COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

James Osborne, Jr.
[redacted]

Transit Management of Alexandria, Inc.
Alexandria, Virginia

INTERSTATE

Date of Appeal to Commission: December 22, 1992

Date of Hearing: April 7, 1993

Place: RICHMOND, VIRGINIA

Decision No.: 41247-C

Date of Mailing: June 4, 1993

Final Date to File Appeal with Circuit Court: June 24, 1993

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This case came before the Commission on appeal by the employer from a Decision of Appeals Examiner (UI-9216683), mailed December 1, 1992.

APPEARANCES

Two Employer Representatives

ISSUES

Did the employer file a timely appeal from the Decision of Appeals Examiner, and if not, was good cause shown to extend the 21-day appeal period as provided in Section 60.2-620B of the Code of Virginia (1950), as amended?

Should the employer's request that the Commission direct the taking of additional testimony and evidence be granted as provided in Regulation VR 300-01-4.3B of the Regulations and General Rules Affecting Unemployment Compensation?

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 December 1, 1992, the Appeals Examiner issued his decision which affirmed the initial Deputy's determination and held that the claimant was qualified to receive benefits, effective August 16, 1992. The basis for that decision was the Appeals Examiner's conclusion the claimant had been discharged for reasons that would not constitute misconduct in connection with his work.

The Appeals Examiner's decision was mailed to the correct, last-known addresses of both the claimant and the employer. A notice appeared on the first page of the decision which informed the employer of its right to appeal, the procedure for filing an appeal, and the final date for doing so. In this case, the final date for filing an appeal was December 22, 1992.

By letter dated December 21, 1992, the employer filed an appeal from the Appeals Examiner's decision. That appeal was delivered to the Commission by Federal Express. The Office of Commission Appeals did not receive the employer's letter until December 28, 1992. No dates appeared on the Federal Express airbill. The employer subsequently provided the Commission documentation from Federal Express which established that a Commission employee signed for and received the letter at 10:05 a.m. on December 22, 1992.

In addition to appealing the Appeals Examiner's decision, the employer also requested the Commission to receive additional evidence and testimony. The employer contended that it had relevant evidence that it could now present after reviewing and studying the transcript of the appeals hearing. The employer further asserted that, because of the confusing nature of some of the claimant's testimony, this evidence could not have been presented at the prior hearing by its representative. At the appeals hearing, the employer representative did not advise the Appeals Examiner of any confusion or of the need to research any aspect of the case based upon the claimant's testimony. The employer representative was afforded an opportunity to add any further evidence to the record prior to the Appeals Examiner closing the hearing. The employer representative elected not to present any further evidence, but simply made a brief closing statement in support of the company's position in the case (Tr. 24-25).

Prior to filing his claim for benefits, the claimant was last employed by Transit Management of Alexandria, Inc. The claimant worked for this employer as a bus driver from July 9, 1990 through April 15, 1992.

At the time he was hired, the claimant was informed that federal law required him and all other bus drivers to obtain a

commercial driver's license on or before April 1, 1992. The employer had a trainer on its staff and a number of written materials and videos that could be used by bus drivers to prepare themselves to take the CDL examination.

The CDL examination consists of a written test, a verbal test, a skills test, and a driving test. These various parts of the examination must be taken and passed in that order. The claimant was first scheduled to take the CDL examination on May 14, 1991. He forgot about that appointment and, as a result, failed to appear for the test. The examination was rescheduled for June 17, 1991. The claimant did not take the test on that occasion because he had not studied enough to be adequately prepared. Accordingly, his request that it be rescheduled again was granted. Thereafter, between July of 1991 and March 31, 1992, the claimant took and passed the first three parts of the CDL examination. During the same period of time, there were occasions when the claimant did not appear for scheduled examinations, and there were a number of instances when, despite encouragement from his employer, he did not promptly follow-up on taking and passing all of the parts of the examination.

When the April 1, 1992 deadline arrived, the claimant had not been issued a commercial driver's license. The license had not been issued because the claimant had not yet taken the driving test. As a result, the employer suspended the claimant and gave him until April 15, 1992, to obtain his CDL.

The claimant took the driving test but failed it because he did not come to a complete stop at a stop sign. The claimant did not attempt to take the driving test again because he would have to pay $50 to rent a bus. The claimant also asserted that there would not have been sufficient time to reschedule the driving test from the date he failed until the April 15, 1992 deadline imposed by the employer. The claimant could not remember when in April of 1992 he took the driving test. As a result of the claimant's failure to obtain his CDL as required by federal law, the employer discharged him.

OPINION

Section 60.2-620B of the Code of Virginia provides that an Appeals Examiner's decision shall become the final decision of the Commission unless an appeal is filed within 21 days of the date which it was mailed to the last known address of the party requesting the appeal. For good cause shown, the appeal period may be extended.

In the case of Barnes v. Economy Stores, Inc., Commission Decision 8624-C (November 22, 1976), it was held:

> The aforementioned statute enunciates the statutory time limit in which an appeal from a decision of an Appeals Examiner must be filed. It allows an extension of that 14-day (subsequently extended to 21 days) time limit where good cause is shown. A reasonable construction of the good cause provision of that statute is that in order for good cause to be shown, the appellant must show some compelling and necessitous reason beyond his control which prevented him from filing an appeal within the enunciated statutory time limit.

In this case, the evidence presented at the Commission hearing establishes that the employer's letter of appeal was received by a Commission employee at 10:05 a.m. on December 22, 1992. Since that was the final date for filing an appeal, the employer's appeal was timely.

Regulation VR 300-01-4.3B of the Regulations and General Rules Affecting Unemployment Compensation provides:

> 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, in its discretion, may direct the taking of additional evidence after giving written notice of such hearing to the parties, provided:
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> 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
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> 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.

The reasons advanced by the employer for desiring to submit additional evidence simply do not meet the criteria set out in the regulation. If the employer was confused in any way about the claimant's testimony, he could have stated that during the hearing

and sought clarification. Additionally, the employer representative was afforded a full opportunity to present all of the evidence that he had at the time, which would have included the presentation of documents and witnesses. Before closing the hearing, the Appeals Examiner gave the employer representative an opportunity to add any further evidence, and he declined to do so. The evidentiary record developed at the appeals hearing is sufficient to enable the Commission to properly adjudicate the case. Therefore, the employer's request that additional evidence be considered must be denied.

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 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).

It is not unusual for workers in certain occupations to be required as a condition of employment to have a certain type of license or certification in order to work. The Commission has held in past cases that the failure of an employee to maintain the licensure or certification that is required for continued employment could constitute misconduct in connection with work.

Goad v. Rental Uniform Service of Bedford, Inc., Commission Decision 19292-C (September 2, 1982); Spencer v. Regis Hair Stylist, Commission Decision 34061-C (February 6, 1991); Brady v. U. S. Military District of Washington, Commission Decision UCFE-479 (August 1, 1979).

In this case, the claimant knew on July 9, 1990, that he would be required to have a commercial driver's license by April 1, 1992. This amounted to nearly 21 months notice of the licensure requirement that he would have to meet in order to retain his job. The record reveals that the claimant made no effort at all to be scheduled to take the CDL examination until May of 1991. From that time until March 31, 1992, the claimant took and eventually passed three of the four parts of the CDL examination; however, he also missed appointments for taking various parts of the test and did not respond to the employer's encouragement to complete this process promptly so he could receive his license. As a result, when the April 1, 1992 deadline arrived, the claimant had not even attempted to take the driving test. The employer then provided him with a 15-day extension to obtain his CDL, Unfortunately, the claimant failed the driving test when he did not obey a stop sign and come to a complete stop at a stop sign.

For these reasons, the claimant's lack of diligence in vigorously pursuing his CDL, and his subsequent failure to pass the driving test because of a traffic infraction, manifests a willful disregard of the employer's legitimate business interests. Accordingly, the disqualification provided by the statute must be imposed unless the claimant could show mitigating circumstances.

After carefully examining the record, the Commission cannot conclude that any mitigation has been shown. Although the claimant asserted that, after failing the driving test,. there was insufficient time to reschedule another one prior to the April 15, 1992 deadline, that is somewhat inconsistent with his testimony that he did not take the test again because he would have to pay $50 to rent a bus. Even if the claimant could not have rescheduled the driving test prior to April 15, 1992, the reasons for that were exclusively because of his own conduct. Without any explanation whatsoever, the claimant did not begin to obtain his CDL until ten months after he was employed and notified of this requirement. By the time the deadline imposed by the statute arrived, the claimant had not even taken the driving test, primarily because of his failure to aggressively and diligently pursue obtaining the license. Accordingly, the fact that the claimant may not have had sufficient time to reschedule the driving test after he initially failed it was due to circumstances that were entirely within his ability to control.

For these reasons, the Commission must conclude that the claimant was discharged for misconduct connected with his work for which no mitigating circumstances have been proven. Therefore, he must be disqualified from receiving benefits.

DECISION

It is held that the employer's appeal was filed in a timely fashion; however, the employer's request that the Commission consider additional evidence must be denied since that request did not meet the criteria set out in agency regulations.

The Appeals Examiner's decision is hereby reversed. The claimant is disqualified from receiving benefits, effective August 16, 1992, because he was discharged for misconduct connected with his work.

This disqualification shall remain in effect for any week benefits are claimed until the claimant 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.

This case is referred to the Deputy who is requested to examine the claimant's claim for benefits and to determine if he has been overpaid any sum of benefits to which he was not entitled and which he is liable to repay the Commission as a result of the disqualification imposed by this decision.

M. Coleman Walsh

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)