

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT: 190.15.
Weight & Sufficiency.



DECISION OF COMMISSION

In the Matter of

Peggy L. Harris
████████████████████

Tidewater Regional Transit
Norfolk, Virginia

Date of Appeal
To Commission: December 14, 1984

Date of Review: January 14, 1985

Place: RICHMOND, VIRGINIA

Decision No.: 24516-C

Date of Decision: January 16, 1985

Date of Mailing: January 24, 1985

Final Date to File Appeal
with Circuit Court: February 13, 1985

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This matter comes before the Commission on appeal by the employer from the decision of the Appeals Examiner (No. UI-84-8700) mailed December 7, 1984.

ISSUE

Was the claimant discharged for misconduct connected with her work as provided in Section 60.1-58(b) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant was last employed as a van driver by Tidewater Regional Transit of Norfolk, Virginia from May 2, 1983 until October 17, 1984.

At the time the claimant was hired, the employer's personnel policy prohibited employees from using intoxicants within twelve hours before reporting for work. Effective August 1, 1984, the policy was amended to require all employees to submit to drug-screening tests to determine the presence of certain chemical substances in their urine. The failure to pass such a test became grounds for immediate termination.

A laboratory report indicated that a urine specimen, collected from the claimant on October 11, 1984, tested positive for marijuana. Because of this test result, the claimant's employment was terminated.

OPINION

Section 60.1-58(b) of the Code of Virginia (1950), as amended, provides for a disqualification if it is found that an individual was discharged for misconduct connected with employment.

In interpreting the aforementioned statute, the Supreme Court of Virginia has stated the following:

"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." Branch v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609, 249 S.E.2d 180 (1978)

The burden to show misconduct rests with the employer. The burden is not carried by mere allegation, but rather, it is necessary to present specific detailed information to establish that it is more likely than not that the misconduct actually occurred (See Herbert Heller, Jr. v. A & P Tea Company, Commission Decision No. 3297-C, dated October 15, 1958 and Elizabeth J. Hancock v. Mr. Casuals. Inc., #1, Commission Decision No. 6355-C, dated July 3, 1974).

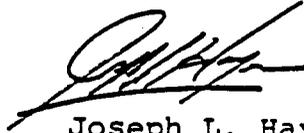
While the employer's prohibition against the use of substances which alter perception is recognized as being reasonable and prudent, the Commission cannot assume facts which are not in evidence. The employer's evidence consists of test results which alleges the presence of marijuana in the claimant's urine. Those test results alone do not establish how and when the marijuana came to be present in her system. There is no indication of the time elapsed between the drug usage and the date of the test. Moreover, there is no certification that the test was performed by someone who is licensed to do so or authentication of the test results themselves. The document presented to support the employer's allegation, in its unsigned, uncertified and unauthenticated state, is at best hearsay and can be afforded little weight. In the absence of evidence of greater probative value, the Commission cannot conclude that this claimant had used an illegal substance since August 1, 1984, the effective date of the employer's rule or within twelve hours of reporting to work on October 11, 1984. Therefore, it cannot be

found that the claimant deliberately or willfully violated the company rule. Beyond these questions, the employer has not presented competent evidence with respect to the claimant's assertion that her unmarked specimen was collected with two other unmarked specimens and was subject to misidentification. Thus, the employer has failed to establish that the specimen which resulted in the positive marijuana screening test was the claimant's. For these reasons, there can be no finding of misconduct. (Underscoring supplied)

Assuming arguendo that the chain of custody could be established and the record contained competent evidence the claimant had used an illegal substance in violation of the rule against such usage issued by Tidewater Regional Transit, the Commission would have no difficulty making a finding of misconduct in this case. Such, however, are not the circumstances. Accordingly, the Commission concludes that the claimant was discharged for reasons which have not been shown to constitute misconduct in connection with her work.

DECISION

The decision of the Appeals Examiner is hereby affirmed. It is held that, subject to compliance with the other eligibility provisions of the Code of Virginia, the claimant is qualified to receive benefits.



Joseph L. Hayes
Special Assistant
Commission Appeals