



DECISION OF COMMISSION

In the Matter of

James Watford, Claimant
[REDACTED]

Wilson Trucking Corporation
Hampton, Virginia

Date of Appeal

To Commission: May 25, 1982

Date of Hearing: July 16, 1982

Decision No.: 18757-C

Date of Decision: October 22, 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-82-1149), dated May 18, 1982.

ISSUE

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

FINDINGS OF FACT

The Findings of Fact of the Appeals Examiner are hereby adopted by the Commission. In addition, the Commission finds that the statements of the co-worker which implicated the claimant in the alleged theft of company property were not made under oath. The employer did not request the Commission to subpoena this individual to be present at the hearing before the Appeals Examiner and this co-worker did not voluntarily appear to testify before the Appeals Examiner.

OPINION

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 his 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, 249 S.E.2d 180 (1978). In that case, the Court held:

"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."

The disqualification for misconduct is a very serious matter since it involves the indefinite forfeiture of benefits to a prospective claimant. The burden of proof is upon the employer to come forward with clear evidence which would establish that the acts or omissions of which they complain did occur and were of such a nature as would be tantamount to misconduct connected with work.

In the present case, the Appeals Examiner held that the employer had not sustained the burden of proof in establishing work-related misconduct on the part of the claimant. At the hearing before the Commission, the employer's attorney alleged four errors by the Appeals Examiner in reaching his decision. First, the employer argued that too severe a burden of proof had been placed upon them. Second, they alleged that the Appeals Examiner erred in his interpretation of prior Commission decisions which were controlling in the instant case. Third, the employer argued that the Appeals Examiner committed error in his evaluation of the weight of the evidence presented at the appeals hearing. Fourth, the employer argued that the Appeals Examiner did not evaluate these cases in light of the unemployment insurance claim for the co-worker whose statement had implicated the claimant and whose appeals hearing had been held earlier on the same day as the claimant's hearing. However, for the reasons stated below, the Commission is not persuaded by the employer's arguments and is of the opinion that the Appeals Examiner did not commit any prejudicial error.

With respect to the first assignment of error, the employer conceded that the Appeals Examiner stated in his decision the correct burden of proof, however, they argued that the manner in which the evidence was weighed and the principles of law applied to that evidence resulted in a burden of proof tantamount to "beyond a reasonable doubt" being applied. However, the true underlying

basis for this assignment of error is the manner in which the Appeals Examiner weighed the evidence and testimony presented before him. To that extent, the first and third assignments of error are very closely related to each other and shall be dealt with simultaneously here.

Over the years, the Commission has been faced with a number of cases where a claimant was discharged for some transgression and the employer predicated that discharge on the results of a polygraph examination. In the precedent case of Vivian C. Northern v. U-Totem of Virginia, Inc., Decision No. 5484-C, October 13, 1971, the Commission held:

"While the results of the polygraph administered by the employer were admissible before the Commission, these results, without more, are not sufficient to substantiate a charge of misconduct. Additional evidence is necessary. The Commission does not decide in this opinion how much additional evidence is necessary since each case is determined on its own facts."

The Commission's analysis in the Northern case was further refined in the case of Elbert R. Saunders v. City of Norfolk, Decision No. 11701-C, March 8, 1979. In that case, the claimant was discharged on the basis of the result of a polygraph examination and the fact that another individual had implicated the claimant in the theft of property from the employer. The only evidence before the Commission in that case was the hearsay testimony of the employer representative concerning the claimant's polygraph results and that the claimant had been accused by a convicted felon. The employer did not submit the actual test results of the polygraph nor the evaluation of the polygraph examiner. Furthermore, there is no direct testimony under oath from the employee who had implicated the claimant in these alleged offenses. The Commission ruled, in holding that the employer had not sustained the burden of proof, that:

"It would appear that the sounder principle would be to consider the results of a polygraph examination as merely one piece of evidence in determining proof of the particular fact. It is the opinion of the Commission that a polygraph examination alone, without corroboration by other evidence would be insufficient to prove that an individual had committed an act of misconduct. However, the Commission is of the opinion that polygraph results would be admissible in an administrative proceeding."
(Emphasis added by Commission)

In the present case, the employer has overcome a number of the problems that the Commission confronted in the Saunders case. In the case at bar, the employer has submitted the actual test results from the polygraph examination together with the evaluation of the polygraph examiner. Additionally, the written statements of the co-worker who implicated the claimant have also been admitted to the record. However, the key issue upon which this case turns is whether or not the additional evidence that has been offered in corroboration of the polygraph results constitutes "other competent evidence" in order to allow the employer to sustain the burden of proof.

The phrase "competent evidence" is defined by Black's Law Dictionary, 4th Ed., p: 355, as follows:

"That which the very nature of the thing to be proven required, as, the production of a writing where its contents are the subject of inquiry . . . Also, generally, admissible or relevant, as the opposite of 'incompetent'."
(Citations omitted)

In those cases where an employer attempts to carry the burden of proof through the submission of the results of a polygraph examination together with other corroborating evidence, the additional corroborating evidence must be (1) admissible under the rules of evidence followed by administrative tribunals; (2) relevant and material to the inquiry being made by the administrative agency as well as to the specific issue which the agency must resolve; and (3) the corroborating evidence must be credible, worthy of belief and not patently incredible or untrustworthy. In reviewing the additional evidence offered by the employer in this particular case, the Commission is of the opinion that this corroborating evidence is insufficient to carry the employer's burden of proof. (Underscoring supplied)

Under the rules of evidence followed by the Virginia Employment Commission, the corroborating evidence offered by the employer is both admissible and relevant. However, the Commission does not view the unsworn statement offered by the other employee as being either credible or convincing in light of this employee's prior inconsistent statements, his failure to voluntarily reveal his alleged knowledge of employee theft to the employer, and the sworn testimony of the claimant denying any complicity in the theft of company property. The claimant's testimony denying the allegations made against him has been consistent throughout the proceedings before the Commission and was not patently incredible or unbelievable. Accordingly, when compared with the unsworn statement of this other employee, the claimant's testimony is entitled to receive greater weight. The Commission recognizes that all of the additional corroborating evidence offered by the employer is hearsay which falls outside of the exceptions to the hearsay rule. However, the Commission does not need to address the question of whether or not

the employer, in polygraph cases, can prevail using only hearsay evidence which does not fall within a recognized rule since there is sworn testimony in the record from the claimant upon which the Commission has relied in adjudicating the issues presented.

The final assignment of error argued by the employer is that the Appeals Examiner improperly failed to consider the evidence and testimony adduced at the appeals hearing that was held concerning the claim for benefits filed by the employee who had implicated the claimant in the alleged thefts. Each record concerning a claimant's claim for benefits and any appeals from eligibility determinations must stand on its own record. For the Commission to merely consider the record of proceedings taken by the Appeals Examiner in that case would deny that employee certain rights of confidentiality provided under Section 60.1-65 of the Code of Virginia and would otherwise deny the claimant in this case a reasonable opportunity to confront and cross-examine an adverse witness. The employer, had they so desired, could have requested the Commission to subpoena this other employee to testify at the hearing held by the Appeals Examiner. Furthermore, the employer could have requested the Commission to hold an evidentiary hearing and subpoena this individual to offer testimony and evidence. However, neither of these alternatives was pursued by the employer. While the Commission has a statutory obligation to insure that a full and complete record is developed concerning each claim for benefits that it adjudicates, the parties have a responsibility to exercise due diligence in the presentation of their cases and in advising the Commission of any witnesses or documents that may need to be subpoenaed. Therefore, the employer's request that the Commission take additional evidence from this witness and the request that the Commission consider the record of evidence and testimony from this other employee's appeals hearing should be denied since the employer had a reasonable opportunity on at least two occasions to compel this particular witness to appear and offer testimony.

DECISION

The decision of the Appeals Examiner which held that no disqualification should be imposed based upon the claimant's separation from his last thirty day employer is hereby affirmed.

M. Coleman Walsh, Jr.
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Special Examiner