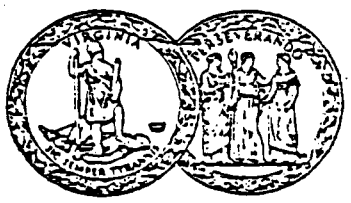
VOLUNTARY LEAVING: 495
Voluntary.



DECISION OF COMMISSION

In the Matter of:

Curtis Lewis
[redacted]

Lynchburg Foundry Company
Lynchburg, VA 24505

Date of Appeal to Commission: October 30, 1986

Date of Review: December 28, 1986
January 8, 1987
January 9, 1987

Place: RICHMOND, VIRGINIA

Decision No.: 27864-C

Date of Mailing: January 13, 1987

Final Date to File Appeal with Circuit Court: February 2, 1987

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This is a matter before the Commission on appeal by the employer from a decision of the Appeals Examiner (Decision Number UI-86-7577), mailed October 10, 1986.

ISSUES

Did the claimant leave work voluntarily without good cause, as provided in Section 60.2-618.1 [formerly Section 60.1-58(a)] of the Code of Virginia (1950), as amended?

Was the claimant receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment based upon the previous work of such individual as provided in Section 60.2-604 [formerly Section 60.1-48.1] of the Code of Virginia (1950), as amended?

Did the payments received by the claimant under the special severance arrangement offered by the employer constitute wages, as provided in Section 60.2-229 [formerly Section 60.1-26] of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On October 30, 1986, the employer filed a timely appeal from a decision of the Appeals Examiner. That decision held that the claimant was qualified to receive benefits based upon the circumstances surrounding his separation from work. The decision also held that the payments received by the claimant under the employer's special severance arrangement did not constitute a pension, retirement or retired pay, annuity, or any other similar periodic payment pursuant to the provisions of Section 60.2-604 of the Code of Virginia (formerly Section 60.1-48.1). The Appeals Examiner also ruled that the payments made to the claimant under this arrangement that were received more than thirty days after the date of separation did not constitute wages under the provisions of Section 60.2-229 of the Code of Virginia (formerly Section 60.1-26).

The claimant was last employed by Lynchburg Foundry Company at its plant in Radford, Virginia. He was a maintenance planner in the Shell Finishing Department. He worked for the company from September 11, 1950, through June 30, 1986.

The employer had two distinct foundry operations at its Radford plant: a Shell Foundry, of which the Shell Finishing Department was a part, and a Medium Casting Foundry. In 1986, the employer elected to close the Medium Casting Foundry due to adverse economic conditions. The effective date of this closing was June 30, 1986. In order to lessen the impact of the closing on the work force, the employer offered all of its long service, salaried employees, including individuals employed in the Shell Foundry, a special arrangement which would allow them to discontinue active employment while retaining most of their benefits as active employees. The offer was available only for those salaried employees who were age 55 or older and who had at least 25 years of service with the company. Eligible employees who took advantage of this plan were given a salary continuation for 24 months that was equal to one-half of their base salary. In addition, health, dental, and life insurance coverages were continued for the same 24-month period. At the end of the 24-month period, dental insurance coverage would cease, but life insurance and health insurance coverage would continue according to the terms of the respective insurance plans.

Employees who were eligible for the special severance arrangement were contacted by letter dated May 27, 1986. The letter included an attachment of the policy statement issued by the company concerning the proposed arrangement and the reasons therefor. The eligible employees were requested to sign and return the letter on or before June 9, 1986, if they intended to participate in the special severance arrangement.

There were eleven employees who were eligible to participate in the special severance arrangement. The claimant and the other eligible employees were informed that the restructuring of the company's operations may require layoffs of both salaried and hourly employees at the Shell Foundry. None of these employees were told that they would be laid off.

The claimant and four other eligible employees elected to accept the employer's proposed special severance arrangement. The claimant executed the agreement on June 6, 1986. Under the terms of the agreement, his job ended on June 30, 1986, and beginning in July, he received salary continuation payments totaling $1,083.50 per month. Effective June 30, 1986, the employer also laid off 17 salaried employees and 175 hourly employees. However, none of the 6 eligible employees who refused to participate in the special severance arrangement were laid off.

OPINION

Section 60.2-618.1 of the Code of Virginia [formerly Section 60.1-58(a)] provides a disqualification if the Commission finds that a claimant left work voluntarily without good cause.

In cases involving this issue, the employer bears the burden of proving that the claimant's separation from work was actually voluntary. Once this has been established, then the burden of proof is upon the claimant to demonstrate that he left work voluntarily for reasons which constitute good cause.

The Commission had the opportunity to address a similar situation in the case of Vernell Gannaway, Jr. v. Brown & Williamson Tobacco Corp., Decision Number 22411-C, November 7, 1983. In that case, the employer was prompted to restructure its operations due to declining sales and depressed economic conditions. The employer negotiated a Special Settlement Option with the unions representing the employees who were affected by the scheduled layoffs. Under the terms of that agreement, employees could volunteer for the layoffs scheduled by the company. The employees who participated in this program received a lump sum payment that was based upon their length of service with the company. The employer did retain the exclusive right to determine the time of the layoffs and which employees would be effected by those layoffs. The Commission held that:

> 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.

While the present case is very similar to the situation in Gannaway, there is a significant distinction. Unlike the employees in Gannaway, there was no certainty in this case that the claimant would be laid off. The claimant knew that layoffs would take place on June 30, 1986. However, none of the employees who were offered the special severance arrangement were told by the company that they would be laid off. Whether the claimant would have been laid off was a matter of speculation. Under these circumstances, it appears that the claimant accepted the employer's severance arrangement in anticipation that he might be laid off. While he acted in anticipation of a possible layoff, he had not been advised that he would be terminated. (See John D. Grantham v. Mounds View ISD#621, et al, Decision Number 24159-C, October 29, 1984.) Therefore, the Commission is of the opinion that the claimant's decision to take advantage of the special severance arrangement constituted a voluntary leaving of work and was not a layoff by the employer. (Underscoring supplied)

Since the Commission has concluded that the claimant voluntarily left his job when he accepted the special severance arrangement, the Commission must determine whether the claimant had good cause for leaving his job. In construing the meaning of the phrase "good cause," the Commission has consistently held that an individual leaves work voluntarily without good cause unless the reasons for leaving are of such a compelling and necessitous nature as would leave him no other reasonable alternative other than quitting his job. Furthermore, in order to establish good cause, a claimant should pursue all of the reasonable alternatives available before electing to voluntarily leave work. [See Lee v. Virginia Employment Commission, 1 Va. App. 82, 335 S.E. 2d 104 (1985).]

In this case, the claimant voluntarily left his job in anticipation of a possible layoff by the employer. Although it was common knowledge that the employer's restructuring of its operations would result in some layoffs of both salaried and hourly employees, there was only speculation as to whether the layoffs would affect the claimant and other similarly situated employees who were eligible for the special severance arrangement. Nevertheless, given the totality of the circumstances, the Commission is of the opinion that the claimant left work voluntarily under compelling and necessitous circumstances. (Underscoring supplied)

First, the claimant knew layoffs would occur and he may be affected. Second, the company would not provide the claimant with any information as to the likelihood he would be laid off. Third, the company's special severance arrangement was a highly attractive offer, especially in light of the claimant's age and the benefits guaranteed for 24 months. By accepting the company's offer, the claimant could attempt to obtain other employment while being assured of the regular severance pay and other benefits guaranteed under the severance arrangement. Therefore, the Commission concludes that the claimant left his job voluntarily with good cause and is qualified to receive benefits. (Underscoring supplied)

At the hearing before the Appeals Examiner and in its brief to the Commission, the employer argued that the salary continuation payments received by the claimant under the special severance arrangement should offset any unemployment insurance benefits under the provisions of Section 60.2-604 of the Code of Virginia (formerly Section 60.1-48.1). That provision of the law states:

> The weekly benefit amount payable to any individual for any week which begins in a period for which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment based on the previous work of such individual, including payments received by such individual in accordance with Section 65.1-54 and Section 65.1-55, shall be reduced, but not below zero, by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week.

After reviewing the evidence in the record, the statutes in question, and the applicable legislative history, the Commission is of the opinion that the payments made to the claimant constitutes severance pay and is neither an annuity or "other similar periodic payment" under the provisions of Section 60.2-604 of the Code of Virginia. At this point, it would be appropriate to briefly discuss the statutory background and legislative history behind the pension offset provision of the Code.

Our system of unemployment insurance has been a joint federal-state undertaking since the enactment of Title IX of the Social Security Act of 1935. In general, Congress has afforded great discretion to the states in the design and operation of the unemployment insurance programs. However, a limited number of "fundamental standards" that states must meet in order to receive the benefits of federal

certification of their programs have been established. Among the "fundamental standards" with which states must comply is the pension offset requirement set forth in Section 3304(a)(15) of the Internal Revenue Code.

Prior to 1976, some states allowed retired individuals to receive social security or public or private pensions to receive unemployment insurance benefits even though they actually had withdrawn from the labor force. In response, Congress enacted Section 3304(a)(15) in 1976 to require all states to offset an individual's unemployment insurance compensation by the amount of any public or private pension or other similar periodic retirement payment, including social security and railroad retirement benefits, based on the individual's previous employment. In 1977, the Virginia General Assembly enacted Section 60.1-48.1 (now 60.2-604) to bring Virginia's unemployment compensation program into conformity with Section 3304(a)(15) as enacted in 1976. It is clear from the accompanying legislative history that Section 3304(a)(15) was enacted as a result of congressional concern regarding individuals who were receiving unemployment insurance benefits and pensions or retired pay based upon their previous work without any offset at all. There is no suggestion in the legislative history that severance pay was contemplated for the purpose of being included under the pension offset provision.

The employer has argued that the payments made to the claimant constitute an annuity within the meaning of the statute. Also, it has been argued that the severance payments would qualify as "other similar periodic payments" under the Statute.

The term "annuity" is defined in Black's Law Dictionary, Fifth Ed., as follows:

> A right to receive fixed, periodic payments, either for life or for a term of years. . . .A fixed sum payable to a person at specified intervals for a specific period of time or for life. Payments represent a partial return of capital and a return (interest) on the capital investment. Therefore, an exclusion ratio must generally be used to compute the amount of taxable income. Special rules apply to employee retirement plan annuities.

Given the definition set out above, payments made under the special severance arrangement do not constitute an annuity since the employee has not made any investment of capital and there is no true return on any capital investment. Furthermore, the Commission does not believe that the severance payments constitutes "other similar periodic payment." When the statute is viewed as a whole, it is cle

that Congress and the General Assembly intended to offset unemployment insurance benefits based on the receipt of a pension or any form of retired or retirement pay. This proposition is clearly supported by the legislative history. Therefore, when the phrase "similar periodic payment" is considered, it must be interpreted in light of the other payments specifically designated. The payments received by the claimant are periodic. However, since those payments are essentially severance payments, they are not "similar periodic payments" when compared to pensions, retired or retirement pay, and annuities based upon the previous work. (Underscoring supplied)

The Commission's conclusion that the payments made under the employer's plan constitutes severance pay is supported by the very agreement between the claimant and the employer. The employer's offer to the claimant was entitled a Special Severance Arrangement. The payments would be made to the claimant only upon his separation from employment. The plan under which these payments would be made, unlike most pension and retirement plans, did not even exist until May 27, 1986. The plan, itself, was a product of the employer's decision to restructure its operations which was going to require substantial layoffs. Given all of these circumstances, the Commission is of the opinion that the payments received by the claimant under the special severance arrangement constitutes severance pay. The Commission is also of the opinion that these payments do not constitute a pension, retired or retirement pay, annuity, or other similar periodic payment as provided in Section 60.2-604 of the Code of Virginia. Therefore, the unemployment insurance benefits paid to the claimant should not be offset by the amount of the payments made pursuant to the special severance arrangement as those payments do not fall under the provisions of the pension offset statute.

Section 60.2-229 of the Code of Virginia (formerly Section 60.1-26) provides, in part, as follows:

> "Wages" means all remuneration payable for personal services, including commissions, bonuses, tips, back pay, dismissal pay, severance pay and any other payments made by an employer to an employee during his employment and the next thirty days thereafter and the cash value of all remuneration payable in any medium other than cash.

While the Commission has concluded that the payments made under the special severance arrangement should not be offset against benefits paid pursuant to the pension offset provision, the statute

specifically defines wages to include severance pay received within thirty days after an employee's separation from work. Therefore, the Appeals Examiner correctly held that the severance payments received by the claimant during the first thirty days following his separation from work and the claimant's weekly benefit amount as subject to being offset pursuant to the provisions of Section 60.2-604 of the Code of Virginia (formerly Section 60.1-48.1). Those payments made to the claimant under the special severance arrangement more than thirty days after his separation from work do not constitute wages and would not offset his weekly benefit amount.

DECISION

The decision of the Appeals Examiner is amended. It is held that the claimant is qualified to receive benefits since he left his job voluntarily with good cause.

It is further held that the payments made to the claimant under the employer's special severance arrangement do not constitute a pension, retired or retirement pay, annuity, or other similar periodic payment based upon his previous work and should not be offset under the provisions of Section 60.2-229 of the Code of Virginia (formerly Section 60.1-26).

It is also held that the payments made to the claimant under the special severance arrangement which were made more than thirty days after his separation from work do not constitute wages and should not be offset against his unemployment insurance benefits. The payments received by the claimant during the thirty days immediately following his separation from work constitute wages which should be offset as provided in Section 60.2-604 of the Code of Virginia (formerly Section 60.1-48.1).

M. Coleman Walsh, Jr.
Special Examiner