COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT: 485.05
Violation of Company Rule -- General.

DECISION OF COMMISSION

In the Matter of:

Frank Ivey, Claimant

Medical Center Hospital
Norfolk, Virginia

Date of Appeal to Commission: February 27, 1981

Date of Hearing: December 8, 1981

Place: RICHMOND, VIRGINIA

Decision No.: 15718-C

Date of Mailing: December 22, 1981

Final Date to File Appeal with Circuit Court: January 12, 1982

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This matter comes before the Commission on appeal by the claimant from the Decision of the Appeals Examiner (No. UI-81-164), dated February 19, 1981.

ISSUE

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

The Findings of Fact of the Appeals Examiner are adopted by the Commission. Those findings read as follows:

> "The employer appealed a determination of the Deputy holding the claimant not subject to disqualification, effective October 12, 1980, for having been discharged.
>
> Medical Cenger (sic) Hospitals, Norfolk, Virginia, was the claimant's last employer for whom he worked as a pharmacy technician from October 20, 1973, until October 13, 1980.

> The employer had reason to believe that some controlled drugs in the pharmacy were unaccounted for. An order had been place (sic) for four hundred Talwin tablets, four boxes of one hundred each. When they arrived they were verified by the supervisor. The claimant and four other employees were on duty when it was discovered that four boxes, of four hundred Talwin tablets were unaccounted for. Inasmuch as this was a controlled drug the incident was reported to the Norfolk police and the State Pharmacy Board. After the employer waited approximately one week, with no results from the report to the police, the supervisor interviewed the five employees who were on duty at the time the Talwin tablets had been found missing. Each employee was asked to submit to a polygraph test, and all five agreed to do so. A second meeting was held, with the same individuals, and again a request was made that they submit to a polygraph test due to the unaccountability of the controlled drug, Talwin. All five of the employees again agreed to take the polygraph test. All five were scheduled for the polygraph test and four of the individuals took the polygraph test and "passed it", the claimant refused to take the polygraph test, after having been advised that if he did not take the test he would be terminated, and if he "flunked" the test he would be terminated. The claimant indicated that he refused to take the polygraph test because while working for another employer he had submitted to a polygraph test, when there was a cash shortage, and that he had "flunked" the test and later was determined not to be responsible for the cash shortage; the employer had not terminated the claimant, as a result of the polygraph test.
>
> At the time of the claimant's employment there was no agreement that he submit to taking a polygraph examination."

Additionally, the Commission finds that at the time the claimant was hired, the employer had no policy which required employees to submit to a polygraph examination in order to continue their employment. The employer requested the claimant to submit to a polygraph examination but could not order it as there was no such policy in existence at the time.

Just before the claimant was discharged, his supervisor, the director of pharmacy, told him "that without some positive proof of his not being involved (inaudible) that he would be terminated." The claimant was unwilling to submit to the polygraph examination which he considered an invasion of his privacy. He further testified that he had shown deception on a polygraph admininistered by a prior employer yet he was later exonerated of the charge.

OPINION

Section 60.1-58 (b) of the Virginia Unemployment Compensation Act provides a disqualification if it is found that an individual was discharged for misconduct in connection with his work.

In Janice R. Walker v. McDonald's, Commission Decision 15825-C (September 24, 1981), the employer discharged the claimant for her refusal to take a polygraph examination as a condition of her continued employment. The company had no policy requiring employees to submit to polygraph examinations either prior to or during their employment for reasonable cause, and the Commission held that the claimant's refusal to comply with the request was not misconduct. The Commission stated:

> "In support of her decision that the claimant in this case was discharged for misconduct, the Appeals Examiner cited Commission Decision 13483-C (July 9, 1980), standing for the proposition that the use of a polygraph by an employer as an aid in security is a reasonable procedure and 'especially when the employees are made aware of the rule and when all employees are subject to the examination when given.' In that case, the claimant was told at the time of hire that all employees would be expected to submit to a polygraph examination at the discretion of the employer. That case, therefore, is clearly distinguishable from the case presently under consideration as this claimant was hired prior to the implementation to the polygraph requirement. Assuming, arguendo, that an employer's requirement that all employees submit to a polygraph is a reasonable rule, this claimant had not agreed to it as a condition of her becoming employed in October of 1977."

The reasoning applied by the Commission in the Walker case, which distinguished the prior case of Nix v. Rosso & Mastracco, would be equally applicable to the case presently under consideration. In this case, the employer does not have a company rule or policy requiring employees to submit to polygraph examinations as a condition of being employed or remaining employed. This is borne out by the testimony of the employer's witnesses at the Appeals Examiner's hearing that the claimant was requested to submit to the polygraph test. Had the employer implimented a company rule requiring the submission to a polygraph, it would have ordered the claimant to take the test.

Since the requirement to submit to a polygraph was not an existing policy of the employer's at the time of the claimant's termination, his refusal to submit to it would not constitute misconduct in connection with his work as that term is used in the Act. (Underscoring supplied)

DECISION

The decision of the Appeals Examiner is hereby reversed.

It is held that no disqualification should be imposed in connection with the claimant's separation from his last employment.

The Deputy is directed to determine the claimant's eligibility for benefits during the weeks claimed.

Kenneth H. Taylor
Special Examiner