

COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Timothy R. Garner  
████████████████████

Accomack County School Board  
Accomac, Virginia

Date of Appeal  
to Commission: September 21, 1988  
Date of Hearing: November 29, 1988  
Place: RICHMOND, VIRGINIA  
Decision No.: 30974-C  
Date of Mailing: December 2, 1988  
Final Date to File Appeal  
with Circuit Court: December 22, 1988

---o0o---

This matter comes before the Commission as the result of an appeal filed by the employer from the Decision of Appeals Examiner (UI-8807196), mailed September 7, 1988.

APPEARANCES

Attorney for Employer

ISSUES

Did the claimant leave work voluntarily without good cause as provided in Section 60.2-618.1 of the Code of Virginia (1950), as amended?

Was the claimant discharged from employment due to misconduct in connection with work as provided in Section 60.2-618.2 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The employer filed a timely appeal from the Appeals Examiner's decision which affirmed an earlier Deputy's determination and declared the claimant to be qualified for unemployment compensation, effective July 17, 1988 with respect to his separation from the employer's services.

Prior to filing his claim, the claimant last worked for the Accomack County School Board of Accomac, Virginia between September 2, 1987 and June 16, 1988. His position was that of a health and physical education instructor at the Parksley Middle School.

At the beginning of March, 1988, the claimant was called into the office by the school principal where his future was discussed. He was basically told that the principal made it a policy of not recommending that new teachers be retained unless he was "100 percent" sure about them. He said that due to some problems the claimant had shown in the management of his classroom, he was not 100 percent sure about him; however, he wished to observe him again since some improvement had been noted. The following week he did drop in unexpectedly to observe the claimant's class and indicated that he was pleased with what he saw.

Almost immediately thereafter, the claimant received a letter from the division superintendent in which he stated that it would be recommended to the county school board that his contract not be renewed for the following school year. Because this letter had come so soon after the final observation by the principal, the claimant thought it was possible that it did not take it into account. He then went back to speak with the principal and, after some delay, was basically told that the letter stood and that the division superintendent recommended he resign his position. The principal also indicated to him that the school board always followed through with the recommendations for retention of new teachers which were presented to it. In addition, he told him that he would give him a good recommendation for a position at the high school level. After this, the claimant chose to submit a resignation on April 11, 1988 to be effective with the end of the school year when his contract was due to expire. He did this in order to protect his employment record.

OPINION

Section 60.2-618.1 of the Code of Virginia provides a disqualification if it is found that a claimant left work voluntarily without good cause.

In the case of Howard v. Woodward & Lothrop, Commission Decision 5669-C, (May 26, 1972), the claimant was given the option of resigning or being fired and chose the later course in order to protect her employment record. The Commission held that she had actually been discharged, citing the following language from Smith v. Meloy Laboratories, Inc., Commission Decision 5512-C, (November 22, 1971):

"... The Commission holds that the legal inference of voluntary quit or discharge must be drawn from the facts of each case, and the words 'discharged' or 'fired' need not be expressly used by the employer, but may be inferred from such language as ... 'It will be best if you resign.'"

In the present case, if the claimant had been simply sent the letter indicating that it would be recommended to the school board that his contract not be renewed and had he then immediately resigned, this would have represented a voluntary action on his part since, under normal circumstances, a mere recommendation does not amount to an actual notice of a discharge. Despite this, the picture changes once the claimant's un rebutted testimony concerning what was told to him by his superiors is taken into account. What this evidence shows is a concerted effort on the part of a number of officials to convince the claimant that it would be in his best interest to resign since the principal was not "100 percent" sure about his abilities, the school board always accepted the recommendations of nonrenewal which were made to it, and he could get a good recommendation if he wished to seek a position at the high school level. The obvious inference to be drawn by the claimant from these statements was that he would have no chance to fight for his job and he would be better off resigning in order to get a good recommendation to go elsewhere. From this, the Commission concludes that the Appeals Examiner and the Deputy both correctly found that the claimant's act of resigning was not voluntary in light of the influence exercised by the employer over his decision. Accordingly, his separation should be considered as a discharge.

Section 60.2-618.1 of the Code of Virginia provides a disqualification if it is found that a claimant was discharged from employment due to misconduct in connection with work.

In the case of Branch v. Virginia Employment Commission, et al, 219 Va. 609, 249 S.E.2d 180 (1978), the Supreme Court of Virginia defined misconduct as follows:

"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 employee is 'disqualified for benefits', and the burden of proving mitigating circumstances rests upon the employee."

In the case of Miller v. J. Henry Holland Corporation, Commission Decision 7470-C, (February 9, 1976), the Commission went on to state:

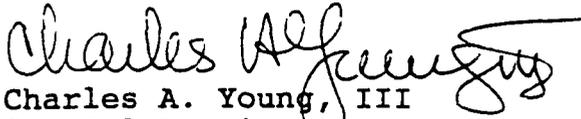
"On the other hand, mere inefficiency, incapability, mistake or misjudgment has never been tantamount to misconduct. The Commission has also consistently held that the burden is upon the employer to prove misconduct."

Here, the employer has failed to produce evidence to show that the claimant deliberately or willfully violated the rules or the standards of behavior expected of him as an employee so as to bring about the employer's decision not to renew his contract for the upcoming school year. His failure to properly control his classes at the beginning of the year may have represented errors in judgment, or may simply have been due to inexperience. In either case, this would not be sufficient to constitute misconduct in connection with the claimant's work so as to impose a disqualification under this section of the Code.

#### DECISION

The decision of the Appeals Examiner is hereby affirmed.

It is held that the claimant is qualified for unemployment compensation, effective July 17, 1988 with respect to his separation from the services of the Accomac County School Board.

  
Charles A. Young, III  
Special Examiner