MISCONDUCT: 190.15
Evidence
Weight and Sufficiency

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of

Sherry Icenhour
[redacted]

Food World, Inc.
Chase City, Virginia

Date of Appeal
To Commission: March 27, 1985

Date of Hearing: June 6, 1985

Place: RICHMOND, VIRGINIA

Decision No.: 24967-C

Date of Decision: June 6, 1985

Date of Mailing: June 10, 1985

Final Date to File Appeal
with Circuit Court: June 30, 1985

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This is a matter before the Commission on appeal by the claimant from the Decision of Appeals Examiner (No. UI-85-1406), mailed March 12, 1985.

APPEARANCES

Two Attorneys for Claimant

ISSUE

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

FINDINGS OF FACT

On March 27, 1985, the claimant initiated a timely appeal from a Decision of Appeals Examiner which disqualified her from receiving unemployment insurance benefits, effective January 13, 1985, based upon the circumstances surrounding her separation from work.

Prior to filing her claim for benefits, the claimant last worked for Food World, Incorporated of Chase City, Virginia. The claimant worked for this company from January 16, 1983 through January 7, 1985. At the time of her separation from work, she was a clerk in the delicatessen department and was paid $4.50 an hour.

On or about January 7, 1985, the claimant submitted a resignation in lieu of being discharged. The claimant was given this option as a result of a written statement that she signed as part of a pre-test interview prior to taking a polygraph examination. The statement, in pertinent part, provides as follows:

> "During this past year with Food World, #92 I have eaten company merchandise without permission or payment. I have eaten radishes, cucumbers, broken cookies, spoonfuls of macaroni and cheese, same with apples, slice of cheese. My minor snacking probably has cost Food World about $75. during the past year. I know now that this snacking isn't right, and will try very hard during the coming year to eliminate this."

The statement that the claimant signed was on a pre-printed form. The form contained a number of blank lines upon which the passage quoted above was written. The statement in the pre-printed portions, contained the statements that the claimant was volunteering this information of her own free will for whatever purpose it may serve and that she certified the facts were true and correct and that no threats or promises had been made.

The pre-test interview where the claimant gave this statement was conducted at a local motel and only the claimant and the polygraph examiner were present during the interview. Although the claimant wrote the handwritten statement, it was dictated to her by the polygraph examiner. The examiner told the claimant that she could be fired if she failed or refused to sign the statement. The claimant, in discussing the matter with the polygraph examiner, admitted to eating these various items but only in conjunction with taste testing, which was permitted by the company. The only exception to this was with respect to the broken cookies and the claimant had received permission from a manager to eat portions of broken cookies since they would not be sold to the public.

Under the employer's policy, employees such as the claimant who have responsibility for preparing food are permitted to engage in taste testing. Under the policy, that taste testing is limited to "already prepared foods". Although the employer never defined precisely what was meant by an "already prepared food", it appears that taste testing was contemplated for food which is cooked and prepared at the store to be sold to the public. The claimant did not understand this limitation and believed she was expected to taste test not only prepared foods but perishable ingredients, such as produce and fruit, which would be included in various salad dishes that she was expected to prepare for the delicatessen. In fact, the claimant's only consumption of radishes, cucumbers, apples and cheese were in conjunction with preparing such dishes to ensure that the product was acceptable for consumption by the public.

The pre-test interview and polygraph examination in question were conducted on November 27, 1984. At the conclusion of the polygraph examination, the claimant and a company representative were advised that the results of the polygraph examination were alright, but the employer was put on notice of the pre-test statement given by the claimant. Thereafter, the claimant continued in employment until January 7, 1985, at which time she was given the option to either resign or be discharged.

OPINION

Section 60.1-58 (b) of the Code of Virginia provides a disqualification if the Commission finds that a claimant was discharged for misconduct connected with work.

This particular language was interpreted by the Virginia Supreme Court in the case of Vernon Branch, Jr. v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609, 249 S.E.2d 180 (1978). In that case, the 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 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 and requires careful consideration. The burden of proof is upon the employer to produce sufficient evidence that would establish that the acts or omissions alleged did occur and were of such a nature as would constitute misconduct connected with work.

In the present case, the claimant was discharged by the employer solely on the basis of a pre-test admission that was given prior to a polygraph examination on November 27, 1984. The type of statement that the claimant signed is an admission against interest and normally would be entitled to great weight. However, when the evidence in the record is viewed as a whole the Commission is unable to conclude that this single document is sufficient to sustain the employer's burden of proof.

There are a number of problems with this particular admission upon which the employer has based its decision to discharge the claimant. First, the undisputed evidence in the record establishes that the claimant was under a threat of discharge if she did not sign the statement. Second, the evidence clearly establishes that the claimant did not actually compose the statement but it was dictated word-for-word by the polygraph examiner. Third, in her sworn testimony, under oath, which was subject to cross-examination by both the Appeals Examiner and the employer, the claimant explained what her intentions were when she signed the statement and further testified that, as she told the polygraph examiner, she had only eaten items at the store, other than the cookies, for the purpose of taste testing, which she believed the employer intended for her to do. Fourth, the dollar amount suggested in the statement, a figure which was suggested by the polygraph examiner, is completely speculative and unsupported by any objective data. Under these circumstances, the Commission is of the opinion that the written statement upon which the employer is relying is of dubious value and not entitled to substantial weight. (Underscoring supplied)

When the balance of the evidence in the record is viewed in light of the circumstances surrounding the claimant's pre-test admission, the most that can be said is that the claimant taste tested foods that were not "already prepared foods". However, the claimant believed that the employer intended for these items to be taste tested. At those times, she used them in preparing the various foods and salads that would be displayed in the delicatessen and sold to the public. In this sense, although she may have technically violated the company's rule, her violation was not deliberate or willful and would not constitute work related misconduct.

In a similar case, Patricia Elmandorf v. Shore Stop Food Stores, Inc., Decision No. 24491-C, dated May 3, 1985, the claimant was discharged as a result of a pre-test admission she gave to a polygraph examiner. In that case, the Commission affirmed the disqualification that was imposed, emphasizing the reliability of a party admission since such an admission was contrary to the claimant's pecuniary and penal interest. However, in the Elmandorf case, the evidence did not support any conclusions, as here, of overreaching on the part of the polygraph examiner. Additionally, the case is factually distinguishable since the claimant never contested the accuracy of the statement that she gave but only alleged that at the time of the interview she simply did not understand the statement when it was signed. These distinctions are important when compared with the case before the Commission here. The evidence in the record in the present case raised serious questions concerning the efficacy of the signed statement and justifies the Commission's election to accord it little weight. However, under circumstances when such factors are not present, the analysis of the Elmandorf case would be applicable and an admission by a claimant of wrongdoing accorded substantial weight.

Therefore, in view of the foregoing, the Commission is of the opinion that evidence in the record is insufficient to establish that the claimant was discharged for work related misconduct. Accordingly, the disqualification provided in Section 60.1-58 (b) of the Code of Virginia shall not be imposed.

DECISION

The Decision of Appeals Examiner is hereby reversed. It is held that the claimant was discharged by the employer for reasons which do not constitute work related misconduct and the disqualification provided in Section 60.1-58 (b) of the Code of Virginia shall not be imposed.

The case is referred to the Deputy with instructions to carefully examine the claimant's claim for benefits and to determine whether she has complied with the eligibility requirements of the Act for each week benefits have been claimed.

M. Coleman Walsh, Jr.

M. Coleman Walsh, Jr.
Special Examiner