidence after giving written notice of such hearing to the parties in accordance with this rule."

In the present case, the employer has moved the Commission to admit into evidence the proposed decision of the neutral arbitrator, the company's dissent from that decision, the company's motion for reconsideration, and the entire record of proceedings of the arbitration including all of the accompanying exhibits. While some elements of those proceedings may be probative to the Commission's inquiry, the Commission is of the opinion that the employer's request should be denied. The primary reason upon which this conclusion is

predicated is the inordinately lengthy period of time from the date the employer initiated their appeal from the decision of the Appeals Examiner and the request by the employer's attorney, nearly one year later, to reopen the record. Certainly, the employer could have envisioned the arbitration proceedings taking place and had they desired, a request could have been made contemporaneously with the hearing before the Appeals Examiner to keep the record open for a reasonable period of time. In addition, the entire record of the arbitration proceedings became available to the employer in February of 1982, yet they delayed in making their request until two days prior to the Commission's hearing.

In the case of Judith L. Clark v. Edsall Garden Apartments, Decision No. 15731-C, the Commission had its first opportunity to address the issue of the scope of the Commission's review. In that case, the Commission concluded that:

" . . . it is authorized by the provisions of Section 60.1-64 of the Code of Virginia to conduct such a review of any case appealed from the decision of an appeal tribunal in such a manner as would insure that a full and complete record of proceedings has been preserved in order for the Commission to make appropriate findings of fact and conclusions of law and to enable any court which may have jurisdiction to review a decision of the Commission to speedily and expeditiously review any decision of the Commission which may come before it upon a petition for judicial review."

While the standard articulated in the Clark case and the Commission's regular administrative practice provides the necessary latitude to ensure that a complete record is preserved regarding any adjudicated claim for benefits, reason and justice demand that the interested parties appearing before the Commission act in a reasonably prompt manner to protect their interests and exercise their legal rights. For the reasons outlined above, the Commission is of the opinion that the employer has not shown good cause to reopen the record of proceedings and accept additional evidence and testimony. Therefore, the employer's request is denied.

Section 60.1-58 (b) of the Code of Virginia provides a disqualification if the Commission finds that a claimant was discharged for misconduct connected with work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Vernon Branch, Jr. v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609, 248 S.E.2d 130 (1978). In that case, the Court stated:

"In our view, an employee is guilty of 'misconduct connected with his work' when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer. . . . Absent circumstances in mitigation of such conduct, the claimant is 'disqualified for benefits', and the burden of proving mitigating circumstances rests upon the employee."

In addition to the Branch case, the Commission has generally followed the interpretation of the term "misconduct" as it was expressed by the Wisconsin Supreme Court in Boynton Cab Company v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941). This case gave the generally accepted definition of the word "misconduct" as it is interpreted by administrative tribunals construing the unemployment compensation statutes of the various states. In that case, the Court stated:

"The intended meaning of the term 'misconduct' is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of the standards of behavior which the employer has the right to expect of his employees, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or the employee's duties and obligations to his employer."

Since it involves the indefinite denial of unemployment insurance benefits to a prospective claimant, the disqualification for misconduct is a very serious matter and warrants careful consideration. The burden of proof is upon the employer to come forward with such evidence as would establish that the reasons for the claimant's termination from work would constitute misconduct connected with work.

In the present case, the claimant was terminated from his job as the result of being convicted in federal court of the felony of possession of an unregistered firearm. While there is no question that the claimant was guilty of some misconduct, the key issue that must be resolved in this case is whether or not that misconduct was "connected with his work" in order to bring the claimant's actions within the ambit of the disqualifying provision of Section 60.1-58 (b) of the Act.

Cases of this type are not new to the Commission. In past cases, the Commission has held that violations of the law which resulted in convictions, whether felony or misdemeanor, constitute misconduct which would be disqualifying under the Virginia Unemployment Compensation Act so long as there was a reasonable nexus between the claimant's conduct and his employment. For example, in the case of Priscilla E. Brady v. U. S. Military District of Washington, Commission Decision UCFE-479, August 1, 1979, the claimant lost her security clearance as a result of a felony conviction. The loss of her security clearance prevented her from performing the duties for which she had been hired and she was discharged by the employer as a result. This conduct was held to be sufficiently connected with her work for the actions to fall within the purview of Section 60.1-58 (b) of the Code of Virginia. Work-related misconduct has also been found to exist where a truck driver was convicted of credit card fraud and could no longer be bonded as required by the employer (James H. Pierce, Jr. v. Carolina Western Express, Decision No. 18305-C May 28, 1982); where a clerk-typist for a police department was arrested and subsequently convicted for shoplifting in a local store while on her lunch break (Ann E. Guizzetti v. City of Virginia Beach, SUA-296, October 5, 1978, finding of no work-related misconduct reversed by Cir. Court of Virginia Beach, Law No. L-6827-A, February 28, 1979); where a Deputy Clerk for a Circuit Court was convicted of the felonies of forging and uttering (Lola G. Poteat v. City of Danville, Decision No. 15077-C, August 5, 1981); where an eligibility worker in the Food Stamp Program was convicted of embezzlement from a life saving and first aid organization (Robert J. Lee v. City of Roanoke, Commission Decision No. 14088-C, January 15, 1981, finding of no work-related misconduct reversed by the Circuit Court of Roanoke); where a hospital employee was discharged for selling drugs from his residence (Ronnie Simmons v. Veteran's Hospital, UCFE-705, April 5, 1982); however, cf. a finding of no work-related misconduct where the employer failed to offer testimony to show a reasonable nexus between the claimant's felony conviction and her duties and responsibilities with the employer (Juanesta Robinson v. Roman Eagle Nursing Home, Decision No. 18645-C, June 22, 1982).

While none of the cases cited above are exactly on point with the present case, nevertheless, the Commission is of the opinion that the principles enunciated in the Brady case and the Simmons case are instructive in the case at bar. In Brady, the Commission held:

"We also feel that it is not necessary for the act to have occurred within the scope of employment. This is just too stringent a standard. A worker has a duty to conduct himself and his affairs in a manner not detrimental to his employment . . . When an individual knowingly commits an act of misconduct that has a substantive detrimental effect on his employer and as a result lose his job, such an individual will not be able to rely on the benefits of unemployment insurance."

In the Simmons case, the Commission adopted the following analysis:


"In the instant case, although the evidence indicates the claimant was not selling drugs on the employer's premises, it is none the less an act of misconduct. When the act is publicized in the news media and the employer, as a hospital, is involved in the publicity, the act then is connected with the claimant's work. It is apparent that the resultant publicity would create a question in the mind of the public which could be detrimental to the employer."

The claimant's job as a meter servicer required that he enter the businesses, homes, or backyards of the employer's customers in order to have access to the meters he was required to service. Such a position is a highly sensitive one since it involves contact with the public where the customers live and work, and not at the employer's place of business. Under these circumstances, the Commission is of the opinion that the employer has established a reasonable nexus between the claimant's job duties and responsibilities and the act of misconduct which resulted in his conviction for possessing an unregistered firearm. Accordingly, the Commission concludes that the claimant was discharged for work related misconduct and should be disqualified from receiving unemployment insurance benefits. (Underscoring provided)

DECISION

The decision of the Appeals Examiner is hereby reversed. It is held that the claimant is disqualified from receiving unemployment insurance benefits effective May 3, 1981 for any week benefits have been claimed until he performs services for an employer during thirty days, whether or not such days are consecutive, for being discharged for misconduct connected with his work.

Upon this decision becoming final, the local office Deputy is instructed to carefully examine the claimant's claim for benefits and ascertain whether or not he has been paid any sum as benefits to which he was not entitled and is liable to repay the Commission as a result of this decision.


M. Coleman Walsh, Jr.
Special Examiner

NOTE: Affirmed Circuit Court of Virginia Beach, November 10, 1983.