COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of

Vernel Gannaway, Jr., Claimant

Brown & Williamson Tobacco Corp.
Petersburg, Virginia

Date of Appeal
To Commission: October 12, 1983

Date of Hearing: October 20, 1983

Place: RICHMOND, VIRGINIA

Decision No.: 22411-C

Date of Decision: November 7, 1983

Date of Mailing: November 16, 1983

Final Date to File Appeal
with Circuit Court: ecember 6, 1983

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This is a matter before the Commission on remand from the Circuit Court for the City of Petersburg, Virginia, the Honorable Oliver A. Pollard, Jr., presiding.

APPEARANCES

Benjamin C. Curtis, Lucille Stewart, Barbara A. Hayes, Gary A. Roney, Vernel Gannaway, Jr., Vernell M. Freeman, Gill L. Marston, Richard L. Jordan, Larry T. Mallory, claimants, and their attorney, John C. Shea, Esq.; Lewis B. Cole, claimant, and his attorney, Jay J. Levit, Esq.; L. Hunter Beazley, Manager of Labor Relations for the employer; David R. Simonsen, Jr., Esq., attorney for the employer

ISSUES

Did the claimant leave work voluntarily without good cause as provided in Section 60.1-58 (a) of the Code of Virginia (1950), as amended?

Does the Special Settlement Option payment received by the claimant constitute "wages" within the meaning of Section 60.1-26 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant filed a timely appeal from a Decision of the Appeals Examiner which disqualified him from receiving unemployment insurance benefits pursuant to the provisions of Section 60.1-58 (a) of the Code of Virginia. After reviewing the evidence and hearing oral argument in the case, the Commission's Special Examiner affirmed the Decision of the Appeals Examiner on March 1, 1983. Subsequently, the claimant filed a Petition for Judicial Review in the Circuit Court of the City of Petersburg, Virginia. Upon reviewing the matter, the Circuit Court remanded the case to the Commission with the following instructions:

> "The Special Examiner, acting at the Commission's final ajudicative (sic) stage, shall consider the Record already in existence plus any new evidence as may be offered upon the issue of whether the Petitioners left their work voluntarily without good cause pursuant to Section 60.1-58 (a), Code of Virginia (Repl. Vol. 1982)."

The claimant, prior to filing a claim for unemployment insurance benefits, was last employed by Brown & Williamson Tobacco Corporation in Petersburg, Virginia. In 1979, the company determined that a substantial re-structuring of its manufacturing operations was necessary. This was prompted due to declining sales and depressed economic conditions. The re-structuring of its operations would involve substantial layoffs of company employees, many of whom had extensive service with the company. In an effort to lessen the impact of the company's actions on the employees and to promote harmonious labor-management relations, the company negotiated a Settlement Agreement with the various unions that represented the employees. This Settlement Agreement, which was effective on April 7, 1979, addressed the concerns of all parties regarding the plans of the company to re-structure its manufacturing operations. The Settlement Agreement, in pertinent part, provides as follows:

PART THREE
TERMINATED EMPLOYEES

The parties have agreed that the phaseout of Louisville Branch and the cutback of the Petersburg Branch shall be accomplished pursuant to a time-table determined solely by the Company based upon several factors including market conditions for the products it manufactures and distributes. As these conditions are in a constant state of change, it is understood that any timetable will be subject to amendments from time to time either increasing or decreasing the speed with which the restructuring of manufacturing operations is effectuated. Excess employees not relocated in accordance with Part Two of this Settlement Agreement will be terminated at times and in numbers as determined by the Company and will receive applicable benefits as provided for in this Part.

1. Insurance Continuation

   Current life and medical insurance will continue after the date of termination of employment for a period of six months or until the employee is covered by insurance plans of his or her new employer, whichever comes first.

2. Special Settlement Option

   The Special Settlement Option of the Income Maintenance Plan will be improved to provide for the following payments:

For Employees With Completed Years of Service of	The Normal Weekly Rate of Pay for
6 or less	26 weeks
7, 8, or 9	26 weeks plus one week for every completed year of service over six
10 or more	26 weeks plus one week for every completed year of service

Employees eligible to receive the Special Settlement Option will receive it in a single sum unless prior to the date of the offer the employee irrevocably elects in writing on a form supplied by the Company to receive such amount in equal monthly installments over a period not exceeding 20 months.

> Employees receiving a lump sum payment shall be paid not later than 60 days after the close of the year in which employment is terminated. The Company may offer Special Settlement Options at times and in numbers deemed appropriate by it and these offers may or may not be linked directly with the announcement of a layoff. Employees desiring to exercise the Special Settlement Option must do so within fifteen (15) days from the date the options are offered by the Company. Employees who are laid off will have the option of taking Supplemental Unemployment Benefit as provided for in the collective bargaining agreement or the improved Special Settlement Option.

* *

During August of 1982, the provisions of this Settlement Agreement were put into effect at the company's Petersburg plant. Employees were advised on August 9, 1982, that at least 700 employees would be laid off by the company and that at least 250 of these would occur on August 31, 1982. Employees were advised that if any of them desired to exercise the Special Settlement Option (hereinafter referred to as SSO) provided in the Settlement Agreement, they must complete and return the appropriate forms to the company no later than August 2[illegible] 1982. By that date 137 employees exercised their right to the SSO. All of these employees were laid off by the company on August 31, 1982. However, no other employees were laid off at that time despite the company's initial plans to layoff at least 250 by that date. On October 1, 1982, another 425 employees were laid off by the company and the remaining layoffs occurred by the end of 1982.

The claimant elected to exercise the SSO, submitted the appropriate documentation to the company, and was laid off on August 31, 1982. The claimant elected to exercise the SSO in order to have the additional time to seek employment. The claimant desired to attempt to secure another job prior to the labor market being inundated with the remaining 550 to 600 employees who were scheduled to be laid off at later dates. Regardless of electing to exercise the SSO, the claimant would have been laid off by the company by October 1, 1982. At all times during the layoffs the company retained the exclusive right to determine the time of the layoffs and the number of employees to be affected by each layoff.

The claimant received a total of $15,162.00 under the SSO. These funds were paid to the claimant more than 30 days after the date of separation from the company.

OPINION

Section 60.1-58 (a) of the Code of Virginia provides a disqualification if the Commission finds that a claimant left work voluntarily without good cause.

In any case arising under the provision, the Commission must first determine whether or not the claimant actually left work voluntarily. If the Commission concludes that the claimant's separation from work was voluntary then the Commission must scrutinize the circumstances surrounding the claimant's leaving work to determine whether or not it would constitute "good cause" within the meaning of the statute.

The factual scenario in the present case, as well as the companion cases, is unique and presents the Commisson with a case of first impression. In analyzing this or any other case which comes before the Commission, the Commission must be ever mindful of the fundamental purpose of our system of unemployment insurance. The Virginia Unemployment Compensation Act is designed "to assure a measure of security against the hazard of unemployment in our economic life." Virginia Employment Commission v. A. I. M. Corp., 225 Va. _____, 225 VRR 302, 307 (1983), quoting Unemployment Compensation Commission v. Collins, 182 Va. 426, 438, 29 S. E. 2d 388, 393 (1944). Legislative acts of this character which provide funds for those temporarily unemployed are remedial in character. The Act as a whole should be so interpreted as to effectuate that remedial purpose implicit in its enactment. See, Ford Motor Company v. Unemployment Compensation Commission, 191 Va. 812, 63 S. E. 2d 28 (1951).

While the Commission has not previously had the opportunity to address this precise fact pattern, the Courts of other states have spoken to the issue presented by this appeal. In the case Campbell Soup Co. v. Board of Review, 13 N. J. 431, 435, 100 A. 2d 287, 289 (1953), Judge (now Justice) William J. Brennan, Jr., wrote:

> "The Legislature plainly intended that the reach of the subsection was to be limited to separations where the decision whether to go or to stay lay at the time with the worker alone."

The Arkansas Court of Appeals, in two recent cases, has followed a similar analysis. In the case of Terry v. Director of Labor, 3 Ark. App. 197, 199, 623 S. W. 2d 857, 858 (1981), the court stated:

> "In the instant case the employee should not be penalized for taking the burden of being laid off upon himself. The fact that the claimant prefered to be one of the employees subject to the layoff does not alter the fact that his employment ended by reason of a work reduction instituted by the employer and not, as the Board of Review stated, for personal reasons. We find no substantial evidence to support the Board of Review's decision, and this case is reversed and remanded."

See also, Jackson v. Daniels, 590 S. W. 2d 63 (Ark. App. 1979), where the claimant, a restaurant manager, was held entitled to Unemployment Compensation Benefits after being laid off subsequent to expressing her preference that if anyone was laid off she hoped it would be her.

An even more persuasive decision was issued by the Supreme Court of Missouri in the case of Missouri Division of Employment Security v. Labor & Industrial Relations Commission of Missouri, William F. Rothman, et al., 651 S. W. 2d 145 (Mo. banc 1983). In that case the employer determined that it was necessary to eliminate 21 positions. Following its usual procedure it called an employee meeting of all employees and announced that 21 jobs were to be eliminated on a certain date. Two policies were utilized regarding the layoffs: the seniority method, by which senior employees whose jobs were to be eliminated were retained by "bumping" those with less seniority, and the volunteer method, by which employees who would not otherwise be laid off were given the opportunity to be considered for the layoff by waiving their seniority rights. However, the final decision as to who would be laid off was reserved by the employer. In this case 11 of the 12 claimants involved had sufficient seniority to continue working. Each of them had volunteered to be chosen for the layoff.

In affirming the award of benefits granted by the Labor & Industrial Relations Commission, the Court unanimously held that the claimants' volunteering for layoff did not have their unemployment as its direct and immediate result. A further event--the employer's choosing them for the layoff--was required. Since the employer's action was the direct and immediate cause of their unemployment, the Court concluded that they were not barred from receiving unemployment compensation under the Missouri statute.

The present case before the Commission is very similar to the Missouri case. Here, employees had the option of volunteering to be laid off and accepting the SSO. However, the company retained the exclusive right to determine the number of employees affected by the layoffs and the timing of those layoffs. It is apparent from the record that the employer did, in fact, exercise that right since they initially planned to layoff 250 employees on August 31, 1982, but in fact only laid off 137. Since the employer retained the exclusive right to determine when the layoffs would occur and the number of employees to be affected, it was the employer's act of laying off the claimants which was the direct and immediate cause of the claimant's unemployment and not the claimant's act of volunteering to be chosen for the layoff. Accordingly, the Commission is of the opinion that the claimant did not voluntarily leave work but was laid off by the employer due to a lack of work at their facility. Accordingly, no disqualification may be imposed under the provisions of Section 60.1-58 (a) of the Code of Virginia.

The Commission is not unmindful of the fact that this situation bears some similarity to those cases where a claimant left his or her job in anticipation of being discharged. However, this is not a case of an employee quitting work in anticipation of a discharge. In those cases, the direct and immediate cause of the claimant's unemployment was their decision to quit work, and there was no act by the employer which was the direct and immediate cause of the claimant's separation from work. Accordingly, it would be incorrect for this decision to

be interpreted as a departure from the Commission's long-standing series of precedent decisions regarding claimants who leave work voluntarily in anticipation of being discharged. (See, James Hutchinson v. Hill Refrigeration Corporation, Commission Decision No. 3251-C, July 10, 1958; Barbara A. White v. B. Frank Joy, Inc., Commission Decision No. 13266-C, July 29, 1980; Carl L. Brock v. Virginia Department of Corrections, Commission Decision No. 16436-C, August 4, 1981, affirmed Circuit Court of Isle of Wight County, Chancery #2995, April 16, 1982).

Section 60.1-26 of the Code of Virginia defines the term "wages" to mean:

> ". . .all remuneration payable for personal services, including commissions, bonuses, tips and gratuities, back pay, dismissal, or severance pay or any payments made by an employer to an employee at the time or not more than thirty days after the employee is separated from employment with the employer. . ."

In the present case, the claimant received a substantial payment from the employer pursuant to the SSO outlined in the April 7, 1983, Settlement Agreement. The payment received by the claimant here clearly falls within the language of this statute as ". . . severance pay or any payments made by an employer to an employee at the time or not more than thirty days after the employee is separated. . ."

In the past the Commission has interpreted the thirty day proviso to apply to both "severance pay" and "any payments made by an employer... In accord with the Commission's prior analysis, the Examiner must conclude that the payment made to the claimant under the SSO does not constitute wages since it was made more than thirty days after the date of separation.

DECISION

The Decision of the Appeals Examiner is hereby reversed. It is held that no disqualification may be imposed upon the claimant's separation from work with the last 30-day employer.

It is also held that the payment received by the claimant under the SSO option does not constitute "wages" within the meaning of Section 60.1-26 of the Code of Virginia.

M. Coleman Walsh, Jr.

M. Coleman Walsh, Jr.
Special Examiner