COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT: 385
Relation of Offense to Discharge.

DECISION OF COMMISSION

In the Matter of:

Deborah A. Cutchin
[redacted]

City of Hampton
Department of Human Resources
Hampton, Virginia

Date of Appeal to Commission: September 11, 1986

Date of Hearing: December 11, 1986

Place: RICHMOND, VIRGINIA

Decision No.: 27645-C

Date of Mailing: April 1, 1987

Final Date to File Appeal with Circuit Court: April 21, 1987

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This is a matter before the Commission on appeal by the employer from the decision of the Appeals Examiner (UI-86-4712), mailed August 28, 1986. This case and the matter of William A. Haraway, III v. City of Hampton, Docket No. 27237-C, were consolidated for oral argument before the Commission.

APPEARANCES

Attorney for Employer, Two Employer Representatives and Two Claimants

ISSUE

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

FINDINGS OF FACT

On September 11, 1986, the employer filed a timely appeal from a decision of the Appeals Examiner. That decision held that the claimant was qualified to receive unemployment

insurance benefits, effective May 11, 1986, based upon the circumstances surrounding her separation from work with the employer.

Prior to filing her claim for benefits, the claimant last worked for the City of Hampton. She worked from July 1, 1985, through April 28, 1986. She was employed as an organizational development manager. She was paid a salary of $33,000 per year.

The claimant's position with the City of Hampton was rather unique. Her job responsibilities included investigating, studying, and evaluating different departments within the city. As a result of that process, recommendations could be made to modify the city's organizational structure in order to improve the departments and the city's overall efficiency. Part of the investigatory process included the claimant's conducting meetings with supervisors and employees. The contents of these meetings were kept confidential since everyone was encouraged to be frank and candid in their evaluations and observations on how their respective departments operated.

On January 21, 1986, the claimant was involved in a training session with the staff of the Human Resources Department. At the conclusion of the training session, some comments were made concerning the management style of the city police chief. The claimant's immediate supervisor commented that she thought the chief was "straight as an arrow." The claimant responded by saying, "I think he's a crook." Although the claimant's supervisor and the other staff members were surprised by this, no action was taken concerning the incident at that time. The claimant's immediate supervisor neither reprimanded the claimant nor reported it to any higher city officials.

On or about February 6, 1986, the claimant's immediate supervisor and other city officials were preparing for a grievance hearing involving another employee. At that time, it was made known that the claimant would be testifying on behalf of the former employee. The claimant's supervisor then mentioned to the city attorney the incident on January 21, 1986. As a result, a meeting was held by the city manager to confront the claimant concerning that and other allegations. After this meeting, the city manager did not make an immediate decision on what course of action he would take. On or about February 21, 1986, the claimant met again with the city manager. At that time, the city manager told the claimant that she could no longer continue in her present position because of complaints that he had received from various department heads. He had also reached this conclusion based upon the incident of January 21, 1986, and an alleged incident that occurred on November 7, 1985. The city manager told the claimant that efforts would be made to allow her to continue working with the city as a consultant. To this end, the claimant and the city began negotiations in an effort to reach an agreement with the claimant to provide consultant services.

These negotiations extended from the end of February until late April, 1986. During that time, the claimant continued to perform services for the City of Hampton as its organizational development manager. Several proposals and counter proposals were exchanged between the claimant and the city. However, no agreement was reached during that time. On or about April 7, 1986, the claimant was told that if a contract was not reached she would be fired by the city. By letter dated April 22, 1986, the claimant advised the city manager that she had negotiated in good faith in an effort to reach a consulting agreement. However, she could not accept the city's final proposal. The claimant attached to this letter a summary of the negotiations concerning the contract.

By letter dated April 28, 1986, the claimant was advised that her dismissal from the employment of the City of Hampton was being proposed, to be effective Wednesday, May 14, 1986. The city based the proposed dismissal on three incidents. The first incident involved a dinner meeting on November 7, 1985, at Bennigan's Restaurant. The second incident involved the training session on January 21, 1986. The third basis for the proposed dismissal was the allegation that the claimant's behavior had, in general, been disruptive since she began employment with the city.

The claimant's attorney responded to the letter of dismissal. After receiving that response, the claimant was dismissed by the City of Hampton.

The City of Hampton has adopted a comprehensive set of rules and policies which govern employee conduct. These rules and policies are found in Chapter 2, Section VIII.D of the Personnel Policies Manual. Item 18 under that section forbids an employee from making false, malicious, unfounded or highly irresponsible statements against other employees, supervisors, and other officials with the intent to destroy or damage the reputation, authority, or official standing of those concerned.

OPINION

Section 60.2-618.2 of the Code of Virginia provides a disqualification if the Commission finds that the claimant was discharged for misconduct connected with her work.

In the case of Vernon Branch, Jr. v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609, 249 S.E.2d 180 (1978), the Virginia Supreme Court defined misconduct as follows:

> "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 connected with work is a very serious matter and warrants careful consideration. In such cases, the burden of proof is on the employer to prove by a preponderance of the evidence that the claimant was discharged for conduct which constitutes misconduct connected with her work. See Dimes v. Merchants Delivery Moving and Storage, Inc., Decision No. 24524-C (May 10, 1985); Brady v. Human Resource Institute, 231 Va. 28, 340 S.E.2d 797 (1986).

In this case, the employer has maintained that the claimant was fired for three reasons. Those reasons were outlined in the Findings of Fact and need not be repeated here. However, the Commission must conclude that two of those three reasons have not been proven by a preponderance of the evidence. First, the only evidence in the record concerning the claimant's "disruptive behavior" is testimony from the city manager and the claimant's supervisor concerning complaints they had received By the same token, each of these individuals acknowledged that the job the claimant was in was a position likely to generate some friction and complaints. There were no specific instances given of any particular conduct that could constitute "disruptive behavior." Also, the alleged incident of November 7, 1985, has not been proven. One witness did testify on the employer's behalf and stated that the claimant made the remarks she was accused of making. However, the claimant denied making such remarks and her denial was corroborated by one other witness who likewise denied that the remarks were made. A second witness who was present testified that she could not recall any such remarks being made. In reviewing this evidence, the Appeals Examiner concluded that the remarks had not been made. The Appeals Examiner was in the best position to judge the credibility of the witnesses who testified. Those credibility findings are entitled to respect and should not be disregarded unless there is some clear basis in the record for doing so. See Foster v. A & B Contract Service, Decision No. 26249-C (February 14, 1986). The Commission, after reviewing the record, cannot find any persuasive basis for disregarding this credibility determination. Accordingly, the Commission must conclude that the employer has not carried its burden of proof with respect to this incident.

It is apparent that the claimant did make the remark that she thought the police chief was a crook. This occurred on January 21, 1986, in a meeting that was attended by her immediate supervisor. However, no action at all was taken by the employer until over two week later. The claimant's immediate supervisor did not see fit to admonish her or report the matter until it became apparent that the claimant was going to testify in a grievance hearing in favor of a former employee. Thereafter, the matter was investigated, the city manager became involved in the situation, and the chain of events recited in the Findings of Fact ensued.

The Commission is convinced that the claimant did make the remark that she thought the police chief was a crook. Further, it is apparent that such a remark did violate the city policy contained in Section VIII.D 18 of the Personnel Policies Manual. However, for the following reasons, the Commission cannot conclude that the claimant was discharged for misconduct connected with her work as contemplated under the Branch case.

First, the claimant's conduct on January 21, 1986, was an isolated incident. No similar instances have been proven, nor have any omissions been established. Further, this particular incident did not appear of great consequence to the claimant's supervisor until it was discovered that the claimant was going to testify on behalf of a former employee in his grievance hearing. Then it became significant to the employer that it was used in an attempt to discredit the claimant's testimony at that hearing. The nature and timing of the employer's responses provided the claimant a cogent basis for arguing that her dismissal was motivated, at least in part, by her participation in that grievance hearing, and that is an argument which cannot be lightly dismissed.

Second, the claimant's actual discharge was too remote in time from the incident on January 21, 1986. When the claimant was discharged in May of 1986, over three months had elapsed from the time of the incident itself. Further, even after the city manager determined that the claimant would not be able to remain in her job as organizational development manager, she remained in that very position for more than two months while negotiations for a consulting position with the city took place.

In order to establish a disqualification for work-connected misconduct, the conduct complained of must be the direct, proximate cause for the dismissal. Further, the dismissal or notice of proposed dismissal should occur within a reasonable period of time from the act of misconduct or the employer's discovery of it. (Underscoring supplied) The Commission has

recently addressed three situations involving an employer's delay in discharging an employee. In the case of Louis C. Urquhart v. Babcock & Wilcox Company, Decision No. 27719-C, December 12, 1986, the Commission rejected the Appeals Examiner's finding that a one-week delay between the claimant being found asleep on the job and his dismissal constituted condonation. In that case, the Commission held:

> "Further, the employer's delay of one week in discussing the last incident with the claimant is not significant. Such a short delay does not imply any condonation by the employer. Also, the claimant had already received notice that he would be fired if he was asleep on the job again. That warning placed the burden on the claimant to rectify the situation so it would not happen again."

However, in two other cases, the employer's delay in discharging the claimant proved fatal. In the case of Deborah Burrell v. City of Richmond, Decision No. 27598-C, November 12, 1986, the claimant was discharged by the employer after being convicted of a crime involving moral turpitude. That conviction occurred 10 months prior to the claimant's dismissal. Further the employer had been told by the claimant of the arrest and subsequent conviction at the time those events happened. In that case, the Commission held:

> "The employer has every right to establish reasonable rules which are designed to protect its legitimate business interests and expect compliance by its employees. By the same token, the employer must enforce the rules at the time it is made aware of a violation of the rules. To delay enforcement of a rule some ten months after the employer is made aware of the violation indicates a condonation of the violation of the rule.

In the case of David W. Johnson v. Service Gas Company, Decision No. 25997-C, December 19, 1985, the claimant who was the manager of one of the employer's convenience stores, cashed a personal check for $500 from the employer's funds. At the time he cashed the check, he neither had a check-cashing application filed with the employer, nor did he have sufficient funds in this account to cover the check. The employer, upon discovering the situation, did not dismiss the claimant, but permitted him to continue to work while repaying the funds. Six months later, when the claimant filed for bankruptcy and the employer realized it could not longer enforce repayment of the funds, the claimant was discharged. In that case, the Commission stated:

> "The employer, by counsel, has argued that the claimant should be disqualified for benefits because the evidence establishes that he committed larceny in deliberately cashing a check for which he did not have adequate funds, and that he disregarded his obligation to reimburse the employer for the debt. Although the employer may not have forgiven the claimant for cashing the bad check, it acquiesced in the matter and elected to retain him in its employ for an indefinite period rather than discharge him. Thus, notwithstanding the criminal nature of the act, it was not the event which precipitated the claimant's separation from employment, . . . the matter was tolerated until the claimant's superiors became aware of his petition to file bankruptcy. Only then was his employment terminated. It is the employer's delay in the decision to terminate the claimant's employment which distinguishes this case from those cited by the employer. While it is clear that the claimant committed an act of misconduct, he was not discharged for that reason. He was discharged because it was thought that he had made it impossible for the employer to collect the rest of the debt."

In this case, the employer may not have condoned the claimant's conduct in the context of forgiving it. However, the lengthy delay between the act complained of and the discharge undermines the employer's claims regarding the seriousness of the offense and that the offense itself was the direct, proximate cause of the claimant's dismissal. (Underscoring supplied)

Third, it would appear from the evidence that the proximate cause of the claimant's dismissal was the failure to reach a contractual agreement concerning her continuing with the city as a consultant. After over two months of negotiations, the claimant and the city had reached an impasse. The claimant rejected the city's last offer, even after being told she would be fired if she did not sign the contract. The claimant's unrebutted testimony on this point undermines the employer's contention that the proximate cause of her dismissal was the alleged misconduct.

Therefore, after carefully reviewing the evidence and considering the arguments made by the claimant and the employer, the Commission is of the opinion that the employer has failed to establish that the claimant was discharged for an act of misconduct connected with her work. Accordingly, no disqualification should be imposed upon the claimant's receipt of unemployment insurance benefits.

DECISION

The decision of the Appeals Examiner is hereby affirmed.

It is held that the claimant is qualified to receive benefits, effective May 11, 1986, based upon the circumstances surrounding her separation from work with the City of Hampton.

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

M. Coleman Walsh, Jr.

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Special Examiner