COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

PROCEDURE: 60.5
Conduct of Hearing — Challenge to the Interest of the Hearing Officer.

DECISION OF COMMISSION

In the Matter of:

David C. Crowson

[redacted]

Johns Brothers, Inc.
Norfolk, Virginia

Date of Appeal to Commission: February 17, 1989

Date of Hearing: May 30, 1989

Place: RICHMOND, VIRGINIA

Decision No.: 31623-C

Date of Mailing: June 20, 1989

Final Date to File Appeal with Circuit Court: July 10, 1989

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This is a matter before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-8901004), mailed January 27, 1989.

APPEARANCES

Attorney for the Employer

ISSUES

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

Was the claimant denied a fair, impartial hearing as mandated by Section 60.2-621 of the Code of Virginia (1950), as amended, due to an alleged ex parte communication with the presiding Appeals Examiner?

FINDINGS OF FACT

On February 17, 1989, the claimant filed a timely appeal from the decision of the Appeals Examiner which disqualified him from receiving benefits, effective November 20, 1988. That

disqualification was based upon the Appeals Examiner's finding that the claimant had been discharged for misconduct connected with his work.

Before he filed his claim, the claimant last worked for Johns Brothers, Inc. of Norfolk, Virginia. He was employed with this company as a technician from July 31, 1984, through November 21, 1988. He was a full-time employee and was paid $11.50 an hour.

On November 17, 1988, the claimant was scheduled to report for work at 8:00 a.m. The claimant slept in that morning until just after noon. He contacted the general manager of the employer's security division stating, to the effect, that he knew he had "messed up." The general manager of the security division told the claimant he should report to the jobsite. The claimant reported to his jobsite between 1:30 p.m. and 2:00 p.m. When the company vice president learned that the claimant had reported so late for work, he instructed the field engineer to send him home. The field engineer relayed that message to the claimant, who left the jobsite. The claimant did not report for work or contact the company on Friday, November 18, 1988. Approximately two weeks earlier, the claimant had reported for work in an intoxicated state and offered a marijuana cigarette to another company employee. The company was aware of past substance abuse problems that the claimant had experienced. The general manager of the security division spoke to the claimant about this incident.

On November 20, 1988, the claimant's superiors reviewed the situation with respect to his failure to report for work as scheduled on November 17 and November 18, 1988. The decision was made to discharge the claimant. This decision was primarily based upon the claimant's absences from work without notice on November 17, 1988, and November 18, 1988. In reaching the decision to discharge the claimant, the company did take into account his prior work performance, which was not considered satisfactory, and the incident concerning his reporting for work intoxicated and offering a marijuana cigarette to another employee.

In his letter of appeal to the Commission, the claimant asserted that the employer exercised undue influence over two employees who appeared at the Appeals Examiner's hearing to testify on his behalf. The claimant also asserted that an ex parte communication occurred between the presiding Appeals Examiner and the president of the company. The employer did not coerce, harass, intimidate, or attempt to unduly influence the testimony of any of the claimant's witnesses. The Appeals Examiner had separate telephone conversations with both the claimant and the employer on January 26, 1989. These

conversations occurred after the hearing had been adjourned and scheduled to resume the following day. Both conversations were initiated by the respective parties and the only item discussed during those phone conversations was the day and time when the hearing would resume. (Tr. 73) With the exception of these two telephone conversations, the Appeals Examiner did not have any communications with either party outside of the hearing that was conducted.

Written notice of the hearing conducted by the Commission was mailed to the claimant at his last known address on April 17, 1989. That notice set out the date, time, and place of the hearing together with the issues that would be heard. Although duly notified of the hearing, the claimant did not appear or respond in any fashion.

OPINION

Section 60.2-621 of the Code of Virginia requires that the Commission establish one or more impartial Appeal Tribunals to hear and decide disputed claims for benefits. The claimant's assertion that the Appeals Examiner's hearing was not fairly conducted because of a previous ex parte communication calls into question whether the Appeals Examiner was impartial.

The evidence available to the Commission on that point consists of affidavits from the Appeals Examiner and from the employer's general manager of security whom the claimant alleged told him of the purported ex parte communication. Those two affidavits make it manifestly apparent that no such ex parte communication ever occurred. Furthermore, the Commission has some question about the claimant's veracity in this matter inasmuch as he alleged that he knew of this purported ex parte communication on January 24, 1989, two days prior to the Appeals Examiner's hearing; however, at no time did he ever raise this as an issue at the hearing.

Accordingly, in the absence of any evidence at all of an improper ex parte communication between the Appeals Examiner and the employer, the Commission rejects the contention that the Appeals Examiner was not impartial in the conduct of the hearing. Furthermore, for the reasons expressed in the Commission's opinion letter of April 18, 1989 (Commission Exhibit 4), the claimant has not established a prima facie case of extrinsic fraud by the employer which would warrant conducting an evidentiary hearing on that issue. (Underscoring supplied)

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 evidence establishes a pattern of conduct by the claimant which clearly demonstrated a willful disregard of the company's interests. Approximately two weeks before his discharge, the claimant reported for work intoxicated and offered a marijuana cigarette to another employee. On November 17, 1988, the claimant was more than five hours late reporting for work and did not give any type of timely notice to the employer that he would be late. Furthermore, on November 18, 1988, the claimant was absent from work and gave the company no notice at all of his absence. This series of incidents establishes a recurring pattern of conduct that manifests a willful disregard of the employer's interests. Accordingly, the disqualification provided by the statute must be imposed unless the claimant can prove mitigating circumstances.

In his defense, the claimant contended that he was late for work on November 17, 1988, because he was staying with his girlfriend who was suspected of having hepatitis. He further asserted that the employer knew in advance of his intention to stay with her on November 17, 1988, until certain laboratory test

results had been received. While the Commission does not doubt that the claimant's girlfriend had hepatitis, the evidence does not establish that the employer knew he would not be at work because he was staying with her. Similarly, when the claimant was sent home on November 17, 1988, nothing was said to him about remaining off work for any period of time. The claimant was simply sent home for the rest of that day with the expectation that he would report for work as usual on Friday, November 18, 1988.

Therefore, for the reasons set out herein, the Commission must conclude that the claimant was discharged for misconduct connected with his work for which no mitigating circumstances have been shown. Accordingly, the disqualification provided in Section 60.2-618.2 of the Code of Virginia must be imposed.

DECISION

The Commission finds that the Appeals Examiner conducted an impartial hearing and did not engage in any improper ex parte communication with the employer.

The decision of the Appeals Examiner is hereby affirmed. The claimant is disqualified from receiving benefits, effective November 20, 1988, 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.

The case is remanded to the Deputy with instructions to review the claimant's claim for benefits and to determine if he has been overpaid any sum as benefits to which he was not entitled and is liable to repay the Commission as a result of this decision.

M. Coleman Walsh, Jr.
Special Examiner