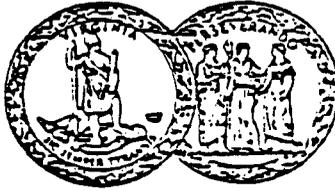


COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION

PROCEDURE: 70.1  
Fraud -- Legal Standard;  
Intrinsic and Extrinsic  
Fraud Distinguished.



DECISION OF COMMISSION

In the Matter of:

Donald R. Davis  
████████████████████

Smith's Transfer Corporation  
Bristol, Virginia

Date of Appeal  
to Commission: September 13, 1985  
  
Date of Review: October 16, 1985  
  
Place: RICHMOND, VIRGINIA  
  
Decision No.: 25826-C  
  
Date of Mailing: October 28, 1985  
  
Final Date to File Appeal  
with Circuit Court: November 17, 1985

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This is a matter before the Commission on remand by the Circuit Court for the City of Bristol to allow the claimant to request the Commission to present additional evidence in the matter.

ISSUE

Should the Commission direct the taking of additional evidence as provided in Section 60.1-64 of the Code of Virginia (1950), as amended, and Regulation XI B of the Rules and Regulations Affecting Unemployment Compensation?

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

FINDINGS OF FACT

Pursuant to the Order of the Circuit Court for the City of Bristol, the claimant, on September 19, 1985, submitted a proffer

of the evidence he wished to present before the Commission. The proffer contains only the claimant's unsworn account of the incidents surrounding his termination. It does not include a single notarized statement of any of the witnesses whom the claimant has alleged could verify his recollection of the relevant events. The primary contention of the claimant was an allegation of a false statement made by the employer at the hearing concerning whether or not the doctor who treated the claimant had been contacted by the employer prior to his termination. The remaining evidence proffered by the claimant was a clarification of his views of the conflict in the evidence presented before the Appeals Examiner. In addition, he has presented a written argument against the Appeals Examiner's decision.

#### OPINION

Section 60.1-64 of the Virginia Unemployment Compensation Act provides, in part:

"The Commission may on its own motion affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or shall permit any of the parties to such decision to initiate further appeals before it. . . ." (Underscoring supplied)

Regulation XI B of the Rules and Regulations Affecting Unemployment Compensation provides, in part:

"Commission Review. 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 may, in its discretion, direct the taking of additional evidence after giving written notice of such hearing to the parties in accordance with this rule." (Underscoring supplied)

The Commission, in David G. Sacco v. Georgetown Holiday Inn, Commission Decision No. 24943-C (April 12, 1985), provided the guidelines to be followed in cases of this nature when it stated:

"The discretion provided the Commission as cited above must be exercised uniformly and consistently

in order to maintain the integrity of the fair hearing process. The Commission follows the guidelines listed below when determining whether to direct the taking of additional evidence:

1. It is affirmatively shown that the additional evidence (A) is material and not merely cumulative, corroborative or collateral and (B) could not have been presented at the prior hearing through the exercise of due diligence and (C) the evidence is likely to produce a different result at a new hearing; or
2. The record of proceedings before the appeals tribunal is insufficient to enable the Commission to make proper, accurate or complete findings of fact and conclusions of law."

In this case, the evidence proffered by the claimant to the Commission is material. However, there has been no showing by the claimant that it could not have been presented at the prior hearing through the exercise of due diligence. Also, the evidence proffered by the claimant would not likely produce a different result at another hearing.

In cases involving the allegation of fraud on the part of the party that prevailed in the matter, the Virginia Supreme Court, in Judith L. Jones v. James D. Willard and Virginia Employment Commission, 224 Va. 602 (1983), held that when a party aggrieved by a decision of the Virginia Employment Commission alleges in his petition for review that the decision was procured by extrinsic fraud committed by the successful party, he must submit a proffer of proof verified by affidavit of witnesses. The court should review the proffer, and if it finds the proffer sufficient as a matter of law to establish a prima facie case of such fraud, it should be remanded to the Commission for a hearing on the issue. This same standard should apply to appeals to the Commission on allegation of fraud. (Underscoring supplied)

In this case, the claimant's proffer of proof of fraud was not verified by an affidavit of witnesses. It was merely his interpretation of the conflict of evidence. After reviewing the proffer, there is no finding by the Commission that the claimant has presented evidence sufficient to establish a prima facie case of extrinsic fraud.

Regarding the claimant's proffer concerning his request to present additional evidence before the Commission, it is concluded that the claimant has failed to show that the evidence proffered could produce a different result or could not have been presented at the hearing before the Appeals Examiner through the exercise of due diligence. In view of the above, it is concluded that the claimant's request to have this matter reopened and additional evidence entered into the record should be denied.

Section 60.1-58 (b) of the Virginia Unemployment Compensation Act provides a disqualification if it is found that a claimant was discharged for misconduct in connection with work.

After having reviewed the entire record and decision of the Examiner, the Commission is of the opinion that the decision should be affirmed, and hereby sustains and affirms the same.

#### DECISION

It is the Decision of the Commission that the claimant's request to reopen the matter and present additional evidence before the Commission is hereby denied.

The Decision of Appeals Examiner is hereby affirmed. It is held the claimant is disqualified for unemployment insurance benefits effective March 3, 1985, for any week benefits are claimed until he has performed services for an employer during thirty days, whether or not such days are consecutive, and becomes totally or partially separated from such employer, for having been discharged for misconduct in connection with his work.

  
Edwin R. Richards  
Special Examiner

NOTE: Affirmed Circuit Court City of Bristol, February 5, 1986