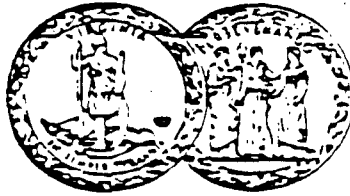


COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Bernard Duncan
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Department of Corrections
Boydton, Virginia

Date of Appeal
to Commission:

September 2, 1994

Date of Hearing:

October 31, 1994

Place: RICHMOND, VIRGINIA

Decision No.:

46472-C

Date of Mailing:

November 15, 1994

Final Date to File Appeal

with Circuit Court: December 5, 1994

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This case came before the Commission on appeal by the claimant from the Decision of Appeals Examiner (UI-9410949), mailed August 12, 1994.

APPEARANCES

Claimant

ISSUES

Was the claimant unemployed during the weeks for which he claimed benefits as provided in Section 60.2-612 of the Code of Virginia (1950), as amended?

Was the claimant discharged for misconduct connected with work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On September 2, 1994, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified him for benefits, effective May 22, 1994. The basis for that disqualification was the Appeals Examiner's conclusion that the

claimant had been discharged for misconduct connected with his work.

The claimant was discharged on May 17, 1994, as the result of a Group III Written Notice which alleged that he had been insubordinate. The claimant filed a grievance to this disciplinary action in accordance with the employer's grievance procedure. At the third step manager's meeting, the employer reduced the Group III Written Notice to a Group II Written Notice. In addition, the claimant's dismissal was rescinded, and he was reinstated, effective May 17, 1994, with full back pay.

The claimant was monetarily eligible to receive a weekly benefit amount of \$187 for a maximum duration of 25 weeks. He claimed unemployment compensation benefits for the 14-week period from May 22, 1994, through August 27, 1994. The claimant returned to work on August 29, 1994. Approximately one week later he received his back pay in the gross amount of \$5,463.40, which was based upon his gross salary of \$799.50 per pay period. The claimant was paid semi-monthly. When computed on a weekly basis, the claimant's salary was nearly double his weekly benefit amount.

OPINION

Section 60.2-612 of the Code of Virginia sets out the threshold requirement that every claimant must meet in order to be eligible for unemployment compensation benefits. That statute specifies that benefits may be paid only to unemployed individuals.

The term "unemployment" is defined by statute. In section 60.2-226(A) of the Code of Virginia the following definition appears:

An individual shall be deemed "unemployed" in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount. Wages shall be deemed payable to an individual with respect to any week for which wages are due. An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the Commission may by regulation otherwise prescribe.

In this case, the evidence establishes that the claimant was discharged by the employer on May 17, 1994. As the result of a successful grievance, the claimant was reinstated with full back pay. His reinstatement was effective May 17, 1994, and he was paid

his full salary from May 17, 1994, through his return to work. The back pay covered all 14 weeks that the claimant claimed benefits.

Under Section 60.2-229 of the Code of Virginia, the term "wages" includes back pay. Consequently, the claimant's reinstatement with full back pay means that he was not unemployed as defined by the statute because he received wages in excess of his weekly benefit amount with respect to the 14 weeks for which he claimed benefits. Accordingly, he would not be eligible to receive any unemployment compensation benefits regardless of how the Commission decided the misconduct issue.

For these reasons, the Commission must conclude that the claimant was ineligible to receive benefits for the period of May 22, 1994, through August 27, 1994, because he did not meet the statutory definition for being "unemployed" by virtue of his reinstatement to his former position with full back pay. Consequently, the issue of whether the claimant should have been disqualified from receiving benefits under the provisions of Section 60.2-618(2) of the Code of Virginia, is moot.

DECISION

The Notice of Deputy's Determination and the Appeals Examiner's decision (UI-9410949), are vacated. The Commission finds that the claimant is ineligible to receive benefits for the period of May 22, 1994, through August 27, 1994, since he was not "unemployed" during those weeks as required by the statute.

M. Coleman Walsh, Jr.

M. Coleman Walsh, Jr.
Special Examiner

NOTICE TO CLAIMANT

IF THE DECISION STATES THAT YOU ARE DISQUALIFIED, YOU WILL BE REQUIRED TO REPAY ALL BENEFITS YOU MAY HAVE RECEIVED AFTER THE EFFECTIVE DATE OF THE DISQUALIFICATION. IF THE DECISION STATES THAT YOU ARE INELIGIBLE FOR A CERTAIN PERIOD, YOU WILL BE REQUIRED TO REPAY THOSE BENEFITS YOU HAVE RECEIVED WHICH WERE PAID FOR THE WEEK OR WEEKS YOU HAVE BEEN HELD INELIGIBLE. IF YOU THINK THE DISQUALIFICATION OR PERIOD OF INELIGIBILITY IS CONTRARY TO LAW, YOU SHOULD APPEAL THIS DECISION TO THE CIRCUIT COURT. (SEE NOTICE ATTACHED)