COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of: **David A. Churchill** **S. S. No. xxx-xx-2105** **L-3 Services, Inc.** **c/o TALX UCeXpress, Inc.** **St. Louis, Missouri**	**Date of Appeal to Commission: May 4, 2010** **Date of Review: June 15, 2010** **Place: RICHMOND, VIRGINIA** **Decision No.: 92714-C** **Date of Mailing: September 30, 2010** **Final Date to Appeal to Circuit Court: October 30, 2010**

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This case comes before the Commission pursuant to an appeal by the claimant from Decision of Appeals Examiner (UI-1005396), mailed April 9, 2010.

ISSUES

Should the Commission direct the taking of additional evidence and testimony as provided in Section 60.2-622 of the Code of Virginia and 16 VAC 5-80-30(B) of the Virginia Administrative Code?

Did the claimant leave work voluntarily without good cause as provided in Section 60.2-618(1) of the Code of Virginia (1950), as amended?

Was the claimant discharged for misconduct connected with work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant filed a timely appeal from an Appeals Examiner's decision that disqualified him for benefits,

effective November 1, 2009. Reversing an earlier Deputy's determination, the Appeals Examiner concluded that the claimant had left work voluntarily without good cause.

Before filing an initial claim for unemployment benefits, the claimant last worked as many as 30 days for a subsidiary of L-3 Services, Inc. known as Military Professional Resources, Inc. of Alexandria, Virginia. He was employed as a "subject matter" expert from June 11, 2008 until October 30, 2009.

The employer supplied mentors in detainee operations to the Afghani National Army from May 1, 2008 until October 31, 2009. The claimant accepted this job with the knowledge that he would be in Afghanistan during a dangerous period due to the Taliban-backed insurgency and surrounding military operations. In the absence of a contract, he agreed to serve at least a year, which he later extended to the end of the original deployment period.

Despite feeling safe at the U.S. Army base where he was housed and the detention facility where he worked, the claimant was extremely concerned about the lack of armor plating on the Humvees used to transport him and other personnel between these sites. His repeated requests for additional armor, especially underneath the vehicle, went unanswered. The claimant was also worried about a general erosion of security in Afghanistan.

The deployment period was extended to April 30, 2010. While ready to honor his commitment, the claimant was unwilling to extend it further. At a time when work as a mentor in Afghanistan was available for at least 6 more months and he had not asked about a transfer, the claimant tendered his resignation on August 6, 2009, to be effective as of October 30, 2009. He had not secured a definite offer of other work before he resigned.

In his appeal to the Commission, the claimant attempted to present additional evidence in the form of a recording of his commute between the military base and prison as well as an unsworn statement from a co-worker about the unsafe conditions. He did not explain why this evidence was not submitted prior to or during the Appeals Examiner's hearing.

OPINION

As a preliminary matter, the Commission needs to address the claimant's request to submit additional testimony and evidence. Section 60.2-622 of the Code of Virginia authorizes the Commission to direct the taking of additional testimony and

evidence in any case pending before it, or to take such additional testimony and evidence itself. To ensure that this discretion is fairly and consistently exercised, the Commission has adopted certain guidelines that appear in the agency's rules and regulations.

16 VAC 5-80-30(B) of the Virginia Administrative Code provides that except as otherwise provided in 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.

Here, the Commission is of the opinion that the claimant has failed to prove that he meets the regulatory criteria to present additional testimony and evidence. He participated in the Appeals Examiner's hearing and has not shown that the evidence that he now wishes to present could not have been offered at that hearing through the exercise of due diligence. Further, the Commission has reviewed the existing record and is of the opinion that it is adequate to allow for accurate and complete findings of fact or conclusions of law. Therefore, the claimant's request must be denied, and a decision in this case will be rendered based upon a review of the record elicited by the Appeals Examiner.

Section 60.2-618(1) of the Code of Virginia provides a disqualification if the Commission finds that the claimant left work voluntarily without good cause.

In interpreting the meaning of the phrase "good cause," the Commission has consistently limited it to those factors or circumstances that are so substantial, compelling, and necessitous as would leave a claimant no reasonable alternative other than quitting work. Accord, Phillips v. Dan River Mills, Inc., Commission Decision 2002-C (June 15, 1955); Lee v. Virginia Employment Commission, 1 Va. App. 82, 335 S.E.2d 104 (1985). In

any case arising under this statute, the claimant bears the burden of proving good cause for leaving work. Kerns v. Atlantic American, Inc., Commission Decision 5450-C (September 20, 1971).

In the case of Umbarger v. V.E.C., 12 Va. App. 431, 404 S.E.2d 380 (1991), the Court of Appeals refined the interpretation of "good cause" when it stated:

> Rather, when determining whether good cause existed for a claimant to voluntarily leave employment, the commission and reviewing courts must first apply an objective standard to the reasonableness of the employment dispute, and then to the reasonableness of the employee's efforts to resolve that dispute before leaving the employment. In making this two-part analysis, the claimant's claim must be viewed from the standpoint of a reasonable employee.

Over the years the Commission has been confronted with situations where claimants agreed to work overseas and thereafter became unemployed. In some instances their contracts expired and no further work was available. In others, the claimants either left before their agreed contract term expired or did not take advantage of the opportunity to extend their contract and remain employed.

In the case of Hutter v. V.E.C., 50 Va.App. 590, 652 S.E.2d 151 (2007) the Virginia Court of Appeals addressed a situation involving an individual who was employed by a tax preparation firm, but only until the tax season was over on April 15. The claimant became unemployed when her contract expired on April 15 and no further work was available or offered to her. Under these circumstances the Court of Appeals rejected the employer’s argument that the claimant had, in effect, voluntarily left work. Rather, the Court agreed with the Commission’s analysis that the claimant was unemployed due to a lack of work when tax season was over.

The Commission is of the opinion that Hutter applies to those individuals who work overseas until the end of their contract and no further work is available to them. In that event, they are unemployed due to a lack of work with the expiration of their contract.

However, if a claimant who has agreed to work overseas quits before the expiration of his contract, he has voluntarily left work. Similarly, if a claimant works to the end of his contract but does not take advantage of an opportunity to extend

the assignment, he has also voluntarily left work. This is consistent with the Commission's well-established precedent that an individual who becomes unemployed by refusing a transfer or demotion has voluntarily left employment. That is predicated on the principle that it was the claimant's decision to decline the demotion or transfer that resulted in his unemployment. Harvey v. Eastern Microfilming Sales & Service, Inc., Commission Decision 6085-C (September 13, 1973), Pugh v. Christian Children's Fund, Commission Decision33298-C (June 29, 1990). Therefore, in these situations the Commission must analyze the case by applying the same judicial and agency precedents as in any other voluntary leaving case. Thus, if the claimant left employment because of some concern over the conditions of work, the Commission would find good cause if the claimant proved the two-part test set out in the Umbarger case.

The Commission recognizes that this approach varies to some degree with the holding in Siugzda v. Vinnell Corporation, Commission Decision 26258-C (January 17, 1986); however, the Commission believes the position articulated here is a better reasoned approach that is more consistent with the fundamental purposes of Virginia's unemployment insurance law. Therefore, to the extent Siugzda differs from the case at bar it is reversed.

Here, the employer has established a prima facie case that the claimant left voluntarily. He agreed to work at least a year, which he later extended by four months to coincide with the end of the original deployment period. In the absence of a contract or written agreement, the claimant's employment was "at-will" and presumably would continue until the contract ended or when his services were no longer required. As stated in Harvey, cited above, the claimant declined to accept a continuing offer of work because of certain safety concerns that he articulated. Therefore, his separation will be addressed as a voluntary leaving under the provisions of Section 60.2-618(1) of the Code and the judicial and agency precedents that have interpreted it.

Under the Umbarger precedent, to establish good cause based on his concerns over safety, the claimant must show first that he had a reasonable employment dispute. He then must show that he took reasonable steps to resolve his dispute with the employer before quitting his job.

In Terrell v. Mecklenburg Correctional Center, Commission Decision 24036-C (November 21, 1984), the Commission considered the case of a corrections officer who resigned because of his honest fear over the perceived lack of security on death row where he was assigned. In finding that he left work voluntarily

without good cause, the Commission relied upon the holding in the case of Glen Alden Coal Company v. Unemployment Compensation Board of Review, 171 Pa. 325, 90 A.2d 331 (1952).

In the Alden case, the claimant, who had loaded coal cars outside the mine, refused work inside the mine because he believed such work to be more dangerous. The Court held that the mere increase in the hazard of one's employment is not good cause for leaving work and specified that:

> All occupations have their hazards, dangers and perils, differing in degree and kind. … Life itself is a hazard. … If fear is recognized as a good cause for refusal of employment, it will operate in respect to all occupations, since none is free from risk, and any perceptible increase of hazard may become the basis for a claim of fear. Drawing a fair and just line, with no arbitrary or artificial or unworkable ingredients, between differing degrees and kinds of hazards in variant fields of work would impose a staggering, if not impossible task upon administrative and judicial authorities. … Once fear, induced by an increased or differing hazard is admitted, the Board, and this Court will be launched on an unknown sea without chart or compass.

In this case, the claimant has not demonstrated that he had a legitimate employment dispute or that he faced compelling and necessitous circumstances that left him without any reasonable alternative except to relinquish his job. He was aware that Taliban and other forces were engaged in military activities that could result in serious injury or death to military and civilian personnel in that area. He was concerned about the lack of armor on the vehicles used to take him to and from the detention center, but this is no different than a corrections officer at a prison or a fire fighter facing a forest fire.

The claimant did not exhaust all reasonable alternatives before he resigned. He could have requested a transfer to another facility, whether in Afghanistan or in some other country where the employer had the need for similarly skilled workers. He could have asked for some time off or waited until he secured a definite offer of permanent work more to his liking before hazarding the risks of becoming unemployed.

Accordingly, the Commission must conclude that the claimant left work voluntarily without good cause. Consequently, he must be disqualified for benefits.

DECISION

The claimant's request to present additional testimony and evidence is denied.

The Appeals Examiner's decision is affirmed. The claimant is disqualified for benefits, effective November 1, 2009, because he left work voluntarily without good cause. This disqualification shall remain in effect until he has worked for an employer during 30 days or 240 hours, and subsequently becomes totally or partially separated from such employment.

The Deputy should calculate what benefits were paid to the claimant after the effective date of the disqualification that he will be liable to repay to the Commission.

William W. Smith
Special Examiner

NOTICE TO CLAIMANT

IF THE DECISION STATES THAT YOU ARE DISQUALIFIED, YOU WILL BE REQUIRED TO REPAY ALL BENEFITS YOU MAY HAVE RECEIVED AFTER THE EFFECTIVE DATE OF THE DISQUALIFICATION. IF THE DECISION STATES THAT YOU ARE INELIGIBLE FOR A CERTAIN PERIOD, YOU WILL BE REQUIRED TO REPAY THOSE BENEFITS YOU HAVE RECEIVED WHICH WERE PAID FOR THE WEEK OR WEEKS YOU HAVE BEEN HELD INELIGIBLE. IF YOU THINK THE DISQUALIFICATION OR PERIOD OF INELIGIBILITY IS CONTRARY TO LAW, YOU SHOULD APPEAL THIS DECISION TO THE CIRCUIT COURT.