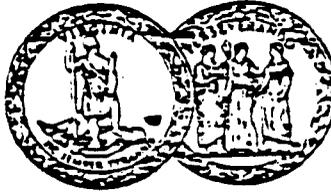


COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



PROCEDURE: 30.3

Requests that Commission  
Take Additional Evidence  
and Testimony -- Insufficiency  
of Record.

DECISION OF COMMISSION

In the Matter of:

Edward L. Copeland  
████████████████████

Master Movers, Inc.  
Portsmouth, Virginia

Date of Appeal  
to Commission: October 26, 1989  
Date of Hearing: November 20, 1989  
Place: RICHMOND, VIRGINIA  
Decision No.: 32742-C  
Date of Mailing: December 7, 1989  
Final Date to File Appeal  
with Circuit Court: December 27, 1989

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This is a matter before the Commission on appeal by the employer from the Decision of Appeals Examiner (UI-8909695), mailed October 24, 1989.

APPEARANCES

Employer Representative  
Attorney for Employer

ISSUE

Was the claimant discharged for misconduct connected with his work as provided in Section 60.2-618.2 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On October 26, 1989, the employer filed a timely appeal from the decision of the Appeals Examiner which held that the claimant was qualified to receive benefits, effective August 20, 1989.

Prior to filing his claim for benefits, the claimant last worked as a truck driver for Master Movers, Inc. of Portsmouth, Virginia. He was a full-time employee and was paid \$5.50 per hour. He worked for this employer from June 9, 1987 until January of 1989. At that time, the claimant was incarcerated on a criminal charge that was not related to his work. He was released from jail and rehired on June 7, 1989.

During his first period of employment with the company, there were occasions when the claimant reported for work under the influence of alcohol, and drove company vehicles while intoxicated. In addition, the claimant had at least one serious altercation with a co-worker which resulted in them drawing knives on each other. When the claimant was rehired on June 7, 1989, the company president made it clear that he did not expect any repetition of these types of incidents.

During his most recent period of employment with the company, the employer became aware that furniture was being damaged by the crew of movers supervised by the claimant. One such incident occurred on June 29, 1989, when a bannister had to be repaired at a cost of \$85.00 to the company. The bannister was damaged when the claimant and his crew were instructed to put a hide-a-way bed on the second floor of the home. The claimant informed the homeowner that the size of the bed would not allow them to move it up the stairwell without causing some damage. The claimant was specifically told by the homeowner to place the bed upstairs, and the homeowner stated that he would take care of any necessary repairs. The second incident that the employer documented occurred on July 21, 1989. On that occasion, a dining room table and an end table that had been moved by members of the claimant's crew required repair. The cost of the repairs was \$260.00, which the employer paid. The claimant could not recall any of the particulars of this incident.

On August 15, 1989, the claimant was informed by the company president that he was being discharged. It had been reported to the company president that some items were missing from several different jobs that the claimant had performed. In particular, a VCR and some small cartons with VCR tapes were reported missing. The claimant was unaware of any items missing since he had checked off each item from his manifest when he made deliveries, and had not noted any discrepancies.

In a letter dated November 2, 1989, the employer requested that the Commission permit additional evidence to be presented in the case. No reason was given at that time for the request, so the request was denied by letter dated November 8, 1989. At the Commission hearing that was held to take oral argument, the employer's attorney renewed that request. Counsel for the employer proffered that there were documents in the company's files that

could be produced to show a large number of incidents regarding damage to property and company policies that the claimant allegedly violated. In addition, the employer's attorney stated that the company president was not as familiar with some of the circumstances regarding the claimant's dismissal as the company vice president, and requested the opportunity to have the vice president testify at a subsequent hearing.

#### OPINION

As a preliminary matter, the Commission should address the employer's renewed request that the Commission allow the introduction of additional evidence and testimony. Section 60.2-622 of the Code of Virginia gives the Commission the discretion to direct the taking of additional evidence and testimony. In order to ensure that this discretion is fairly, consistently and uniformly exercised, the Commission has adopted certain guidelines which are now a part of the agency's rules and regulations.

Regulation VR 300-01-4.3B of the Rules and Regulations 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.

In the present case, the employer elected to be represented at the Appeals Examiner's hearing by its president. The company president testified that he was the one who both rehired the claimant and fired him. He also presented some limited documentary evidence with respect to the allegation of damages of customers'

property. While the Commission understands why the employer wishes to present additional evidence, the request does not meet the criteria set out in the Regulation. In particular, all of the documents that were referred to were in the company's possession and could have been presented at the Appeals Examiner's hearing through the exercise of due diligence. Furthermore, if the company vice president had relevant, material information regarding the claimant's separation, he could have attended the hearing as well and offered that testimony.

The Commission has carefully reviewed the tape recording of the Appeals Examiner's hearing. The Appeals Examiner fully explored the factual issues that were presented. The employer had an opportunity to present all of its evidence regarding the claimant's dismissal, and the claimant was given a full opportunity to respond to those allegations. While the evidentiary record may not contain every single piece of evidence that could possibly have been offered by the parties, that is not the proper test for determining the sufficiency of the record. The proper test is whether the Appeals Examiner made a reasonable, diligent effort to obtain all of the available evidence concerning the issues in dispute in light of who attended the hearing and what documents they may have brought with them. The record is certainly sufficient when viewed from this perspective. (Underscoring supplied)

Under these circumstances, the employer has not met the regulatory criteria for submitting additional evidence. Therefore, the Commission hereby denies the request that additional evidence be taken.

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 this 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 his work. See, 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).

In this case, the Appeals Examiner found, based upon the evidence in the record, that the claimant was discharged because of damage to customers' property and the employer's suspicion that he had engaged in theft. Those findings were based, in part, on the Appeals Examiner's specific finding that the claimant's testimony was more credible. The Commission has previously held that such credibility determinations are entitled to respect and should not be reversed unless there is some clear basis in the record for doing so. See, Foster v. A & B Contract Service, Commission Decision 26249-C (February 14, 1986). In examining this record in light of the principles enunciated in the Foster case, it is readily apparent that the testimony of the claimant and the company president was in direct conflict on a number of issues. In addition, there were several occasions when the company president was uncertain about the dates when certain events occurred. In reviewing the record as a whole, the Commission cannot find any clear basis for setting aside the Appeals Examiner's determination that the claimant's testimony was more credible.

The employer was unable to offer any proof that the claimant had stolen property either from the company or its customers. Although items were reported missing from several jobs that the claimant had worked, that does not prove that he was involved in the theft of the property. The Commission understands that the claimant, as the driver of the truck, was given greater responsibility over the other crew members who assisted him. Nevertheless, the fact that he had more responsibility does not make him culpable of theft when items are reported missing. In addition, the two incidents of damage to customers' property were neither so severe nor so recurrent as would establish a willful, substantial disregard of the employer's business and the duties and obligations he owed to the company.

Under these circumstances, the Commission must conclude that the employer has failed to carry its burden of proof in this case. While the employer may have had a legitimate business reason for discharging the claimant, the evidence that has been presented does not establish that the claimant, during his last period of employment, either deliberately violated a reasonable company rule or engaged in recurring acts or omissions that constituted a willful disregard of the company's interest. Accordingly, no disqualification may be imposed on the claimant's receipt of unemployment insurance benefits.

#### DECISION

The decision of the Appeals Examiner is hereby affirmed.

It is held that the claimant is qualified to receive benefits, effective August 20, 1989, since the employer has failed to prove that his discharge was for reasons which would constitute work connected misconduct.

The case is remanded to the Deputy with instructions to carefully examine the claimant's claim for benefits and to determine if he has complied with the eligibility requirements of the Code for each week benefits have been claimed.

*M. Coleman Walsh, Jr.*  
M. Coleman Walsh, Jr.  
Special Examiner