

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

James M. Jones, III
[REDACTED]

Northside Electric Company
Richmond, Virginia

Date of Appeal
to Commission: January 11, 1995
Date of Hearing: March 7, 1995
Place: RICHMOND, VIRGINIA
Decision No.: 47442-C
Date of Mailing: March 27, 1995
Final Date to File Appeal
with Circuit Court: April 16, 1995

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9417704), mailed December 22, 1994.

APPEARANCES

Claimant, Witness For Claimant, Employer Representative

ISSUE

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?

FINDINGS OF FACT

On December 22, 1994, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified him for benefits, effective October 30, 1994. The basis for that disqualification was the Appeals Examiner's conclusion that the claimant left his job voluntarily under circumstances that did not constitute good cause.

The Commission conducted an evidentiary hearing on March 7, 1995. The evidence obtained at that hearing and at the appeals hearing held on December 14, 1994, constitutes the complete record upon which the following findings of fact are based.

Prior to filing his claim for benefits, the claimant last worked as many as 30 days for Northside Electric Company of Richmond, Virginia. He worked from May 13, 1994, until October 14, 1994. He was a full-time journeyman electrician and was paid \$17.25 an hour.

The claimant is a member of Local Union No. 666 of the International Brotherhood of Electrical Workers (IBEW). The IBEW has a collective bargaining agreement with the Capital Division of the Virginia Chapter, National Electrical Contractors Association (Association). That agreement, which is known as the Inside Construction Agreement, provided that journeyman electricians such as the claimant would be paid \$17.25 an hour for their services. Section 3.04 of the agreement provides as follows:

The Employer recognizes the Union as the exclusive representative of all its employees in performing work within the jurisdiction of the Union for the purpose of collective bargaining in respect to rates of pay, hours of employment, and other conditions of employment. Any or all such employees shall receive at least the minimum wages and work under the conditions of this Agreement.

The Association and the management of Local Union No. 666 have entered into a side agreement known as Commercial Market Recovery Memorandum. This memorandum identifies certain types of jobs that would not be covered by the wage rates specified in the inside agreement. Instead, the wage rate would be, in most instances, 85 percent of the rate specified in the inside agreement. Union electricians would not be required to accept recovery memorandum work if they preferred to work at the 100 percent wage rate. Those who agreed to work under the recovery memorandum would not be penalized by the Union for doing so.

One of the primary goals of the recovery memorandum was to enable union contractors to compete more effectively with non-union contractors when they submit bids for work. There are a total of 68 union electrical contractors in the Central Virginia area, which encompasses the local union's jurisdiction. There are more than double that number of non-union electrical contractors in the same geographic area. In the area encompassed in the cities of Richmond and Hopewell, and the counties of Henrico and Chesterfield, approximately 12 percent of the electrical work performed is done by union contractors. That same percentage holds true for the entire geographic area served by Union No. 666.

The U.S. Department of Labor publishes wage surveys for various occupations and trades by geographic areas. These wage surveys are based upon data secured solely from union contractors. As of the date of the Commission hearing, the most recent wage survey

published by the U.S. Department of Labor revealed that the prevailing wage for a journeyman electrician was \$16.90 an hour based on work performed in the cities of Richmond and Hopewell and the counties of Chesterfield and Henrico. The overall wage range for journeyman electricians, whether union or non-union, in the same geographic area is \$12 to \$20 an hour.

The claimant was initially referred to Northside Electric Company under the inside agreement. Consequently, during his tenure, he was paid \$17.25 an hour. On or about October 14, 1994, the employer had no additional work for the claimant at the job site where he was working. Consequently, he was offered the opportunity to transfer to another Northside Electric Company job at a Virginia Power facility in the locality. That particular job, which would have been for a short duration, was covered by the provisions of the recovery memorandum. Consequently, the claimant would have been paid \$14.66 an hour had he accepted the transfer. The claimant did not accept the transfer because he wanted to work at 100 percent of the wage rate specified under the inside agreement rather than the 85 percent rate for work covered under the recovery memorandum.

After refusing the transfer, the claimant received from the employer a Notice of Termination. Under the heading "Voluntary Quit" the box entitled "Dissatisfied" was checked. The explanation provided was "would not report to job." The notice indicated that the claimant's last day of work was October 14, 1994, and that he was eligible for rehire. The company's issuance of the termination notice, rather than a layoff notice, became the subject of a grievance that the claimant and the union filed. The claimant took the position that the employer did not have the right to refer him to a job under the recovery memorandum since he had been referred to the employer by the union under the terms of the inside agreement. The grievance was ultimately heard by the Council on Industrial Relations for the Electrical Contracting Industry. On February 15, 1995, the Council ruled that:

In the instant case, there is no apparent violation of the collective bargaining agreement. However, the parties should meet and discuss this situation in an effort to reach a mutually agreeable resolution.

After declining the transfer, the claimant was out of work for approximately three weeks. At that point, he accepted a referral to a job in Pennsylvania that paid \$19.85 an hour. At the time of the Appeals Examiner's hearing he was working on a job site in West Virginia at a pay rate of \$16.85 an hour. The claimant had to pay his own travelling and living expenses when working out of state.

OPINION

Section 60.2-618(1) of the Code of Virginia provides a disqualification if the Commission finds that a claimant left work voluntarily without good cause.

The Commission has adhered for many years to the principle that an employee who is separated because of a refusal to accept a transfer or demotion has voluntarily left work. Accord, Harvey v. Eastern Microfilming Sales & Service, Inc., Commission Decision 6085-C (September 13, 1973); see generally, Young v. Mick or Mack, Commission Decision 24302-C (December 13, 1984); Hendrickson v. Commonwealth of Virginia, Commission Decision 31692-C (May 26, 1989).

In Pugh v. Christian Children's Fund, Commission Decision 33298-C (June 29, 1990), aff'd, Circuit Court of the City of Richmond, Case No. 760CH90A00774-00 (January 23, 1991), the Commission explained the rationale for this principle. In that case, the Commission stated:

In these cases, the employee has the option of continuing in gainful employment, or becoming unemployed. The employee's election to refuse a transfer or demotion constitutes a free, voluntary choice to become unemployed when continuing employment was readily available.

When these principles are applied to the present case, it is clear that the claimant became unemployed by virtue of his voluntary decision to refuse the transfer offered by the employer. This constitutes a voluntary leaving of work within the contemplation of the Virginia Unemployment Compensation Act. Therefore, the Commission must now consider whether the claimant had good cause for leaving employment.

In construing the meaning of the phrase "good cause," the Commission has consistently limited it to those factors or circumstances which were so substantial, compelling and necessitous as would leave a claimant no reasonable alternative other than quitting work. Accord, Phillips v. Dan River Mills, Inc., Commission Decision 2002-C (June 15, 1955); Lee v. V.E.C., 1 Va. App. 82, 335 S.E.2d 104 (1985). In cases arising under this statute, the burden of proof is upon the claimant to establish good cause for leaving work. Kerns v. Atlantic American, Inc., Commission Decision 5450-C (September 20, 1971).

In many cases involving a transfer or demotion, the modified conditions of employment give rise to an issue of whether the new work is suitable. This was addressed by the Commission in the Pugh case, previously cited, when it stated:

In many cases involving an employee's refusal to accept a transfer or demotion, the basis for doing so is rooted in the contention that the new work is in some way unsuitable. The Commission has recognized in such cases that proof that the new work was unsuitable would constitute good cause for quitting. (citations omitted).

In addressing this issue, it is necessary to review the provisions of Section 60.2-618(3)(b), which set out specific criteria the Commission must consider in determining whether or not any work is suitable for an individual. In particular, the statute requires that the Commission consider the degree of risk involved to the employee's health, safety, and morals, the employee's physical fitness, prior training and experience, length of unemployment and the accessibility of the available work from the employee's residence.

The job at Virginia Power was consistent with the claimant's prior training and experience. There is no evidence that the claimant would have been exposed to any undue risk to his health, safety or morals. The job was within the Richmond metropolitan area. Since the claimant was subsequently able to accept jobs in Pennsylvania and West Virginia, there certainly does not appear to be any problem with the accessibility of the work from his residence. Had the claimant accepted the transfer, he would not have been unemployed at all. Therefore, when the factors articulated in this statute are duly considered, the Commission must conclude that the job was suitable.

Furthermore, the Commission is of the opinion that the job was suitable in light of the "prevailing standards" test set out in Section 60.2-618(3)(c) of the Code of Virginia. That statute provides that:

No work shall be deemed suitable, and benefits shall not be denied under this title to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality. (emphasis supplied)

In determining the prevailing wage for journeymen electricians in the Richmond metropolitan labor market area, the Commission cannot focus solely on either union or non-union work. The statute mandates that the Commission make a determination based upon

"similar work in the locality." That language does not contemplate the consideration of just union employment. Further, since 88 percent of the electrical work performed in the Richmond metropolitan area, as well as the Central Virginia region, is non-union, "similar work" would include both union and non-union jobs. Thus, the VEC cannot rely exclusively on the wage data for union jobs in determining the prevailing wage rate.

It is readily apparent that non-union electrical contractors generally pay less than union contractors who are members of the Association and signatories to the inside agreement. If this was not so, there would have been little need for the Commercial Market Recovery Memorandum. If the 85 percent wage rate under the recovery memorandum enables the union contractors to be more competitive with their non-union rivals, then it logically follows that this rate is at or near the prevailing wage for this type of work in the locality. This is certainly within the \$12 to \$20 per hour range that the Job Service representative testified to. The parties did not dispute the accuracy of this wage range as it relates to union and non-union jobs for journeymen electricians. Therefore, the Commission is of the opinion that the 85 percent wage rate that was applicable to the Virginia Power job was not substantially less favorable to the claimant than the wage rate that prevailed for similar work in the locality.

The remaining issue that the Commission must decide is whether the claimant had good cause for refusing the transfer based solely on the fact that he would have incurred a 15 percent wage reduction. The Commission is of the opinion that it does not. In reaching that conclusion, the Commission has given particular attention to the following factors.

First, despite the reduction, the wage rate was still prevailing for similar work in the locality. Second, the lower wage rate had been negotiated by the Association and management of Local Union No. 666 in an attempt to generate more work for both union contractors and union members.

Third, the record reveals that the recovery memorandum job for Virginia Power would have been for a short period of time. Consequently, the claimant would not have been precluded from receiving referrals to 100 percent wage scale jobs for a lengthy, indefinite period.

Under these particular facts, the Commission is of the opinion that a reasonable person who was desirous of maintaining employment would have accepted the transfer to a job paying \$14.66 per hour rather than refusing the transfer and becoming unemployed. Therefore, good cause for the claimant's decision to voluntarily leave employment has not been shown.

In reaching this conclusion, the Commission recognizes that the claimant was not required to accept the transfer under either the inside agreement or the recovery memorandum. The claimant's right to refuse a transfer by an employer or a referral from the union is not the issue. The issue is whether, under the facts of this particular case, the claimant should be entitled to receive unemployment compensation benefits when gainful, suitable employment was available to him which he declined.

DECISION

The Appeals Examiner's decision is affirmed. The claimant is disqualified for benefits, effective October 30, 1994, because he voluntarily left work without good cause.

This disqualification shall remain in effect for any week benefits are claimed until the claimant performs services for an employer during 30 days, whether or not such days are consecutive, and he subsequently becomes totally or partially separated from such employment.

The case is referred to the Benefit Payment Control Unit for the purpose of determining the amount of benefits the claimant has been overpaid which he will be liable to repay the Commission as a result of the disqualification imposed by this decision.

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)