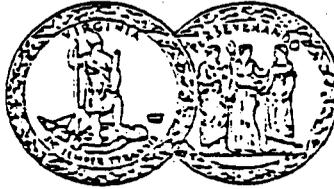


COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

PROCEDURE: 80.05
Res Judicata/Collateral
Estoppel -- General.



DECISION OF COMMISSION

In the Matter of

Cheryl A. Collins

City of Norfolk
Treasurer's Office
Norfolk, Virginia

Date of Appeal
To Commission: November 23, 1983
Date of Hearing: March 8, 1984
Place: RICHMOND, VIRGINIA
Decision No.: 22536-C
Date of Decision: March 8, 1984
Date of Mailing: March 16, 1984
Final Date to File Appeal
with Circuit Court: April 5, 1984

This is a matter before the Commission on appeal by the employer from the decision of the Appeals Examiner (No. UI-83-9081), mailed November 18, 1983.

APPEARANCES

Attorney for the Employer

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 first two paragraphs of the Findings of Fact of the Appeals Examiner are hereby adopted by the Commission. Those findings are as follows:

"The employer filed a timely appeal from a Deputy's determination which held the claimant not subject to a disqualification effective July 24, 1983, for having been discharged for reasons not constituting misconduct in connection with her work.

The City of Norfolk, Treasurer's Office, Norfolk, VA, was the claimant's last employer where she worked from July 1, 1970, until June 15, 1983. She was last employed as a general clerk in the main Treasurer's Office, a position she had held since March 16, 1983. At the time of separation, she was receiving \$10,563.00 per year as a full-time employee of the City of Norfolk."

Effective January 1, 1982, a new City Treasurer had been elected by the voters of the City of Norfolk. After reviewing the current procedures being followed by employees in the Delinquent Tax Section, certain changes were initiated. Previously, certain employees handled problems and inquiries that related exclusively to real estate while other employees handled only those matters which involved personal property taxes. In order to provide the best possible service for taxpayers, this arrangement was changed and all employees were expected to handle any inquiry, whether real estate or personal property, which came in to the office. Written notices were distributed to all employees advising them of the change, and in subsequent months, meetings were held where the City Treasurer specifically advised the employees of these changes.

After these policies were initiated, there were a number of instances when the claimant failed to comply with them. On many occasions, the claimant restricted herself to handling only real estate inquiries and would not deal with any problems or inquiries that were made concerning personal property taxes. On some occasions when a taxpayer would telephone the office with a personal property question, the claimant would put them on hold for an extended period of time while waiting for another employee to handle this call.

On March 11, 1983, the claimant received a written warning concerning the handling of telephone calls from taxpayers. In particular, the claimant was admonished for her failure to handle all tax inquiries and for placing some callers on hold for as much as five minutes. On March 14, 1983, the claimant received another warning. This warning concerned treating taxpayers and any other individuals who had business with the Treasurer's Office with courtesy and efficiency. This warning also repeated the admonition that no one should be left on hold on the

telephone for five minutes. On March 14, 1983, the claimant also received another memorandum from the employer which advised her that effective March 16, 1983, she would be transferred to the main Treasurer's Office and it gave her the name of the person to whom she was to report. The employer was extremely concerned over the claimant's failure to comply with the new policies. It had also come to the employer's attention that the claimant did not get along well with her co-workers and had engaged in occasional "silent treatment" which had a depressing effect on office morale. Due to these problems, and in hopes of rehabilitating the claimant as a good employee, the transfer to the main office was carried out.

The claimant worked in the main office of the Treasurer's Office from March 16, 1983, through June 15, 1983. During that period of time, the claimant did not receive any warnings or counselings regarding her job performance or any violations of any rules or policies. On or about June 8, 1983, an attorney who was also president of a local title insurance company complained to the City Treasurer about the claimant. The basis of the complaint appeared to involve the claimant's attitude. At the hearing before the Appeals Examiner, the City Treasurer testified regarding this incident that:

" . . . one attorney in particular, ah, complained and, ah, ah, stated to me the similar problems that he had been experiencing in the delinquent tax office and advised me of the problems that he was . . . had experienced with Ms. Collins."
(Transcript of Proceedings, p. 17; emphasis added).

As a result of this complaint made on about June 8, 1983, the employer decided to discharge the claimant.

Subsequent to being discharged, the claimant filed a grievance against the employer which went to a panel hearing. The decision of the panel and reasoning was as follows:

"By 2 to 1 majority vote upheld termination. Panel felt it imperative that the City Treasurer have written employee policies and procedures and that they be implemented immediately. Two felt the grievances were definitely in the wrong in job performance, attitude was very much a part of their job in dealing in a public office, so termination was justifiable. 1 felt termination was too harsh for the offense."

OPINION

Section 60.1-53(b) of the Code of Virginia provides a disqualification if the Commission finds that a claimant was discharged for misconduct connected with her work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Vernon Branch, Jr. v. Virginia Employment Commission and Virginia Chemical Company, 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."

Since it involves the indefinite forfeiture of unemployment insurance benefits by the claimant, the disqualification for misconduct is a serious matter which warrants careful consideration. In such cases the burden of proof is upon the employer to produce sufficient evidence which would establish that the acts or omissions of which they complain did occur and were of such a nature as would constitute misconduct connected with work.

In the present case, the claimant was discharged by the employer due to complaints they had received regarding her attitude and the courtesy she extended to those individuals having business with the Treasurer's Office. While the evidence in the record clearly establishes that the claimant did not comply with the newly implemented policies of the Treasurer's Office prior to March 14, 1983, she was not discharged for that specific reason. On March 14, 1983, the employer made a decision to transfer the claimant to another department within the office in hopes of rehabilitating her and also to be in a position to carefully observe her conduct and job performance. After the transfer, the claimant was not again warned or counselled about any failures or shortcomings in her performance. Furthermore, the only complaint received by the employer after the transfer was the complaint made on or about June 8, 1983. However, as can be seen from the Treasurer's

testimony, it is not clear whether the complaint dealt with a contemporaneous situation or whether this attorney was simply complaining about some past conduct on the part of the claimant. Since this individual who made the complaint did not testify before the Appeals Examiner, the specific nature and substance of the complaint is unknown. Under those circumstances, the Commission is simply unable to conclude that the claimant's discharge on June 15, 1983, was for reasons which constitute work related misconduct. The Commission does not take issue with the employer's decision to discharge the claimant, however, the evidence presented simply is insufficient to carry their burden of proof.

At the hearing before the Appeals Examiner, as well as the Commission's hearing, the attorney for the employer argued that the decision of the grievance panel constituted res judicata/collateral estoppel and that the Commission was bound to adopt the factual findings of the grievance panel. In support of their argument the attorney cited the case of Bates v. Devers, 214 Va. 667 (1974), where the Virginia Supreme Court held that:

"The doctrine is firmly established in our jurisprudence and should be maintained where applicable. . .Collateral estoppel is the preclusive effect impacting in a subsequent action based upon a collateral and different cause of action. In the subsequent action, the parties to the first action and their privies are precluded from litigating any issue of fact actually litigated and essential to a valid and final personal judgment in the first action."

While the argument made is novel and unique, the Commission is not persuaded that the doctrine is applicable. First, the employer did not cite and the Commission was unable to find any authority which supported the proposition that the findings of a grievance panel or arbitrator were binding on a court or an administrative agency exercising its quasi-judicial functions. Second, in order to establish res judicata, it is necessary to prove that there are both an identity of parties as well as an identity of claims and issues. While there is certainly an identity of parties in the case at bar, there is no identity of issues. The grievance panel was called upon to determine whether or not the termination of the claimant was justified. The Commission is charged by the legislative mandate of the Virginia General Assembly as contained in Section 60.1-34 of the Code of Virginia (1950), as amended, to administer the provisions of Title 60.1. The Commission is specifically authorized as follows: (Underscoring supplied)

"It shall have power and authority to adopt, amend, or rescind such rules and regulations to employ such persons, make such expenditures, require such reports, make such investigations, and take such other actions as it deems necessary or suitable to that end."

Part of the Commission's responsibility is the adjudication of contested claims for benefits. The present case arises under the provisions of Section 60.1-58(b) of the Code which presents a distinctly different issue, as well as a distinctly different remedy, from the issue that was before the grievance panel. Furthermore, there is substantial authority for the proposition that the doctrine of res judicata does not apply when the same issue arises under two separate statutes. In the case of Thompson v. Flemming, 188 F. Supp. 123 (D. Oz. 1960), a finding by the Veterans Administration that the plaintiff's disability prevented his engaging in substantial gainful employment was held not binding upon the Social Security Administration. The issue was identical except that it arose under a different statute. The Court quoted with approval from NLRB v. Pacific Intermountain Express Co., 228 F.2d 170 176 (8th Cir. 1955), certiorari denied 351 U. S. 952 (1956):

"Each fact-finding agency is entitled to make its own decision upon the evidence before it and the fact that another tribunal has reached different conclusions upon the same issue . . . does not invalidate any decision which has evidentiary support."

In the case of Title v. Immigration and Naturalization Service, 322 F.2d 21, 25 (9th Cir. 1963), the Ninth Circuit held that a finding by a court in a denaturalization proceeding that the petitioner was a member of the Communist Party did not establish such membership for the purposes of later deportation. In holding that the doctrine of collateral estoppel did not apply, the court held that the difference in the two statutes destroyed the identity of issues necessary for the purposes of res judicata. Accordingly, for the foregoing reasons, the Commission is of the opinion that the doctrine of res judicata/collateral estoppel is not applicable to the Commission's determination in this matter. Furthermore, based upon a careful review of the evidence and testimony in the record, the Commission is also of the opinion that the evidence is insufficient to establish work-related misconduct within the meaning of Section 60.1-58(b) of the Code of Virginia. Accordingly, no disqualification

may be imposed based upon the claimant's separation from this employer. (Underscoring supplied)

DECISION

The decision of the Appeals Examiner which held that the claimant was not subject to a disqualification from receiving unemployment insurance benefits is hereby affirmed.

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

NOTE: Affirmed in the Circuit Court of the City of Norfolk, Chancery No. C-84-428, dated August 17, 1984.