COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

Misconduct
190—Evidence

DECISION OF COMMISSION

In the Matter of

Kenneth P. Ware, Claimant
[redacted]

American Safety Razor
Verona, VA 24482

Date of Appeal
To Commission: February 21, 1980

Date of Hearing: September 23, 1980
October 27, 1980

Decision No.: 14560-C

Date of Decision: October 31, 1980

Place: Richmond, Virginia

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This matter comes before the Commission on appeal by the claimant from the decision of the Appeals Examiner (UI-80-599), dated January 31, 1980.

ISSUE

Did the claimant have good cause to extend the fourteen day appeal period as provided in Section 60.1-62 of the Code of Virginia (1950), as amended?

Was the claimant discharged for misconduct in connection with his work as provided in Section 60.1-58 (b) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On January 31, 1980 an Appeals Examiner's decision was mailed which disqualified the claimant for benefits effective December 9, 1979 for having been discharged for misconduct in connection with his work. The decision stated it would become final unless further appealed by either party no later than midnight of February 14, 1980.

The claimant has testified that he did not receive a copy of the Appeals Examiner's decision in the mail but when he reported to

the local office on or about February 19, 1980 to check on his claim he was shown a copy of the Appeals Examiner's decision. The claimant told the president of his local union about the decision and she called the local office of the Employment Commission in Staunton on February 21, 1980 in order to file an appeal. She was told that it would not be necessary to make a personal appearance to file an appeal and the appeal was taken over the telephone. The notice of appeal prepared by the local office shows that the appeal was taken by telephone.

American Safety Razor Company of Verona, Virginia was the claimant's last employer where he had worked from April 5, 1955 through November 16, 1979. The claimant was a thermal former operator adjustor at the time he was discharged.

On March 21, 1979 the claimant left the plant at lunch time with intentions of returning to work within his half hour lunch break. Accordingly, he failed to clock out. The claimant visited his mother in the hospital at that time and his return to the plant was delayed until about 1:30 that afternoon. The claimant was, therefore, away from the plant for an hour and a half without authorization and without having clocked out. He was given a written warning that his behavior violated three company rules on March 22, 1979. He was also suspended for two weeks for leaving the plant without clocking out and clocking back in when he returned, for leaving the plant without permission and for falsifying company records.

On June 14, 1979 the claimant left the plant without clocking out and clocking back in when he returned. He was given another two week suspension and told that any further violations of company rules might lead to his discharge.

On November 15, 1979 the claimant was scheduled to work a twelve hour shift, from 8:00 a.m. to 8:00 p.m. He was tired because he had been working several twelve hour shifts during that week so he left work at 5:30 p.m. without having obtained the permission from his supervisor. The claimant did clock out but he was discharged at that point for violating company Rule 8, involving failure to observe department working hours scheduled and Rule 15, leaving company premises during working hours without permission from your supervisor.

The claimant filed a grievance from his discharge and an arbitrator's decision rendered on July 12, 1980 was that the claimant was not discharged for just cause because the company had not followed the proper steps in their progressive disciplinary system prior to discharging the claimant. Accordingly, the claimant was reinstated but without back pay. The claimant, by counsel, argues that the findings of the arbitrator are binding on the Commission and since the claimant was reinstated it cannot now be maintained that he was discharged for misconduct in connection with his work.

OPINION

Section 60.1-62 of the Code of Virginia provides in part:

> "The parties shall be duly notified of such tribunal's decision, together with its reasons therefore, which shall be deemed to be the final decision of the Commission, unless within fourteen days after the date of notification or mailing of such decision, further appeal is initiated pursuant to §60.1-64; provided, however, that for good cause shown the fourteen day period may be extended."

Since the claimant has testified under oath that he did not receive the Appeals Examiner's decision at his correct address of record he has obviously shown good cause to extend the statutory appeal period for a reasonable period of time. The issue before the Commission is whether or not an appeal taken by telephone is valid. The Rules and Regulations Affecting Unemployment Compensation provide that all appeals to the Commission shall be in writing and shall set forth the grounds upon which the appeal is sought. Therefore, the phone call to the local office in Staunton on February 21, 1980 by the claimant's union president would obviously not satisfy the technical requirement of the Rules and Regulations. Regardless of this fact, representations were erroneously made to the claimant's representative over the telephone by local office personnel that an appeal could be taken over the telephone. This is evidenced by the fact that notice of appeal was prepared in the local office and the individual completing the form indicated that it was taken "by phone". Since the local office personnel had the apparent authority to make such representation to the parties and since the claimant's representative in this case relied upon the representation made by the Commission, it would be unconscionable to penalize the claimant for misinformation given by the local office. Accordingly, the appeal should be accepted in this instance and it is the opinion of the Commission that good cause has been shown to extend the statutory appeal period.

Section 60.1-58 (b) of the Code of Virginia provides a disqualification if it is found that an individual was discharged for misconduct in connection with his work. In Vernon Branch, Jr. v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609, 249 S.E.2d 180 (1978), the Supreme Court stated:

> "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 and mitigation of such conduct, the employee is 'disqualified for benefits', and the burden of proving mitigating circumstances rests upon the employee." (Emphasis supplied)

In the Branch case the Court held that willful violation of a reasonable company rule was tantamount to misconduct. The definition of misconduct which it cited made it clear that misconduct could be found by either a violation of a reasonable company rule or a disregard of standards of behavior owed to the employer by its employees.

It is the opinion of the Commission that absence away from an individual's work station without authorization from the employer as well as habitual leaving of the worksite without clocking out and clocking in would manifest a disregard of duties and obligations owed to the employer. The justification given by the claimant for the initial offense on March 21, 1979 regarding his desire to visit his mother in the hospital is quite understandable and a single isolated instance of that nature might not constitute misconduct. Regardless of that fact, the claimant was specifically warned that he should not leave without permission nor should he leave without clocking out. In the light of this warning the claimant left on June 14 without clocking out and left work early on November 15, 1979 without the permission of his supervisor. It is the opinion of the Commission that these actions in the light of warnings represented a willful disregard of the duties and obligations he owed to his employer by virtue of the employment relationship. The claimant had been clearly put on notice that further violations of this nature could result in his discharge. It is the opinion of the Commission that the claimant's discharge under these circumstances was for misconduct in connection with his work as that term is used in the Virginia Unemployment Compensation Act.

The primary defense raised by the claimant is that the employer failed to properly administer its rules in accordance with the collective bargaining agreement. This Commission is not charged with the responsibility of administering the collective bargaining agreements between employers and their employees. The finding of an arbitrator that an employer has not complied with the technical requirements of its collective bargaining agreement would have no bearing on the decision of the Virginia Employment Commission as to whether or not an individual's discharge was for misconduct. The issues are legally different and the evidence before the arbitrator and the Commission are obviously different. Accordingly, it is concluded that the claimant's reinstatement without back pay would have absolutely no bearing on the issue of whether or not his discharge was for misconduct in connection with his work. In the case of Ralph H. Munsey v. Kersey Manufacturing Company, Commission Decision 9022-C (March 15, 1977), the claimant argued that his reinstatement without back pay was binding on the Commission's determination of whether the claimant was discharged for misconduct. The Commission, in expressly rejecting this argument stated:

"This Commission is charged with determining entitlement to unemployment compensation based on the relevant provisions of the statute as they have been interpreted by the Commission and the Courts in previous decisions. Therefore, to hold that an individual's separation was not disqualifying under the statute merely by virtue of the fact that he was subsequently reinstated would be to delegate the statutory duty of the Commission to the parties and their representatives. The Commission is of the opinion, therefore, that the claimant's reinstatement would have no bearing on the issue of whether or not his separation was disqualifying under the statute."

Since the actions of the claimant in this case did reveal a willful disregard of duties and standards he owed his employer and since he had been put on notice that his behavior was not being condoned, his discharge for these reasons was tantamount to misconduct in connection with his work as that term is used in the Act.

DECISION

It is held that the claimant has shown good cause to extend the statutory appeal period.

The decision of the Appeals Examiner is hereby affirmed.

Kenneth H. Taylor
Special Examiner