

MISCELLANEOUS: 95.2  
Construction of  
statutes: Legislative  
intent

DECISION OF COMMISSION

In the Matter of:

Emmett D. Gillispie, II  
[REDACTED]

Date of Appeal  
to Commission: June 3, 1994

Date of Review: August 15, 1994

Place: RICHMOND, VIRGINIA

Decision No.: 45871-C

Date of Mailing: August 16, 1994

Final Date to File Appeal  
with Circuit Court: September 5, 19

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This case is before the Commission on appeal by the claimant from Appeals Examiner's decision UI-9405120, mailed May 27, 1994.

ISSUES

Was the claimant unemployed during the week or weeks for which benefits were claimed as provided in Sections 60.2-612, 60.2-226 and 60.2-229 of the Code of Virginia (1950), as amended?

Did the claimant receive any sum as benefits to which he was not entitled, and is he liable to repay such sum to the Commission as provided in 60.2-633 of the Code of Virginia (1950), as amended?

Did the claimant receive back pay at his customary wage rate from his employer after reinstatement so as to be liable to repay such sum to the Commission as provided in Section 60.2-634 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant filed a timely appeal from the Appeals Examiner's decision which affirmed an earlier Deputy's determination and declared him to be overpaid unemployment compensation in the amount of \$4,343.00, and liable to repay such sum to the Commission.

The claimant had filed his claim for unemployment compensation, effective January 31, 1993, after being discharged from his last employment with the Commonwealth of Virginia, Department of Waste Management. Commission records reflect that he was found monetarily qualified for benefits in the amount of \$208.00 per week for up to 26 weeks. After being initially disqualified with respect to his separation, he was found to be qualified when Appeals Examiner's decision UI-9304896, became final on April 26, 1993.

After serving his unpaid waiting period for the week ending February 6, 1993, Commission records reflect that the claimant certified for and was paid benefits for 21 consecutive weeks through July 3, 1993. The payment was at the rate of \$208.00 per week for all but the week ending April 3, 1993. Because he reported \$50.00 in earnings for that week, his benefit payment was reduced to \$183.00. The total amount of benefits paid on his claim came to \$4,343.00.

The claimant pursued a grievance to protest his termination under the Commonwealth of Virginia Employee Grievance Procedure. After a panel hearing, he won reinstatement to his job with full back pay, except for the period of ten working days beginning with the date of his termination which was to be considered as an unpaid suspension. In accordance with this agreement, the claimant was paid approximately \$13,000.00 in back wages. He returned to work on July 6, 1993.

#### OPINION

Section 60.2-612 of the Code of Virginia provides ten specific eligibility criteria which an unemployed individual must meet in order to receive unemployment compensation.

Section 60.2-226 of the Code provides that 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.

Section 60.2-229 of the Code of Virginia provides that wages shall include back pay awards which are to be allocated to and reported as being paid during the calendar quarter or quarters in which such back pay would have been earned.

Section 60.2-633 of the Code of Virginia provides that any person who has received any sum as benefits to which he was not entitled shall be liable to repay such sum to the Commission. In the event the claimant does not refund the overpayment, the Commission shall deduct from any future benefits such sum payable to him under this title unless the overpayment occurred due to administrative error, in which case the Commission shall deduct only fifty percent of the payable amount for any future benefits claimed until the overpayment is satisfied. Administrative error shall not include decisions reversed in the appeals process.

In the case of Siman v. City of Norfolk, Commission Decision EB-62 (September 22, 1981); aff'd, by City of Norfolk Circuit Court, C-81-1642 (March 10, 1982), it was noted that the liability to repay benefits may be incurred retroactively to the effective date of the claim so as to declare a claimant to be overpaid benefits to which he may have been entitled at the time he received them, but to which the entitlement was revoked due to a subsequent disqualification being imposed as a result of the appeals process.

Arguably, this case could be decided under the provisions of Section 60.2-633 of the Code, because a claimant is not entitled to receive benefits for any week in which he cannot be considered "unemployed." Inasmuch as back pay awards constitute wages, and such wages are to be allocated to the quarter in which they otherwise would have been earned, it would appear that the holding in the Siman case makes it possible to declare this claimant to be overpaid, even though the benefits he received were benefits to which he was entitled at the time he received them. Nevertheless, since there is another section of the Code which is more applicable to his situation, the Commission finds it more appropriate to apply it first.

Section 60.2-634 of the Code of Virginia provides:

Whenever the Commission finds that a discharged employee has received back pay at his customary wage rate from his employer after reinstatement, such employee shall be liable to repay any benefits paid to such person during the time he was unemployed. When such an employee is liable to repay benefits to the Commission, such sum shall be collectable without interest by civil action in the name of the Commission.

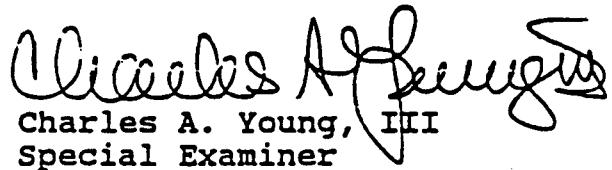
Although this claimant has argued that since his back pay award did not include the 10 days for which he was to be considered suspended, it does not meet the requirement of a back pay award at his customary wage rate under the provisions of this section of the Code, the Commission must disagree. This is because unemployment compensation is payable on a week-to-week basis. The only reasonable reading of the claimant's back pay award is that he is to be made whole by being paid full wages for all but the first two weeks he did not work, with those two weeks (ten working days) being considered as an unpaid suspension. Accordingly, he received a full back pay award at his customary wage rate with respect to the entire period between February 14 and July 3, 1993. Inasmuch as none of his back pay award was to be allocated to the first two weeks claimed between January 31 and February 13, 1994, it is apparent that the overpayment must be reduced by the sum of \$208.00, representing the benefits to which he was entitled for the second week, after serving his unpaid waiting period. Accordingly, the amount of benefits the claimant is liable to repay to the Commission as a result of the back pay award is only \$4,135.00.

DECISION

The decision of the Appeals Examiner is hereby amended.

It is held that the claimant is overpaid unemployment compensation in the amount of \$4,135.00, due to his receipt of back pay after reinstatement at his customary wage rate between February 14 and July 3, 1993, so as to be liable to repay such sum to the Commission under the provisions of Section 60.2-634 of the Code of Virginia.

It is held that the claimant remained unemployed so as to be eligible to receive the \$208.00 for the week ending February 13, 1993, and he is not liable to repay that sum to the Commission.

  
Charles A. Young, III  
Special Examiner