COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

PROCEDURE: 5
General.

DECISION OF COMMISSION

In the Matter of:

Robert C. Durant
[redacted]

County of Henrico
Richmond, Virginia

Date of Appeal to Commission: January 23, 1990

Date of Review: March 6, 1990

Place: RICHMOND, VIRGINIA

Decision No.: 33144-C

Date of Mailing: March 8, 1990

Final Date to File Appeal with Circuit Court: March 28, 1990

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This matter comes before the Commission on appeal by the claimant from a decision of the Appeals Examiner (UI-8912318), mailed January 19, 1990.

ISSUES

Should the Commission take additional testimony and evidence and hear additional argument in the case as provided in Regulation VR 300-01-4.3B of the Rules and Regulations Affecting Unemployment Compensation?

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

FINDINGS OF FACT

On January 23, 1990, the claimant filed a timely appeal from the decision of the Appeals Examiner which disqualified him from receiving benefits, effective November 12, 1989. The basis for that disqualification was the Appeals Examiner's finding that the claimant had been discharged for misconduct connected with his work.

The Appeals Examiner's hearing was conducted at the Richmond local office of the Virginia Employment Commission at 9:45 a.m. on January

19, 1990. Written notice of the date, time and place of that hearing was mailed to the claimant at his correct address on January 11, 1990. The claimant did not appear for that hearing or respond in any fashion to the Notice of Hearing. When he filed his appeal from the Appeals Examiner's decision, the claimant addressed in great detail the circumstances surrounding his most recent absences that led to his dismissal. He also submitted a copy of his termination letter and a Certificate of Illness from his attending physician. Both of these documents were introduced as exhibits at the Appeals Examiner's hearing. The claimant did not provide any explanation whatsoever concerning his failure to attend the Appeals Examiner's hearing.

Upon receiving the claimant's letter of appeal, the Office of Commission Appeals issued a Notice of Appeal to both the claimant and the employer. The Notice of Appeal acknowledged receipt of the claimant's appeal and put the employer on notice that the appeal had been filed. On the Notice of Appeal the following instructions appear:

> All appeals to the Commission shall be decided on the basis of a review of the evidence in the record developed by the Appeals Examiner. The Commission will not automatically schedule a hearing in this case. If either party wishes a hearing to present additional testimony, evidence, or oral argument, a written request setting forth the grounds must be submitted to the Clerk of the Commission within fourteen (14) days from the mailing of this notice.

The claimant did not request a hearing before the Commission within 14 days of the mailing of the Notice of Appeal. By letter dated February 19, 1990, and received by the Commission on February 22, 1990, counsel for the claimant submitted a written request for oral argument in the case. The claimant's attorney acknowledged that the request for oral argument was not timely; therefore, if the request for oral argument was denied, the Commission was asked to consider the information in the claimant's appeal, the documentary evidence he submitted, and the brief submitted by counsel. In the cover letter that accompanied the brief, counsel for the claimant represented to the Commission that the claimant had not attended the Appeals Examiner's hearing because he was a student and he had a conflict with his school examinations. No information was provided concerning what efforts, if any, the claimant took to notify the Commission of his predicament and to request that the hearing be postponed. Neither the cover letter nor the brief contains a certification that a copy was mailed to the employer or the employer's attorney.

Prior to filing his claim for benefits, the claimant last worked for the County of Henrico. He performed services as a permit clerk trainee. He was a full-time employee and was paid $493.19 every two

weeks. He was scheduled to work from 8:00 a.m. until 4:30 p.m. Monday through Friday.

During his initial orientation, the claimant was informed of various rules, regulations and procedures that he would be expected to follow. The claimant was told that he was expected to be at work promptly at 8:00 a.m. If he was absent or late for any reason he was required to call his supervisor prior to 8:00 a.m. This information was provided to the claimant orally and in writing.

On August 30, 1989, the claimant was absent without permission for half of the day. He had received approval to take four hours off; however, he never showed up for work at all and did not contact his supervisor to let her know that he would not be in for work. On August 31, 1989, the claimant was five minutes late and did not contact his supervisor prior to 8:00 a.m. On September 1, 1989, the claimant had an appointment and he was granted permission to take off the first half of the day. He did not appear for work until 1:45 p.m., and he did not notify his supervisor that his arrival at work was going to be delayed. On September 7, 1989, the claimant contacted his supervisor at 8:05 a.m. and informed her that he had personal business that required his attention. The claimant informed his supervisor that he would report at 9:00 a.m. On September 12, 1989, the claimant was 15 minutes late without justification or notification to his supervisor.

On September 13, 1989, the claimant met with his supervisor. During this meeting, a number of items that concerned the supervisor were reviewed. Among those items were the claimant's attendance record and his failure to notify his supervisor in advance of instances of absenteeism and tardiness. The claimant was reminded that he needed to be at his work station at 8:00 a.m., and that if he was going to be late he himself must call the supervisor not later than 7:50 a.m. If he was going to be absent from work, he was expected to personally call his supervisor not later than 7:45 a.m. unless there was an emergency, in which case the supervisor would need to know the details surrounding the situation. These instructions were reduced to writing and given to the claimant on September 20, 1989, in the form of an interoffice memorandum. Although it was not contained in the memorandum, the claimant was told that it was not permissible for him to leave messages on the employer's tape recorder. The employer provided that service for vendors and contractors who needed to leave messages for county personnel.

On October 2, 1989, the claimant was one minute late reporting for work. On October 13, 1989, the claimant did not report for work or call in until 10:00 a.m. At that time he informed his supervisor that he had forgotten about a dental appointment that he had scheduled. The claimant was absent due to illness on both October 17 and October 18, 1989. On both of those days he called his supervisor in accordance

with the employer's policy and brought in a note from his doctor as he had been instructed to do.

On or about October 23, 1989, the claimant was assigned to a different supervisor. That supervisor met with him on October 23, 1989, and reviewed his job duties and where he would be working. Additionally, she spoke to him about his attendance record. She reminded him that he was expected to be at work at 8:00 a.m. and that he must personally call her prior to 8:00 a.m. if he was going to be absent or late. Additionally, if he was absent due to illness he would be required to bring in a doctor's note.

On October 27, 1989, the claimant did not report for work. He did not call his supervisor until 9:45 a.m. At that time, he informed her that his car had been stolen and that he was filing a police report. He told her that he would come in to work if he could get a ride. The claimant came to work at 3:45 p.m. and picked up his paycheck. He did not perform any work on that day. On November 1, 1989, the claimant reported for work one hour late. He did not call his supervisor prior to 8:00 a.m. as required by the employer's policy.

On November 6 and November 7, 1989, the claimant was absent due to illness. This illness was later diagnosed as strep throat. He did not personally call his supervisor on either of those days. On November 6, 1989, he called and left a message on the answering machine. Sometime during the day of November 7, 1989, someone unknown to the employer called and provided information that the claimant was absent due to illness. On November 8, 1989, the claimant was again absent. He called and spoke to his supervisor at 12:40 p.m. He informed her that he was on his way to the hospital. He also told her that his doctor had advised him to stay out of work until November 17, 1989. By letter dated November 8, 1989, the claimant was informed that he was being discharged because of his unacceptable attendance record.

OPINION

As a preliminary matter, the Commission needs to address two procedural points. It is apparent that the claimant wishes the Commission to consider the factual information contained in his letter of appeal in making a decision in this matter. Also, counsel for the claimant has made an untimely request for oral argument. Both of these procedural points are governed by the same regulation.

Regulation VR 300-01-4.3B of the Rules and Regulations Affecting Unemployment Compensation provides as follows:

> Except as otherwise provided by this rule, all appeals to the Commission shall be decided on the basis of a review of the evidence in the record.

The Commission, in its discretion, may direct the taking of additional evidence after giving written notice of such hearing to the parties, provided:

1. It is affirmatively shown that the additional evidence is material and not merely cumulative, corroborative or collateral; could not have been presented at the prior hearing through the exercise of due diligence; and it is likely to produce a different result at a new hearing; or

2. The record of proceedings before the appeals examiner is insufficient to enable the Commission to make proper, accurate, or complete findings of fact and conclusions of law.

A party wishing to present additional evidence or oral argument before the Commission must make a written request to the Office of Commission Appeals within fourteen days from the date of delivery or mailing of the Notice of Appeal. The Commission shall notify the parties of the time and place where additional evidence will be taken or oral argument will be heard. Such notice shall be mailed to the parties and their last known representatives at least seven days in advance of the scheduled hearing. A request to present additional evidence will be granted only if the aforementioned guidelines are met. A request for oral argument will be automatically granted provided it is made in a timely fashion and is not thereafter withdrawn in writing by the party requesting it.

All of the factual material in the claimant's letter of appeal could have been presented at the Appeals Examiner's hearing had the claimant chosen to appear. Furthermore, when the information in his letter of appeal is compared with the testimony presented at the Appeals Examiner's hearing, the Commission could not conclude that a different result would be likely if the record were reopened and this evidence was accepted and considered. Inasmuch as the record developed by the Appeals Examiner is sufficient to enable the Commission to make proper, accurate and complete findings of fact and conclusions of law, the Commission shall not accept any additional evidence in this case.

Similarly, the Commission cannot accept any oral or written argument in this matter. The request for oral argument was not submitted to the Commission until February 22, 1990, 13 days after the period for requesting oral argument had expired. The Notice of Appeal

mailed to the claimant on January 26, 1990, informed him in clear, unambiguous language that the Commission will not automatically schedule a hearing in the case and that if he wished a hearing to present additional evidence or submit oral argument, a written request must be submitted within 14 days from the date the Notice of Appeal was mailed. While the Commission has the discretion to set a case for oral argument on its own motion, that is usually done only in cases that present a novel, unique, or complex question of law. No such issues are presented here. Therefore, the request for oral argument cannot be granted. (Underscoring supplied)

Furthermore, it would not be proper for the Commission to consider the brief submitted on the claimant's behalf because apparently no copy was mailed to the employer or the employer's attorney. If that had been done, then the employer would have the option of responding in kind and the Commission could have considered both submissions. The absence of any certification that a copy of the brief was mailed to the employer suggests that an inadvertent ex parte communication may have occurred. Thus, the Commission could not properly consider the claimant's brief given these circumstances.

There is a possibility that the claimant's appeal letter, when read together with the letter from his counsel, could be interpreted as a request for a reopening of the Appeals Examiner's hearing pursuant to the provisions of Regulation VR 300-01-4.2I of the Rules and Regulations Affecting Unemployment Compensation. In order to show good cause to reopen a hearing pursuant to that regulation, the party making such a request must show that he was prevented or prohibited from participating in the hearing by some cause which was beyond his control, and that in the face of such a problem he acted in a reasonably prudent manner to preserve his right to participate in future proceedings. Engh v. United States Instrument Rentals, Commission Decision 25239-C (July 12, 1985). Assuming, without deciding, that examinations constitute a compelling reason for not attending a hearing, the claimant did not take any steps to inform the Commission of his circumstances and request that the hearing be rescheduled. Consequently, his failure to take such remedial action precludes a finding of good cause to reopen the Appeals Examiner's hearing.

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

This particular language was first interpreted by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission, 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. Dimes v. Merchants Delivery Moving and Storage, Inc., Commission Decision 24524-C (May 10, 1985); Brady v. Human Resource Institute of Norfolk, Inc., 231 Va. 28, 340 S.E.2d 797 (1986).

In the present case, the claimant was discharged because of his unsatisfactory attendance record. That poor attendance record manifested itself in several ways. First, there were an unusually large number of occasions when the claimant was absent or tardy, particularly when his short period of employment is taken into account. Second, the claimant persistently failed to comply with the employer's notice requirements. The claimant knew that he was required to personally call his supervisor prior to 8:00 a.m. in the event of any absence or tardiness. These instructions had been provided to the claimant orally or in writing on at least four separate occasions; nevertheless, he persistently failed to comply with those requirements.

Every employer has a legitimate business interest in expecting employees to be at work or to provide advance notification of their need to be off. Such notification is obviously required when an employer must find someone else to substitute for an absent employee and readjust a work schedule. Casey v. Cives Steel Company, Commission Decision 27111-C (June 30, 1986), aff'd, Circuit Court of Frederick County, Chancery No. C-86-168 (April 27, 1987). Even in cases where absenteeism is attributable to illness, an employee may still be disqualified from receiving unemployment insurance benefits if he failed to properly notify the company of his illness. See generally, Hancock v. Mr. Casual's Inc., #1, Commission Decision 6355-C (July 3, 1974). In this case, the employer has proven that the claimant was chronically and excessively absent without proper notice to supervision as required by the employer's policies. Under these circumstances, the employer has established a prima facie case of misconduct; consequently, in order to avoid the disqualification provided by the statute, the claimant must prove mitigating circumstances.

In light of the claimant's failure to appear at the Appeals Examiner's hearing, there is very little evidence that would support a finding of mitigation sufficient to preclude a disqualification. The evidence does reflect that the last two days the claimant was absent was due to his illness. The claimant's statement to the local office Deputy, together with a certificate from his physician were made a part of the evidentiary record and established that the claimant was suffering from a strep throat and required medical attention.

Unfortunately, the claimant did not personally contact his supervisor on either of those days in accordance with the company's policy. He asserted in his statement to the Deputy that he was too sick to call the company. The Commission cannot accept that assertion in light of the evidence in the record. The claimant was diagnosed with having a strep throat; however, that would not necessarily preclude him from calling his supervisor as required by the employer's policies. If he had appeared at the Appeals Examiner's hearing, his testimony may have supported such a conclusion. In the absence of such testimony, the Commission cannot find that the claimant was physically unable to contact the employer in accordance with its policies. Furthermore, the evidence in the record does not prove any mitigation whatsoever for any of the other incidents when the claimant was late reporting for work, or absent without permission. Accordingly, since the claimant has not proven any mitigating circumstances that would show that his actions were not in disregard of the employer's legitimate business interests, the disqualification provided in Section 60.2-618.2 of the Code of Virginia must be imposed. V.E.C. v. Gantt, 7 Va. App. 631, 376 S.E.2d 808 (1989).

DECISION

The claimant's request that the Commission take additional evidence and testimony, together with his request that the Commission hear oral argument in the case are hereby denied.

The decision of the Appeals Examiner is hereby affirmed. The claimant is disqualified from receiving benefits, effective November 12, 1989, because he was discharged for misconduct in connection 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