

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Thelma D. Slacum
[REDACTED]

R. H. Walker & Associates
t/a Britthaven of Keysville
Keysville, Virginia

Date of Appeal
to Commission:

October 29, 1992

Date of Review:

December 12, 1992

Place: RICHMOND, VIRGINIA

Decision No.:

40195-C

Date of Mailing:

January 11, 1993

Final Date to File Appeal

with Circuit Court: January 31, 1993

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This case came before the Commission on appeal by the claimant from the Decision of Appeals Examiner (UI-9214334), mailed October 8, 1992.

ISSUES

Does the employer have good cause to reopen the Appeals Examiner's hearing as provided in Regulation VR 300-01-4.2I of the Regulations and General Rules Affecting Unemployment Compensation?

Should the Commission grant the employer's request to submit additional evidence as provided in Regulation VR 300-01-4.3B of the Regulations and General Rules Affecting Unemployment Compensation?

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

FINDINGS OF FACT

On October 29, 1992, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified her from receiving benefits, effective July 19, 1992. The basis for that disqualification was the Appeals Examiner's finding that the claimant had been discharged for misconduct in connection with her work. In her notice

of appeal, the claimant denied that she had falsified a job application and noted that the employer had never presented a copy of the application that she allegedly falsified.

By letter dated and postmarked November 19, 1992, the employer requested that the evidentiary record be reopened to accept a copy of the employment application in question. A copy of the employment application was attached to that letter. The employer also alleged as follows:

September 30, 1992 the personnel director was not present for the hearing. Britthaven had requested a telephone interview. Britthaven was never notified if the telephone interview was set up for that day by mail, or by phone.

The Appeals Examiner's hearing had been scheduled for 11:00 a.m. on September 30, 1992, at the Farmville office of the Virginia Employment Commission. On September 28, 1992, the employer requested permission to participate in the hearing by telephone, alleging that conditions at the premises precluded a representative from personally attending the hearing. The name and telephone number of the facility administrator was provided to the Commission.

Except in cases where the claimant has filed an interstate claim for benefits and resides outside of Virginia, telephone hearings are conducted only by consent of the parties. The Commission was not able to reach the claimant prior to the hearing to obtain her consent. The Appeals Examiner was advised of the employer's request. During the pre-hearing conference that she conducted with the claimant, the Appeals Examiner asked her if she consented to the employer participating in the hearing by telephone. The claimant gave her consent and the Appeals Examiner called the personnel administrator at the telephone number provided. The Appeals Examiner was informed that the personnel administrator was not available to participate in the hearing. Consequently, the Appeals Examiner proceeded with the hearing and took testimony from the claimant and her witness.

Prior to filing her claim for benefits, the claimant was last employed by Britthaven of Keysville. From September 16, 1991, until July 13, 1992, the claimant worked as a cook in the dietary department. She applied for a promotion to the position of Activities Director. The claimant was hired for that position effective July 13, 1992, and continued in that job until July 16, 1992, when she was discharged.

The claimant had been informed that she needed to complete an employment application if she wished to apply for the position of Activities Director. In particular, the claimant had been told that the information reflected on her original application did not reveal adequate work experience or education to be eligible for the position.

The claimant was encouraged to provide any additional information in those areas that would reflect her qualifications for the position. Although these areas of the application were emphasized, the claimant was told to complete the application in its entirety.

The claimant was subsequently hired to be the Activities Director. The employer made this decision sometime during the week prior to July 13, 1992. After making that decision, the employer heard a rumor that the claimant had been convicted of embezzlement. Since the position of Activities Director involved handling certain financial accounts, the employer was understandably concerned. Upon investigating the situation, the employer learned that the claimant had been convicted of the crime of embezzlement. The conviction had occurred after the claimant began working for the employer as a cook. As a result of the conviction, the claimant was placed on two years supervised probation and was required to pay restitution through her probation officer.

The claimant did not disclose the conviction on the application that she completed for the Activities Director position. During a meeting with the facility administrator on July 13, 1992, the claimant informed her that she did not mark the appropriate box on the employment application regarding her conviction because she was afraid that she would not get the job. The facility administrator told the claimant that she needed to discuss the situation with her regional manager. The claimant was permitted to continue in the Activities Director position; however, the employer did not turn over any money to her and did not place her name on the accounts that the Activities Director would usually manage. On July 16, 1992, the claimant was discharged for falsifying her employment application when she applied for the Activities Director position.

OPINION

As a preliminary matter, the Commission needs to address the employer's request that the evidentiary record be reopened. Since the employer failed to participate in the Appeals Examiner's hearing, it would be appropriate for the Commission to consider this request in light of the general reopening regulation as well as the regulation which permits the Commission to direct that additional evidence and testimony be taken in certain circumstances.

Regulation VR 300-01-4.2I of the Regulations and General Rules Affecting Unemployment Compensation provides, in pertinent part, that an Appeals Examiner's hearing may be reopened upon a showing of good cause. In the case of Engh v. United States Instrument Rentals, Commission Decision 25239-C (July 12, 1985), the Commission held:

In order to show good cause to reopen a hearing, the party making such a request must show that he was prevented or prohibited from participating in the

hearing by some cause which was beyond his control and that, in the face of such a problem, he acted in a reasonably prudent manner to preserve his right to participate in future proceedings.

In this instance, the Commission attempted to accommodate the employer's request to be permitted to participate in the hearing by telephone. Given the circumstances of this case, the only way a telephone hearing could have been allowed was by consent of the parties. The Commission was unable to contact the claimant to discuss in detail the employer's request until she reported to the Farmville office to participate in the hearing. At that time she consented to allowing the employer to participate telephonically; however, when the Appeals Examiner called the employer, the personnel administrator was not available for the hearing. There has been no showing that the personnel administrator was unavailable at the time of the hearing due to any circumstances beyond her control. Therefore, good cause for reopening the hearing under this regulation has not been established.

Section 60.2-622 of the Code of Virginia authorizes the Commission to direct the taking of additional evidence and testimony in any case pending before it. In order to ensure that this statutory discretion is fairly and consistently exercised, the Commission has adopted certain guidelines which are now included in the agency's rules and regulations.

Regulation VR 300-01-4.3B of the Regulations and General Rules Affecting Unemployment Compensation provides:

Except 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, in its discretion, may direct the taking of additional evidence after giving written notice of such hearing to the parties, provided:

1. It is affirmatively shown that the additional evidence is material, and not merely cumulative, corroborative, or collateral; could not have been presented at the prior hearing through the exercise of due diligence; and it is likely to produce a different result at a new hearing; or
2. The record of proceedings before the appeals examiner is insufficient to enable the Commission to make proper, accurate, or complete findings of fact and conclusions of law.

The additional evidence that the employer presented with its appeal letter was a copy of the employment application that the claimant

completed. This could have been presented at the Appeals Examiner's hearing through the exercise of due diligence. Accordingly, the additional information submitted by the employer cannot be considered by the Commission in rendering a decision on this case.

Section 60.2-618(2) of the Code of Virginia provides a disqualification if the Commission finds that a claimant was discharged for misconduct in connection with work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission, 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 employee is "disqualified for benefits", and the burden of proving mitigating circumstances rests upon the employee.

The disqualification for misconduct is a serious matter which warrants careful consideration. The burden of proof is on the employer to prove by a preponderance of the evidence that the claimant was discharged for reasons which would constitute misconduct connected with work. Dimes v. Merchants Delivery Moving and Storage, Inc., Commission Decision 24524-C (May 10, 1985); Brady v. Human Resource Institute of Norfolk, Inc., 231 Va. 28, 340 S.E.2d 797 (1986).

The Commission is satisfied from the evidence presented that the employer has established that the claimant falsified the employment application that she submitted for the Activities Director position. Although it is hearsay evidence, the information contained in Commission Exhibits II and VI is sufficient to establish a prima facie case. As the Appeals Examiner noted in her decision, the falsification of company documents, such as an employment application, constitutes misconduct in connection with work. Powell v. Sims Wholesale Company, Commission Decision 13448-C (June 10, 1980); Blount v. D.G.S.C., Commission Decision 30397-C (June 30, 1988). Therefore, in order to avoid the statutory disqualification, the claimant prove mitigating circumstances.

In her defense, the claimant has advanced two contentions. First, she maintained that she did not answer the question regarding whether she had been convicted of a crime. Second, she argued that the

employer allowed her to work for a brief time as the Activities Director after learning of the embezzlement conviction. The Commission is not persuaded by these arguments.

The evidence is sufficient to establish that the claimant was convicted of embezzlement. This is a felony that involves moral turpitude. Consequently, the claimant's assertion that she did not falsify her employment application cannot be accorded the same weight as the testimony of someone who had no felony conviction. Furthermore, the Commission is satisfied from the evidence that the claimant was instructed to complete the employment application in its entirety. If, as she claims, she did not answer the question regarding any criminal convictions, she was withholding material information from the employer. Information regarding a conviction for embezzlement would obviously be important to an employer who is considering hiring an individual who, as part of her responsibilities, will be handling money.

Similarly, the Commission is not convinced that the employer condoned or acquiesced to the claimant's conduct by permitting her to work in the Activities Director position while the investigation was being completed. The personnel administrator took steps to ensure that the claimant would not be handling any funds during that time. That action was reasonable and it also rebuts any inference of condonation or acquiescence.

For these reasons, the Commission must conclude that the claimant was discharged for misconduct in connection with her work for which no mitigating circumstances have been proven. Accordingly, she must be disqualified from receiving benefits.

DECISION

The employer's request that the Commission reopen the Appeals Examiner's hearing, or in the alternative, accept additional evidence in the case is hereby denied.

The Appeals Examiner's decision is hereby affirmed. The claimant is disqualified from receiving benefits, effective July 19, 1992, because she was discharged for misconduct connected with her work. This disqualification shall remain in effect for any week benefits are claimed until the claimant performs services for an employer during thirty days, whether or not such days are consecutive, and she subsequently becomes totally or partially separated from such employment.

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)