COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCELLANEOUS: 60.1
Benefit Computation Factors
-- Base Period.

DECISION OF COMMISSION

In the Matter of:

Namsook Armstrong
[redacted]

Town of Blacksburg
Blacksburg, VA 24060

Date of Appeal to Commission: October 27, 1989

Date of Hearing: May 10, 1990

Place: RICHMOND, VIRGINIA

Decision No.: 32759-C

Date of Mailing: May 31, 1990

Final Date to File Appeal with Circuit Court: June 20, 1990

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This matter comes before the Commission on appeal by the employer from the Decision of Appeals Examiner (UI-8907842), mailed October 6, 1989.

APPEARANCES

Attorney for Employer

ISSUES

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?

Is the claimant ineligible to receive benefits because she is subject to the "between terms denial" provision set out in Section 60.2-615D of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On October 27, 1989, the employer filed a timely appeal from the decision of the Appeals Examiner which held that the claimant was qualified to receive benefits, effective July 2, 1989. The Appeals Examiner concluded that the claimant was not disqualified from receiving benefits based upon her separation from work, and that the between terms denial provisions of Section 60.2-615 of the Code of Virginia were not applicable.

The claimant filed her claim for benefits effective July 2, 1989. Prior to filing that claim, the claimant was last employed by the police department for the Town of Blacksburg. She worked as a school crossing guard from April 24, 1989, through June 9, 1989. She worked a split shift and was paid $4.98 an hour.

Although she was employed by the Town of Blacksburg, she performed services for the Montgomery County School system. As a school crossing guard, she provided traffic control at designated cross walks near the county's public schools. She also assisted school buses as they entered and left the school area. All school crossing guards are considered permanent part time employees. They are hired to work only during the school year which runs from early September to early June of each year.

The claimant's employment with the Town of Blacksburg ended on June 9, 1989, when the county public schools recessed for summer vacation. The claimant was offered a job as a school crossing guard for the 1989-90 school year.

Prior to working for the Town of Blacksburg, the claimant had performed services for Kirk Mayer, Inc., which provides temporary employees to area businesses. The claimant's base period, which is predicated upon the effective date of her claim, began on April 1, 1988, and extended through March 31, 1989. During that base period, all of the claimant's wages were from Kirk Mayer, Inc.

OPINION

Section 60.2-618 of the Code of Virginia delineates five circumstances when a claimant may be disqualified from receiving unemployment insurance benefits. Subsection 1 of the statute provides a disqualification if a claimant left work voluntarily without good cause. Similarly, subsection 2 of the statute provides a disqualification if a claimant was discharged for misconduct in connection with work. The employer bears the burden of proving that a claimant's separation from work was voluntary. Kerns v. Atlantic American, Inc., Commission Decision 5450-C (September 20, 1971). Additionally, if the claimant's separation from work was involuntary, the disqualification would be imposed only if the employer proved that the separation was due to a

dismissal for work-connected misconduct as defined by the Virginia Supreme Court in Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978).

In this particular case, it is manifestly apparent that the claimant's unemployment was due to the fact that no more work was available for her after June 9, 1989. That occurred because the school year had ended and the claimant's services would not be required again until September, 1989, when the regular school year began. Accordingly, no disqualification may be imposed upon the claimant's receipt of unemployment insurance benefits based upon the provisions of subsections 1 or 2 of Section 60.2-618 of the Code of Virginia.

The employer has contended that the claimant was not eligible to receive benefits under the between terms denial provisions of Section 60.2-615 of the Code of Virginia. The provisions of that statute which are pertinent to this case are as follows:

> Benefits based on service in employment defined in subsection A of Section 60.2-213 shall be payable in the same amount on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this title, except that:
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> B(1). Benefits based on service in any capacity, other than an instructional, research, or principal administrative capacity, for an educational institution shall not be paid to any individual for any week which commences during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms. . . .
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> D. Benefits based on services provided to or on behalf of an educational institution while employed by a governmental entity or nonprofit organization shall not be payable to any individual who provided such services under the same circumstances and subject to the same terms and conditions as described in subsections A, B, C and E of this section.

Public Law 94-566 amended the provisions of 26 U.S.C. 3304 to require all states to adopt one of several between terms denial provisions as part of their basic employment security law. The Virginia General Assembly elected to adopt the provisions cited herein in order for the Commonwealth's unemployment insurance

statute to be in conformity with the requirements of the Federal Unemployment Tax Act.

The key to resolving the dispute in the present case is the interpretation of the phrase "benefits based on service." The employer has argued that this phrase must be interpreted to mean benefits based on service in employment for a thirty day employing unit. In propounding this argument, counsel for the employer suggested that unemployment insurance benefits under Virginia law was based upon a claimant's service for a thirty day employing unit. The Commission disagrees.

In order to be eligible to receive benefits, a claimant must meet two threshold requirements. First, the claimant must be unemployed as defined in Section 60.2-226 of the Code of Virginia. Second, the claimant must have sufficient earnings in his base period to be monetarily eligible for benefits. Code of Virginia Sections 60.2-612(1), 602. The phrase "benefits based on service" refers to the claimant's earnings in employment during his base period. Benefits are based upon whether a claimant has sufficient earnings in employment during his base period to be monetarily entitled to unemployment compensation. This interpretation has been consistently followed by the Commission as well as the U. S. Department of Labor. Pruden v. Richmond City Jail, Commission Decision 12986-C (March 5, 1980); Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 - P. L. 94-566, Supplement #5 (November 13, 1978).

The employer's contention that the phrase "benefits based on service" means that benefits must be based upon the service for a thirty day employing unit is inconsistent with the plain language of the statute. There is no mention of a thirty day employing unit in this statute or the federal legislation upon which it was based. The reason for this is simple. Under Virginia law, the thirty day employing unit is simply that employing unit who will be charged for any benefits awarded to one of its former employees. The concept of a thirty day employing unit has nothing whatsoever to do with creating an entitlement to benefits. If, as the employer argued, that was the case, then a claimant would be eligible to receive benefits based upon a non-disqualifying separation from a thirty day employing unit regardless of whether that claimant had any wages in the base period. This type of result was certainly outside both the letter and intent of the statute.

In summary, the Commission concludes that the phrase "benefits based on service" refers to the wages earned in employment by a claimant during the base period. Since this claimant did not have any earnings whatsoever in her base period from an educational institution or governmental municipality, the provisions of Section 60.2-615 of the Code of Virginia are not applicable.

DECISION

The decision of the Appeals Examiner is hereby affirmed. The claimant is qualified to receive benefits, effective July 2, 1989, based upon her separation from work with the Town of Blacksburg. The Commission further holds that the claimant is not subject to the between terms denial provisions of Section 60.2-615 of the Code of Virginia.

M. Coleman Walsh, Jr.
Special Examiner