COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

David E. Broad
[redacted]

Town of Grottoes
Grottoes, Virginia

Date of Appeal
to Commission: July 31, 1995

Date of Review: September 20, 1995

Place: RICHMOND, VIRGINIA

Decision No.: 49303-C

Date of Mailing: September 23, 1995

Final Date to File Appeal
with Circuit Court: October 13, 1995

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This case is before the Commission on appeal by the claimant from Appeals Examiner's decision UI-9506863, mailed July 10, 1995.

ISSUE

Was the claimant discharged due to 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 the Appeals Examiner's decision which affirmed an earlier Deputy's determination and disqualified him for unemployment compensation, effective April 2, 1995, for having been discharged due to misconduct in connection with work.

Prior to filing his claim, the claimant last worked for the Town of Grottoes, Virginia, between October 10, 1994, and March 27, 1995. His position was that of a police officer.

The Town of Grottoes has a police force consisting of two officers and a police chief. The claimant was hired with the understanding that he was on probation for a period of one year. He

provided his own sidearm which was a Beretta nine millimeter semiautomatic pistol. He requested, and the town purchased for him, a special type of locking holster in which to carry it.

At least twice during the course of his employment, the police chief had to verbally reprimand the claimant for inappropriate behavior. There were two instances when he was overheard using profanity on the police radio, and one instance where he offended the town mayor by making a sexually suggestive gesture and remark in jest. Although the claimant admitted that these incidents had occurred, he denied before the Appeals Examiner that he had exercised poor judgment with respect to either of them (Transcript page 124). At no time prior to the incident which ultimately caused his discharge was he ever made aware that his job was in jeopardy.

After an incident involving a traffic stop, the claimant complained to the police chief that he was having problems with his pistol. Not only was it difficult to draw out of the holster, but he had to look down to see where it was before he could get his hand on it, thereby putting him in a vulnerable situation in the event he had to face someone who was also armed and out to shoot him. On the evening of February 17, 1995, while in uniform and on duty, the claimant went by the home of the police chief who had offered to help him work on these problems.

The claimant was unaware that the police chief had been consuming alcoholic beverages to the point of being legally intoxicated. He saw no behavior out of the ordinary when the police chief showed him the revolver his wife had purchased for him as a gift. They then proceeded to unload both weapons, and the chief proceeded to demonstrate to the claimant the techniques he knew for quickly drawing and firing without looking down. They practiced with each other's guns, and then with their own to the point where the chief thought that the claimant was getting the technique down right. Each participant would signal the other person to draw by clapping his hands. After the session come to an end, the claimant proceed to reload his pistol, including chambering the first round and withdrawing the clip to replace it so as to be able to fire 15 shots without reloading. The chief did not realize that the claimant had done this.

Just before the claimant was getting ready to leave, the chief asked the claimant to engage in one more round of practice. The claimant clapped his hands and the chief drew on him. The chief then clapped his hands and the claimant drew on him and fired from the hip, with the bullet striking the chief in the chest. Somehow the claimant had forgotten that he had reloaded his pistol, and this is one of the first things he said in the conversation with the emergency 911 operator who was immediately called. The chief was evacuated by helicopter to Charlottesville where he underwent surgery and, after a brief relapse, was able to recover from the injury. The

claimant was suspended with pay until March 27, 1995. After and investigation, the decision was made to terminate him from his job as a result of the incident.

OPINION

As a preliminary matter, the Commission must reject the claimant's proffer of a letter from Dr. Richard R. Kobetz, dated August 23, 1995, in which he expressed the opinion that this was an unfortunate accident predicated upon the "mental set" of the claimant. Not only was the proffered letter not in the form of an affidavit, but the fact that Dr. Kobetz was not available to testify before the Appeals Examiner was a matter which was brought up and considered at that time. Eventually, at page 158 in the transcript, the claimant's attorney consented to close the record without presenting any additional testimony or evidence, and the fact that he later found out that the Appeals Examiner was not particularly convinced of the "training mode" excuse is insufficient reason to admit Dr. Kobetz's unsworn letter which, even if it were in the record, would make no difference to the Commission in arriving at a decision in the case.

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 work.

In the case of Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978), the Supreme Court of Virginia defined misconduct as follows:

> 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 Appeals Examiner appropriately cited the case of Poland v. T. D. L. C., Inc., Commission Decision 30841-C (November 8, 1988), as setting forth Commission precedent with respect to negligence cases. In that case, the claimant had been a truck driver with relatively little experience who, while driving on a divided highway, came upon a situation where one lane was closed due to construction up ahead. Although she was traveling in the lane which was not closed, a car in

the other lane suddenly pulled in front of her causing her to jackknife so as to overturn her rig in the median strip, thereby causing over $20,000 in damage. In that case, the Commission found that the claimant had acted negligently in the operation of her vehicle; however, it was then necessary to determine the degree of that negligence. The Commission went on to state:

> Virginia law recognizes three degrees of negligence, (1) ordinary or simple, (2) gross, (3) willful, wanton, and reckless. Ordinary or simple negligence is the failure to use "that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury to another." Griffin v. Shively, 227 Va. 317, 315 S.E.2d at 212-13, (1984).
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> Gross negligence is defined as "that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of (another). It must be such a degree of negligence as would shock fair-minded men although something less than willful recklessness." Griffin, 227 Va. at 321, 315 S.E.2d at 213, quoting Ferguson v. Ferguson, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971).
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> "Willful and wanton negligence is acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the (individual) aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another." Griffin, 227 Va. at 321, 315 S.E.2d at 213; Fredman v. Jordan, 166 Va. 65, 68 184 S.E. 186, 187 (1936). Willful or wanton negligence involves a greater degree of negligence than gross negligence, particularly in the sense that in the former an actual or constructive consciousness of the danger involved is an essential ingredient of the act or omission. Griffin, 227 Va. at 321-322, 315 S.E.2d at 213, quoting Boward v. Leftwich, 197 Va. 227, 231, 89 S.E.2d 32, 35 (1955).

It was found that despite the amount of damage caused, the negligence exhibited by the claimant was nothing more than simple or ordinary negligence, especially considering the actions of the other driver whose sudden lane change had caused her to react the way she did. The Commission went on to cite the case of Norwood v.

Respiratory Home Care of Virginia, Commission Decision 30219-C (June 9, 1988), in which it was stated:

> (T)he Commission has steadfastly declined to impose the disqualification for misconduct when the basis for doing so would have been a single act of simple, ordinary negligence. While there may be cases where a single act of gross negligence would be sufficient to constitute misconduct, a single act of simple negligence would rarely, if ever, sustain a finding of work-connected misconduct.

In the case of Borbas v. V. E. C., 17 Va. App. 720, 440 S.E.2d 630 (1994), the Virginia Court of Appeals had the occasion to rule in a case involving a correctional officer at a maximum security prison who committed three security violations in the space of one year so as to bring about her termination under the applicable standards of conduct. It was held that because none of the offenses involved an exact repeat of a prior one, because the record failed to establish that the claimant had ever demonstrated the ability to perform her job satisfactorily, and because none of the acts involved were volitional in nature, this was insufficient to establish misconduct in connection with her work so as to disqualify her for benefits.

There is no doubt that the claimant acted negligently with respect to the incident which resulted in him shooting and nearly killing his supervisor. It is equally apparent to the Commission that the evidence does not establish that he was acting with the reckless and wanton intent which would raise this to the highest level of negligence recognized in Virginia.

Nevertheless, unlike the incidents found not to be disqualifying in the Borbas case, each of the three incidents of negligence in this case involve volitional conduct on the claimant's part. There is no doubt that he chose to utter profanity on the radio, he chose to make an inappropriate obscene, sexually suggestive gesture and remark to the mayor of the town he worked for, and he chose to draw and pull the trigger on his pistol in the final incident. The Commission must find that this incident represented gross negligence inasmuch as the claimant, while handling a deadly weapon, acted with such an utter disregard of prudence as amounting to a complete neglect of the safety of another. The Commission concludes that a prima facie case that the claimant's discharge was due to misconduct in connection with his work has been made out. This shifts the burden to him to show mitigating circumstances if he is to avoid a disqualification under this section of the Code.

The fact that the chief only informally reprimanded the claimant with respect to the incidents involving the use of profanity on the radio and the gesture and remark he made to the mayor does not

eliminate them from consideration as prior incidents of negligence on his part so as to establish that the final incident was not isolated in nature. The fact that the claimant stated during the course of the Appeals Examiner's hearing that he did not feel that either of the first two incidents involved poor judgment on his part betrays a serious lack of either common sense or candor.

The Commission has found there to be sufficient evidence to show that the police chief was under the influence of alcohol on the evening he got shot and has no reason to doubt the claimant's testimony that he was unaware of this. Nevertheless, there has been no showing of the same type of contributory negligence on the chief's part as was shown to have existed in the Poland case, supra, with respect to the automobile driver who caused that claimant to have to brake suddenly. It was this claimant's actions in reloading his pistol and then forgetting that he had done so which directly led to the shooting incident. Inasmuch as the record does not establish that the claimant called such attention to the fact that he was reloading his pistol as would have made a reasonable person unaffected by alcohol aware of what he was doing, the Commission is unable to conclude that the chief's alcohol consumption amounted to a mitigating circumstance for the claimant's gross negligence. As a police officer, on duty and unencumbered by any intoxicants, it was his responsibility to handle his weapon in a responsible and appropriate manner, including knowing that it was reloaded. It is obvious to the Commission that he did not do this with respect to the final incident which, once it became publicly known in the community, essentially ended any possibility that he could work effectively as a police officer for the Town of Grottoes any longer. The Commission finds that he has not shown mitigating circumstances for the conduct which brought about his termination so as to be relieved of a disqualification under this section of the Code.

DECISION

The decision of the Appeals Examiner is hereby affirmed.

The claimant is disqualified for unemployment compensation, effective April 2, 1995, for any week or weeks benefits are claimed until he has performed services for an employer during 30 days, whether or not such days are consecutive and he has subsequently become totally or partially separated from such employment, because he was discharged due to misconduct in connection with work.

Charles A. Young, III
Special Examiner