COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Hunter L. Carr

[redacted]

Conagra, Inc.
Crozet, Virginia

Date of Appeal
to Commission: August 27, 1990

Date of Hearing: November 2, 1990

Place: RICHMOND, VIRGINIA

Decision No.: 34343-C

Date of Mailing: November 9, 1990

Final Date to File Appeal
with Circuit Court: November 29, 1990

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9008192), mailed August 21, 1990.

APPEARANCES

Attorney for Claimant

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 August 27, 1990, the claimant filed a timely appeal from the Decision of Appeals Examiner which disqualified him from receiving benefits, effective June 17, 1990. That disqualification was based upon the Appeals Examiner's finding that the claimant had been discharged for misconduct in connection with his work.

Prior to filing his claim for benefits, the claimant was last employed by Conagra, Inc., of Crozet, Virginia. He worked for this employer from November 28, 1988 through May 19, 1990. He last worked as a slip sheet operator. He was paid $7.62 an hour and was scheduled to work on the third shift which began at midnight and ended at 8:00 a.m.

On May 18, 1990, the claimant requested a 30-day leave of absence to begin on May 21, 1990. The warehouse manager and his immediate superior reviewed the request and decided to grant a two-week leave of absence to begin May 28, 1990. The company was extremely busy at the time and every employee was needed to work during the period of May 21, through May 27, 1990.

The claimant discussed this situation with his immediate supervisor. The supervisor suggested that they discuss it at the end of the shift. At 8:00 a.m. on May 19, 1990, the claimant and his immediate supervisor met to review the claimant's leave request to see what, if anything, could be done. At that meeting, the claimant requested that he be permitted to take one week of vacation, which he had earned. The supervisor did not have the authority to grant either vacation time or a leave of absence. He promised the claimant that he would call the warehouse manager and see if the vacation request could be approved.

The claimant's supervisor never called the warehouse manager to seek approval for the vacation. He did not make the phone call because he knew that he could not obtain authorization for the vacation. Under company policy, any vacation request had to be approved by the warehouse manager and the personnel department. Since this request for vacation was made on the weekend, authorization could not have been obtained until the following week.

The claimant was scheduled to report for work at midnight on May 20, 1990; however, he did not do so. He went ahead and took a one week vacation on the assumption that it had been approved. As a result, he was discharged for being absent from work without authorization.

The claimant asserted that his immediate supervisor had agreed to call him in the event that his request for vacation was not approved. Neither the claimant's supervisor nor the first shift supervisor, who overheard their conversation, remembered that statement being made. The claimant's testimony on this issue was not consistent. On page 21 of the transcript, the claimant stated:

> "So I waited until quarter after 8 and they were real, real busy and I said well one of you call me at home and let me know if I can take the vacation or not."

Later on that same page of the transcript, the claimant stated, "No, he, he didn't call me and let me know if I, I said if I couldn't take the time for him to call me."

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 in connection with his 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. 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).

The evidence in the record is sufficient to establish that the claimant was absent without authorization during the period of May 20, through May 25, 1990. The claimant had requested emergency vacation for that week, but it had never been approved. Nevertheless, the claimant took the time off on the assumption that it would be approved. Under these circumstances, his absence from work was clearly unauthorized and amounted to work connected misconduct.

The claimant maintained that he reasonably believed that his request for vacation had been approved. He based that contention on his testimony that his immediate supervisor had agreed to call him at home if his vacation request was not approved. When he

received no telephone call, he assumed that his vacation had been authorized. The Commission is not convinced by the claimant's testimony on that issue. First, neither his immediate supervisor nor the first shift supervisor who overheard the conversation, recalled any such statement being made. Second, the claimant's testimony regarding what was said is inconsistent. He initially testified that he had requested the supervisor to call him to let him know if he could take the vacation or not. He later changed that testimony to indicate that the supervisor would call him only if the vacation had not been approved. The claimant did not take any steps whatsoever to ensure that his request for vacation had been approved. That would have been the most reasonable course of action in light of the action that the company took on his request for a 30-day leave of absence.

Accordingly, the Commission must conclude that the claimant was discharged for misconduct in connection with his work, for which no mitigating circumstances have been proven. Therefore, the disqualification provided by the statute must be imposed.

DECISION

The decision of the Appeals Examiner is hereby affirmed. The claimant is disqualified from receiving benefits, effective June 17, 1990, because he was discharged for misconduct in connection with his work. This disqualification shall remain in effect for any week benefits are claimed until he performs services for an employer during 30 days, whether or not such days are consecutive, and he subsequently becomes totally or partially separated from such employment.

M. Coleman Walsh, Jr.
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. (SEE NOTICE ATTACHED)