COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

LABOR DISPUTE - 465.3
Voluntary Suspension and Leaving Work

DECISION OF COMMISSION

In the Matter of:

Minnie L. Adams, et al
(See Appendix)

Heritage Hall Health Care
Big Stone Gap, VA

Date of Appeal to Commission: November 8, 1984

Date of Hearing: November 1, 1985

Place: RICHMOND, VIRGINIA

Decision No.: 24380-C

Date of Mailing: March 7, 1986

Final Date to File Appeal with Circuit Court: March 27, 1986

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This is a matter before the Commission on appeal by the employer from the Decision of Appeals Examiner (UI-84-7537), mailed October 19, 1984.

APPEARANCES

Attorney for Employer

ISSUE

Were the claimants' unemployment the result of a labor dispute in active progress or to shutdown or start-up operations caused by such dispute and if so, did the claimants come within the exceptions set forth in the Section 60.1-52 (b) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The employer appealed from a decision, which held the claimants' unemployment commencing September 23, 1984, was not the result of a labor dispute in active progress.

The Findings of Fact made by the Appeals Examiner are hereby adopted by the Commission. Those findings are as follows:

The claimants were last employed as nurse's aides, housekeepers, food service workers or laundry workers for Heritage Hall Health Care in Big Stone Gap, Virginia through October, 1983.

In May of 1982, a union election was held at which time the United Steel Workers of America was selected as the bargaining agent for employees of the claimants' classification. This union was not certified as the bargaining agent until October of 1983; however, in the meantime, negotiations had gone on for a labor contract. Because no agreement could be reached, a strike was called in October of 1983, and picket lines were immediately set up at the employer's place of business in Big Stone Gap, Virginia. Picket lines remained up through September 20, 1984.

On September 19, 1984, a union representative and an employer representative met in a parking lot with a federal mediator with the intention of settling the dispute. The union representative wanted the employer to agree to rehire all of the striking workers and then lay off any of the replacement workers who had been hired on a seniority basis. The employer rejected this proposal. The union representative then wanted to know if the employer would give layoff slips to all of the former striking workers who could not be immediately rehired so that they could file their claims for unemployment compensation. The employer also rejected this proposal. The following day, the union had a meeting with the workers and informed them that the strike was being abandoned. The picket lines came down and most of the workers, including the claimants, returned to the employer to ask for their jobs back. They could not be immediately rehired because there were not enough vacancies for them. Instead, they were placed on a preferential rehire list.

It was the employer's contention that the labor dispute remained in effect even after September 20, 1984, since the union had not been decertified and it continued to be the employee's bargaining agent with whom no agreement had been reached. The meeting at which time the union representative indicated that the strike was being abandoned was attended by reporters for the news media who reported that the strike had, indeed, been abandoned and no further operations were being conducted with respect to reaching a settlement. In any event, the claimants have asked to return to work and have placed no conditions upon their employability with respect to demands for wages, hours of work or conditions of work.

OPINION

Section 60.1-52 (b) of the Code of Virginia (1950), as amended, provides as follows:

> "An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that:
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> (b) His total or partial unemployment is not due to a labor dispute in active progress or to shutdown or start-up operations caused by such dispute which exists (1) at the factory, establishment, or other premises (including a vessel) at which he is or was last employed, or (2) at a factory, establishment or other premises (including a vessel) either within or without this Commonwealth, which (a) is owned or operated by the same employing unit which owns or operates the premises at which he is or was last employed and (b) supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed. This subsection shall not apply if it is shown to the satisfaction of the Commission that:
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> (1) He is not participating in or financing or directly interested in the labor dispute; and
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> (2) He does not belong to a grade or class of workers of which, immediately before the commencement of the labor dispute, there were members employed at the premises (including a vessel) at which the labor dispute occurs, any of whom are participating in or financing or directly interested in the dispute."

In this case, the employer has argued that the claimants are not eligible for unemployment compensation because their unemployment resulted from a labor dispute, which has not been settled, and because they voluntarily assumed the risk that the employer would hire replacements for them.

Settlement is not the only means by which a labor dispute may end. Numerous jurisdictions have held that a labor dispute ceases when the employees unilaterally and completely abandon their strike activities and make an unconditional offer to return to work. (See generally, Sarvis v. High Point Sprinkler Company and Employment Security Commission of North Carolina, 296 NC 475, 251 S.E.2d 434 [1979]; Kraft v. Texas Employment Commission, 418 S.W.2d 482 [1967]; and Johnson v. Wilson & Company, 266 Minn. 500, 124 N.W.2d 496 [1963]). This Commission has utilized the aforementioned criteria in similar cases. (See, Feba C. Bryan, et al v. Dean Foods Company, Commission Decision No. 5399-C, dated July 22, 1971, and Feba Clair Bryan v. Dean Foods Company, Decision No. UI-71-2347, dated November 18, 1971, affirmed by Commission Decision No. 5538-C, dated December 20, 1971) Here, the evidence does not support the contention that there was a labor dispute in active progress as of September 23, 1985. All strike activity, including picketing and demands, had ended as of September 21, 1984. Moreover, on the same day, all of these claimants applied for rehire and were placed on a preferential hiring list. (Tr. page 26)

Likewise, the argument that the claimants voluntarily risked the loss of their jobs is not persuasive. Unemployment caused by a labor dispute cannot be equated to a voluntary separation from employment. A finding of a voluntary leaving without good cause will subject a claimant to a disqualification for benefits for an indefinite period. [See, Section 60.1-58 (a), Code of Virginia (1950), as amended] By contrast, Section 60.1-52 of the Code provides for a determination of a claimant's eligibility on a weekly basis. A claimant is not eligible for unemployment compensation if his unemployment is the result of a labor dispute in active progress during that claim week. The employer's own evidence showed that the striking employees, including the claimants, continued to be carried on the employer's payroll throughout the dispute. (Tr. page 29) Thus, the employer/employee relationship remained in tact. Once the labor dispute was abandoned by the claimants, they became unemployed as a result of the employer's inability to return them to work. (See Feba Clair Bryan v. Dean Foods Company, supra) (Underscoring supplied)

The cases cited by the employer in its brief do not cause the Commission to reach an opposite result. For example, in Lee-Norse v. Board of Review, 291 So.2d 477 (1982), the issue before the West Virginia Supreme Court was not the abandonment of a labor dispute, but whether a labor dispute existed when the claimants were locked out by an employer. In paraphrasing the

opinion of the court, the employer omitted a phrase which was critical to its interpretation. The court did not hold that the claimants had severed their relationship with the employer of their own volition, but rather, that workers who withheld labor in a dispute to gain greater benefits make a choice that the loss of wages during the strike is worth any potential gain and that such is a voluntary risk. (Emphasis added) In Building Products v. Arizonia Department of Employment Security, 604 P2d 1148 (1976), the court did not rule that the employees who had participated in a strike were unemployed because of a labor dispute. In that case, it was held that the employer's mere resumption of work and replacement of strikers after a temporary cessation is not sufficient evidence to establish that a labor dispute had ended. The claimants in the present case are clearly distinguishable from the claimants in Texas Employment Commission v. Reddick, 485 S.W.2d 849 (1972) since, as noted in the employer's brief, the Texas claimants who were denied benefits had not made applications to return to their jobs.

After careful consideration of all of the record, it is concluded that the claimants were eligible for benefits effective September 23, 1984, because their unemployment was not due to a labor dispute in active progress.

DECISION

The Decision of Appeals Examiner is hereby affirmed. The claimants have satisfied the eligibility requirements of Section 60.1-52 (b) of the Code of Virginia (1950), as amended, because their unemployment was not due to a labor dispute in active progress.

Patrice Taylor Johnson
Special Examiner