

COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Leo C. Crisman  
[REDACTED]

Select Staffing Services, Inc.  
Hampton, Virginia

Date of Appeal  
to Commission: May 2, 1996  
Date of Review: June 12, 1996  
Place: RICHMOND, VIRGINIA  
Decision No.: 51475-C  
Date of Mailing: June 14, 1996  
Final Date to File Appeal  
with Circuit Court: July 4, 1996

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This case is before the Commission on appeal by the employer from Appeals Examiner's decision UI-9605204, mailed April 22, 1996.

ISSUES

Did the Deputy promptly render a determination concerning the claimant's separation as provided in Section 60.2-619(C) of the Code of Virginia (1950), as amended?

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 due to misconduct connected 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 reversed an earlier Deputy's determination which had disqualified the claimant for benefits, effective August 20, 1995, with respect to his separation from the employer's services. This determination was reversed on the grounds that it was not promptly rendered.

The claimant had filed his claim for unemployment compensation, effective August 20, 1995, giving Select Staffing Services, Incorporated of Hampton, Virginia as his last 30-day employer, and "lack of work" as the reason for his separation. The employer was promptly sent and returned a separation report indicating that the claimant was considered to have voluntarily quit his job. Although this report was received in the Newport News local office on September 5, 1995, no Deputy's determination was issued. Accordingly, after being credited with his waiting period, the claimant began to be paid benefits on his claim.

Towards the end of November, The Frick Company, acting on behalf of the employer, wrote to protest a charge against the employer's account noting that no determination or decision had been received on the separation issue. This communication was received in the Client Relations office of the Commission on December 1, 1995. On February 15, 1996, this matter was referred to the field for further action. Commission records reflect that the claimant was then scheduled for a fact-finding interview before a Deputy to take place by telephone on February 27, 1996; however, he did not call in to participate. On March 12, 1996, a Deputy then issued a determination which disqualified the claimant effective August 20, 1995, for having left work voluntarily without good cause. It was the claimant's timely appeal from this determination which brought the matter before the Appeals Examiner.

The claimant had worked for Select Staffing Services, Incorporated, a temporary employment agency, off and on at least since 1991. On July 18, 1994, he was referred to a long-term job at the Howmet Corporation at a pay rate of \$7.50 per hour. The employer's own records indicate that he worked on three separate assignments there through May 31, 1995, at which time he was removed because it was felt that he had become unreliable in his attendance. Nevertheless, within a week he was sent on another assignment at the College of William & Mary at a pay rate of \$6 per hour. He continued to work at this assignment through July 17, 1995, when it ended.

In accordance with the employer's rules, the claimant periodically called in to see if other assignments might be available. In early August, he was contacted about a temporary assignment helping unload trucks at PetsMart at a pay rate of \$5.10 per hour. Although he initially indicated that he would accept this assignment, before he could begin on August 11, a family emergency took the claimant out of town. He neglected to call, and the employer simply indicated that he was a "no show" on its record.

#### OPINION

Section 60.2-619(C) of the Code of Virginia provides that notice of a determination involving the provisions of Section 60.2-618 of the Code shall be promptly given to the claimant and to the last 30-day employing unit.

It is apparent from the language used that promptness is a mandatory requirement which a Deputy's determination must meet. With the exception of fraud cases arising under the provisions of Section 60.2-618(4) of the Code, there is no specific time limit setting forth when a Deputy's determination will be considered to be prompt. Nevertheless, the retroactive application of a disqualification or finding of ineligibility to a period of time for which benefits have already been paid should be done as soon as possible after the facts to support such a determination are made known to the agency.

The first case that addressed this issue was In Re Ardizzone, Commission Decision 10619-C (August 2, 1978). It held that a Deputy's determination which declared a claimant ineligible to receive benefits for a period of time over two years previously was not promptly rendered. Accordingly, this constituted a fatal defect which rendered the determination void ab initio. In the cases of Crone v. Kitchens Equipment Company, Commission Decision 18398-C (July 1, 1982), and Randolph v. Huff-Cook, MBA, Commission Decision 25734-C (July 11, 1986), delays of 13 months and seven months, respectively, were found to violate the promptness requirement of the Code.

Although the Appeals Examiner cited the fact that the Deputy's determination in this case was not mailed until "nearly seven months" after he initially filed his claim for benefits, that is not the time period which should be measured. Instead, it is the period of time which elapses between receipt of information which establishes the need for a determination and the time the determination is actually rendered. In this case, the delay was six months and one week. It is next important to look at the reasons for the delay. Only that portion which is attributable to agency neglect can be counted against it. In this case, the agency attempted to have the claimant participate in a fact-finding interview on February 27, 1996; nevertheless, he did not choose to participate. The Commission does not feel that the two weeks it took after his failure to appear before the determination was rendered to be an inordinately long period of time, accordingly that two weeks is not attributable to agency neglect and should not be counted. This leaves a delay which is one week shy of being six months in length, and the Commission finds this to be simply too much of a departure from the prior limit of seven months found not to be prompt in the Randolph case. Inasmuch as the Commission finds that case to be pushing the limit of what can be considered not prompt, the delay in this case simply does not rise to that level.

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.

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

In the case of Kerns v. Atlantic American, Incorporated, Commission Decision 5450-C (September 20, 1971), the Commission held:

It is established that the burden is upon the employer to produce evidence which establishes a prima facie case that the claimant left his employment voluntarily. The employer assumes the risk of non-persuasion in showing a voluntary leaving. Once a voluntary leaving is shown, the burden of coming forward with evidence sufficient to show that there are circumstances which compel the claimant to leave his employment and that such circumstances amount to good cause as set out in the Unemployment Compensation Act, devolves upon the claimant.

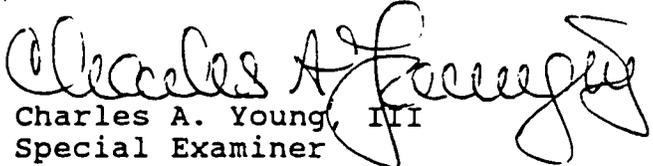
Although this claimant contends that he was laid off when his last assignment ended, the Commission must agree with the employer that this is not what occurred. Since he was working for a temporary agency which had informed him that he needed to call in to request another assignment if his old one ended, and since he did not file a claim at that point, the employer/employee relationship did not end with the last assignment. Instead, it did not end until after the claimant initially accepted but later chose not to report on the assignment at PetsMart. Under the doctrine enunciated in Harvey v. Eastern Microfilming Sales & Service, Inc., Commission Decision 6085-C (September 13, 1973), when an individual refuses to accept work from his regular employer under changed circumstances, knowing that the alternative is to be unemployed, that refusal is properly considered a voluntary leaving. In that case, the claimant was found to be disqualified because her employer offered her continuing employment at a pay increase which she turned down because it would only last between one and two months.

In Young v. Mick or Mack, Commission Decision 24302-C (December 11, 1984), a claimant who was demoted for disciplinary reasons to a job with a pay reduction of approximately one-third was found to have good cause to refuse the demotion and quit on the grounds that he had insufficient time to explore the local labor market area to find other work more in line with his prior experience and pay rate. In the case of Beckner v. Harris Teeter Supermarket, Commission Decision 37487-C (April 2, 1992), a pay reduction of 21 percent was found to be enough to justify a claimant's refusal of a demotion. In the case at hand, the claimant had worked during his entire base period at a pay rate of \$7.50 per hour through May, 1996. The assignment he took at the College of William & Mary involved a 20 percent pay reduction which he accepted. Nevertheless, the last assignment which he did not accept involved a pay reduction in excess of 30 percent. Under the circumstances, the Commission finds that the claimant did have good cause not to accept that offer. Accordingly, he should be qualified for benefits with respect to his separation.

DECISION

The decision of the Appeals Examiner is hereby amended.

It is held that the Deputy's determination which disqualified the claimant for benefits, effective August 20, 1995, was promptly rendered; nevertheless, since the claimant did have good cause to voluntarily leave the employer's services, that determination should be reversed. Accordingly, the claimant is qualified for benefits with respect to his separation from the employer's services.

  
Charles A. Young, III  
Special Examiner