COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCELLANEOUS: 95.2
Construction of Statutes — Legislative Intent.

DECISION OF COMMISSION

In the Matter of:

Leroy White [redacted]

Newport News Shipbuilding
Newport News, Virginia

Date of Appeal to Commission: January 8, 1990

Date of Hearing: January 23, 1990

Place: RICHMOND, VIRGINIA

Decision No.: 33087-C

Date of Mailing: January 31, 1990

Final Date to File Appeal with Circuit Court: February 20, 1990

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This case comes before the Commission on appeal by the employer from the Decision of Appeals Examiner (UI-8911314), mailed December 19, 1989.

APPEARANCES

Employer Representative

ISSUES

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?

Was the claimant separated as a result of an unlawful act and a conviction, and did his absence due to confinement cause a disruption of the employer's operations as provided in Section 60.2-618.5 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On January 8, 1990, the employer filed a timely appeal from the decision of the Appeals Examiner which held that the claimant was qualified to receive benefits, effective October 29, 1989. This decision was based upon the Appeals Examiner's finding that the disqualification provided in Section 60.2-618.5 of the Code of Virginia could not be imposed since there was no proof that the employer's operations had been disrupted.

Prior to filing his claim for benefits, the claimant last worked for Newport News Shipbuilding, Inc. as a shipping supply clerk. He was employed from October 21, 1971, through September 5, 1989. He was a full-time employee and was paid $10.63 an hour.

On or about July 28, 1989, the claimant was convicted for being an habitual offender. As part of his sentence, he was required to serve 90 days in jail. He was incarcerated during the period of July 31, 1989, through August 3, 1989. He was admitted to the work release program and returned to his job on Friday, August 4, 1989. The claimant continued to report for work through September 5, 1989. On or about September 6, 1989, the claimant was informed that he was no longer going to be allowed to participate in the work release program. This decision was the result of some type of "bureaucratic snafu" (Commission Exhibit 6). The claimant, for some unexplained reason, was transferred to the Powhatan Correctional Center, where it was impossible for him to participate in the work release program with the Newport News Shipyard. The claimant contacted the employer on September 7, 1989, and on September 11, 1989, to inform his supervisor of these circumstances. The claimant was absent from work for five consecutive work days, from September 6, 1989, through September 12, 1989. As a result, he was discharged by the employer for being absent without leave for five or more consecutive work days. The employer does not grant leave to employees during any period of incarceration.

During his investigation of the matter, the Deputy contacted the employer by telephone on November 8, 1989. The employer advised the Deputy that the effective date of the claimant's discharge was September 5, 1989, and that his absence caused a disruption in the work. No specific details were provided regarding how the claimant's absence caused a disruption.

The Appeals Examiner's hearing was conducted at the Suffolk office of the Virginia Employment Commission at 10:30 a.m. on December 13, 1989. Written notice of that hearing was mailed to the claimant and the employer at their correct, last known addresses. The employer did not appear for that hearing or respond to the hearing notice.

OPINION

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 his work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission, et al, 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. Dimes v. Merchants Delivery Moving and Storage, Inc., 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 claimant was discharged by the employer for being absent without leave for five or more consecutive work days. The claimant was absent on those days because he had been erroneously transferred to Powhatan Correctional Center by the Department of Corrections. As a result, he could not continue working for the employer through the work release program. The claimant made contact with the employer during two of the five days he was absent to inform his supervisor of the situation; however, the company did not grant leave because its policy prohibited doing so when an employee was incarcerated. Under these circumstances, there simply is no proof of a deliberate rule violation or conduct which manifested a willful disregard of the employer's interests. Therefore, no disqualification may be imposed pursuant to the misconduct statute.

Section 60.2-618.5 of the Code of Virginia (1950), as amended, states:

> An individual shall be disqualified for benefits upon separation from the last employing unit for whom he has worked 30 days or from any subsequent employing unit:
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> 5. While imprisoned or confined in jail. Additionally, upon a conviction and after his release from prison or jail such individual shall be disqualified for benefits for any week such individual is separated from the work of his former employer if such separation arose as a result of the unlawful act and his absence due to confinement caused a disruption of the employer's operations.

The evidence presented by the claimant establishes that he was convicted of being an habitual offender, and that his incarceration was the result of that conviction. In addition, the claimant's confinement at Powhatan Correctional Center beginning September 6, 1989, resulted in his being absent from work. Accordingly, the only remaining issue that the Commission must decide is whether the claimant's absence due to confinement caused a disruption of the employer's operations.

The Appeals Examiner cited the leading Commission case which has interpreted this statute. In Stephen v. United Chemicals, Inc., Commission Decision 31180-C (December 15, 1988), the Commission provided the following interpretation of the term "disruption," within the context of the statute:

> The word disrupt is defined in the American Heritage Dictionary as, "To throw into confusion or disorder." In order to show a disruption under this section of the Code the employer must prove that the claimant's absence caused confusion and disorder in its operations to the extent that some goal, objective, delivery, or deadline was not met or that some part of the company's operation was stopped or significantly curtailed. The fact that work was reassigned among other employees or that a new employee was hired to replace the claimant does not, by itself, show a disruption within the meaning of the statute.

In reviewing the record in light of the argument presented by the employer representative, the Commission is convinced that Stephen articulated the proper standard to be applied in these cases. The employer has not presented any objective evidence to establish that some goal, objective, delivery, or deadline was not met or that any part of its operations was significantly curtailed. The employer did argue two points which the Commission needs to address. First, the employer maintained that the company had met its burden of proof by informing the Deputy that the claimant's absence caused a disruption. Second, the employer argued that the fact that the claimant was confined and absent from work automatically meant that a disruption occurred within the meaning of the statute. The Commission cannot agree with these arguments.

Section 60.2-111 of the Code of Virginia grants to the Commission the power, authority, and duty to administer the provisions of Title 60.2. That is a responsibility that the Commission may not delegate. If an employer could carry its burden of proving a disruption by simply stating that one occurred, then the Commission would, in effect, be delegating its statutory responsibility to interpret and apply the applicable law to a particular dispute. It is the responsibility of the parties to present the Commission with all of the relevant, material evidence regarding a dispute over benefit entitlement or tax liability. It is the sole responsibility of the Commission to make findings of fact and conclusions of law based upon that information. Munsey v. Kersey Manufacturing Company, Commission Decision 9022-C (March 15, 1977); Cotman v. American Tobacco Company, Commission Decision 15847-C (June 9, 1981); Upton v. Southeastern Roofing & Siding, Commission Decision 28298-C (March 31, 1987).

The employer's argument that an absence due to confinement automatically means that a disruption occurred is inconsistent with the language of the statute. The last section of the statute states, in pertinent part, ". . . if such separation arose as a result of the unlawful act and his absence due to confinement caused a disruption of the employer's operations." If the Commission adopted the employer's argument, it would render superfluous the last ten words of the statute. A fair reading of the statute reflects that the General Assembly recognized that not all absences due to confinement would cause a disruption of an employer's business operations. If that was not the case, then the General Assembly could simply have provided the disqualification if the claimant was absent due to confinement. It is clear from the plain language of the statute that such a result was not intended and it would be clearly inappropriate for the Commission to otherwise construe the statute. Temple v. City of Petersburg, 182 Va. 418, 29 S.E.2d 357 (1944); Virginia Department of Labor & Industry v. Westmoreland Coal Company, 233 Va. 97, 353 S.E.2d 758 (1987); Marsh v. City of Richmond, 234 Va. 4, 360 S.E.2d 163 (1987). (Underscoring supplied)

Therefore, the Commission must conclude that the employer has not proven that the claimant's absence due to confinement did cause a disruption of its operations. Consequently, the disqualification provided in Section 60.2-618.5 of the statute may not be imposed.

DECISION

The decision of the Appeals Examiner is hereby affirmed. The claimant is qualified to receive benefits, effective October 29, 1989, since his dismissal was not for reasons that would constitute work-connected misconduct, and his separation from work and subsequent confinement due to an unlawful act and conviction did not cause a disruption of the employer's operations.

M. Coleman Walsh, Jr.
Special Examiner