COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT: 190.05
Evidence -- General.

DECISION OF COMMISSION

In the Matter of:

Frederick Burney

[redacted]

County of Arlington
Arlington, Virginia

Date of Appeal to Commission: June 26, 1989

Date of Hearing: August 17, 1989

Place: RICHMOND, VIRGINIA

Decision No.: 32155-C

Date of Mailing: September 8, 1989

Final Date to File Appeal with Circuit Court: September 28, 1989

This is a matter before the Commission on appeal by the employer from a Decision of Appeals Examiner (UI-8905285), mailed on June 9, 1989.

APPEARANCES

Claimant

ISSUE

Was the claimant discharged for misconduct connected with his work as provided in Section 60.2-618.2 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On June 26, 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 March 26, 1989. The basis for that decision was the Appeals Examiner's finding that the claimant had been discharged for reasons that would not constitute misconduct connected with his work.

Prior to filing his claim for benefits, the claimant worked in the Public Works Department for the County of Arlington. He was employed from August 8, 1977, through March 21, 1989. He was a full-time employee and was paid $9.36 an hour.

On March 16, 1989, the claimant was arrested and charged with the offense of indecent exposure pursuant to the provisions of Section 18.2-387 of the Code of Virginia. The claimant was incarcerated and missed three consecutive days of work. Upon his return to work on or about March 22, 1989, he was informed that he was being discharged. Although the County initially indicated that the claimant was being discharged for being absent from work for three consecutive days without approved leave, the real basis for his dismissal was the fact that he had been accused of indecent exposure. The claimant was accused of two such offenses, occurring on March 13, and March 14, 1989, while he was on duty. The two women that brought the complaint advised the investigating police officer that a County employee had exposed himself to them. They identified the County employee as the driver of truck number 542, which was the truck assigned to the claimant. One of the women informed the police officer that the man identified himself as "Fred" while the other woman stated that the man said his name was "Burney." On both March 13, and March 14, 1989, there were times during the day when the claimant was not on the jobsite and his whereabouts were unknown.

At the Appeals Examiner's hearing, the claimant denied that he had exposed himself to anyone. He maintained that an incident occurred between himself and another individual which prompted these charges being fabricated against him. Although he identified another County employee as being present when this incident allegedly occurred, he did not summon that individual to testify on his behalf.

The claimant was tried in the Arlington County General District Court on June 22, 1989. At that time, the claimant entered a plea of guilty to the charge of indecent exposure that occurred on March 13, 1989. The court sentenced the claimant to six months in jail and suspended the execution of that sentence.

At the Commission hearing, the claimant offered evidence in explanation of his plea of guilty. He presented a letter from the attorney who represented him in that proceeding. That letter (Claimant Exhibit A) stated, in pertinent part, as follows:

> On June 22, 1989, Mr. Burney entered a plea of guilty to the aforementioned charge. Said plea was conducted pursuant to Allford v. North Carolina, in which the defendant tenders a guilty plea without an admission of guilt.

> Mr. Burney felt he was innocent of the offense, but given the alleged anticipated testimony and the offer made by the Commonwealth Attorney, Mr. Burney, with advice of counsel, entered said plea.

OPINION

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 his work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission, et al, 219 Va. 609, 249 S.E.2d 180 (1978). In that case, the Court held:

> 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 which warrants careful consideration. The burden of proof is on the employer to prove by a preponderance of the evidence that the claimant was discharged for reasons which would constitute misconduct connected with his work. See, Dimes v. Merchants Delivery Moving and Storage, Inc., Decision 24524-C (May 10, 1985); Brady v. Human Resource Institute of Norfolk, Inc., 231 Va. 28, 340 S.E.2d 797 (1986).

In this case, the Commission is satisfied that the preponderance of the evidence establishes that the claimant did commit the offense of indecent exposure while on duty for the employer. Although the claimant denied that he committed the offense, that denial is outweighed by the other evidence. First, the claimant pleaded guilty to the offense when he was tried on June 22, 1989. Second, other evidence in the record independently supports the admission that the claimant made in court. The

evidence establishes that two complaining witnesses identified the perpetrator as the driver of truck number 542, which was the truck assigned by the County to the claimant. The complaining witnesses informed the investigating police officer that the perpetrator identified himself as either "Fred" or "Burney." Third, on both days when the offenses occurred, the claimant was unaccountably absent from the jobsite. When this evidence is viewed together with the claimant's guilty plea, the evidence establishes that he did commit the offense in question. (Underscoring supplied)

The claimant argued that, notwithstanding his plea of guilty, he was innocent of the charge. He submitted a letter from his attorney that asserted that the guilty plea was entered without an admission of guilt pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). This contention is not supported by the evidence before the Commission. The certified copy of the court's order reflects only that the claimant pleaded guilty. The presiding judge did not indicate that the plea was entered without an admission of guilt. There is nothing in the court's order to reflect that the plea was entered under circumstances similar to the Alford case, i.e. a guilty plea accompanied by a statement of innocence, an inquiry by the court into the voluntariness of the plea and the defendant's understanding of its consequences, and the presentation of substantial evidence of guilt. Furthermore, there is no compelling reason under Virginia law for a defendant to enter an "Alford" plea since Section 19.2-254 of the Code of Virginia (1950), as amended, allows a person charged with a misdemeanor to enter a plea of nolo contendere. Such a plea does not constitute an admission of guilt, but demonstrates the willingness of the accused to waive his trial and accept the sentence of the court.

Accordingly, the Commission concludes from the evidence that the claimant's plea of guilty constituted a judicial admission of his guilt. Under Virginia law, such an admission can be very persuasive, convincing evidence. In the case of Watson v. Coles, 170 Va. 141, 195 S.E. 506 (1938), the Virginia Supreme Court concluded that the admission of a defendant often furnishes the strongest and most convincing evidence of his guilt. This proposition was reaffirmed in the case of Tyree v. Lariew, 208 Va. 382, 158 S.E.2d 140 (1967), where the Virginia Supreme Court stated:

> An admission deliberately made, precisely identified and clearly proved affords evidence of a most satisfactory nature and may furnish the strongest and most convincing evidence of truth. 208 Va. at 385, 158 S.E.2d at 143.

The claimant's guilty plea certainly meets the criteria set out in the Tyree case. The claimant's guilty plea is entitled to substantial weight since the other evidence in the record is consistent with a finding that he committed the offense in question and he failed to call as a witness a co-worker who arguably could have presented material evidence on his behalf.

Under these circumstances, the Commission concludes that the claimant was discharged for misconduct connected with his work. Other than his denial that the incident occurred, the claimant has offered no evidence that would prove any mitigating circumstances for his conduct. Therefore, the disqualification provided in Section 60.2-618.2 of the Code of Virginia must be imposed.

DECISION

The decision of the Appeals Examiner is hereby reversed. The claimant is disqualified from receiving benefits, effective March 26, 1989, because he was discharged for misconduct connected with his work. This disqualification shall remain in effect for any week benefits are claimed until he performs services for an employer during thirty days, whether or not such days are consecutive, and he subsequently becomes totally or partially separated from such employment.

M. Coleman Walsh, Jr.
Special Examiner