COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

Date Referred or Appealed : 05/19/88

Claimant's SSN : [redacted]

LAYTON BLOUNT
3204 FENDALL AVENUE
RICHMOND VA 23222

Date of Hearing: 06/13/88

Decision No. : 30397-C

Date Decision Mailed : 06/30/88

Final Date to File Appeal with Circuit Court: 07/20/88
(See Attached Notice)

IN THE MATTER OF:

CLAIMANT:
LAYTON BLOUNT
3204 FENDALL AVENUE
RICHMOND VA 23222

LAST 30-DAY EMPLOYING UNIT:
DGSC BELLWOOD
JEFF DAVIS HWY
RICHMOND VA 23297

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This is a matter before the Commission on appeal by the claimant from the Decision of Appeals Examiner (UI-8804070), mailed May 3, 1988.

APPEARANCES

Attorney for Employer

ISSUE

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

FINDINGS OF FACT

On May 19, 1988, the claimant filed a timely appeal from the Decision of Appeals Examiner, which disqualified him from receiving benefits, effective March 13, 1988. The basis for the disqualification was the Appeals Examiner's finding that the claimant had been discharged for misconduct connected with his work.

Prior to filing his claim for benefits, the claimant last worked for Defense General Supply Center - Bellwood in Richmond, Virginia. He was employed as a warehouseman from October 26, 1987, through December 3, 1987.

The claimant originally submitted his application for this position on November 7, 1986. Question number 40 on this application asked if he had ever been convicted of or forfeited collateral for any felony. The claimant checked the box "no" in response to this question. After the claimant had been hired, the employer received a copy of the claimant's Virginia criminal record. This record indicated that on September 10, 1976, the claimant had been convicted of possessing marijuana with the intent to distribute and was sentenced to five years in the state penitentiary. Upon discovering this discrepancy, the employer's initial decision was to terminate the claimant's employment. However, the claimant had performed well on his job and he was allowed to continue as long as he completed an amended job application. The claimant completed an amended application in December of 1987 and disclosed that he had been convicted for distributing marijuana and had been sentenced to five years in the penitentiary. He also stated that he had served some of the sentence and was no longer on any probation or parole.

After the claimant had amended his job application, the employer received a copy of the claimant's criminal record from the Federal Bureau of Investigation. In addition to the Virginia criminal offenses, this record indicated that the claimant had been convicted of two counts of embezzlement by mail in violation of 18 U.S.C. Section 1709. The claimant was committed to the custody of the Attorney General or his authorized representative for imprisonment for an indefinite period not to exceed six years pursuant to the applicable provisions of the Federal Youth Corrections Act then in force. With respect to the second count of mail embezzlement, the claimant was placed on probation for five years, which was to be served pursuant to the provisions of Federal Youth Corrections Act. The claimant did not disclose these two felony convictions which occurred on June 19, 1973. The claimant was discharged by the employer for falsifying the employment application by failing to reveal his past criminal record.

On the original employment application that the claimant signed, certain certifications appeared immediately above his signature. In pertinent part, these certifications provided that a false statement on the application could be grounds for not hiring the applicant or for firing the applicant after he had begun work. The certification also disclosed that the falsification of the application was a crime which could subject the offending party to fine or imprisonment as provided in 18 U.S.C. Section 1001. Immediately above the claimant's signature is a certification which reads, "I certify that, to the best of my knowledge and belief, all of my statements are true, correct, complete, and made in good faith." On the amended application, the following certification appears immediately next to the claimant's signature, "I certify that the statements made by me on this form update my Personal Qualifications Statement completed 11/7/86 and are true, complete, and correct to the best of my knowledge and belief, and are made in good faith." Immediately below the claimant's signature is the sentence, "False statement on this form is punishable by law."

Oral argument was scheduled before the Commission for 10:00 a.m. on June 13, 1988. Written notice of the hearing was mailed to all parties on June 6, 1988. At the time and place designated for the hearing, the employer's attorney appeared and argued the case. The claimant did not appear for the hearing until shortly before 1:00 p.m. He had misread the hearing notice and thought the hearing began at 1:00 p.m. on June 13, 1988. His request that the hearing be reopened was denied by the Commission by letter dated June 13, 1988, which letter is hereby incorporated by reference. The claimant was granted leave to file a written argument as long as it was received by the Commission no later than June 20, 1988. The claimant did not file any written argument within the time allowed.

OPINION

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 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., 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 this case, the claimant was discharged by the employer after he had twice falsified his employment application by failing to disclose his record of felony convictions. The claimant certainly knew of his criminal record and was placed on ample notice by the various questions and certifications on the forms he completed that full disclosure of his felony criminal record was required. His failure to do so constitutes a deliberate falsification of his employment application, which the Commission has consistently held constitutes misconduct connected with work. See, Powell v. Sims Wholesale Company, Commission Decision 13448-C (June 10, 1980). Therefore, since the evidence before the Commission clearly establishes a prima facie case of misconduct, the burden is on the claimant to prove mitigating circumstances.

The only defense that the claimant offered was his allegation that the convictions for embezzlement by mail should have been expunged pursuant to the provisions of the Federal Youth Corrections Act. However, the claimant presented no evidence whatsoever that these convictions should have been expunged. In fact, the evidence before the Commission suggests that the convictions may not have been expunged as a result of a probation violation. The claimant was sentenced, in part, to five years probation for one count of embezzlement by mail. However, within that five-year period, he was subsequently convicted of a felony under Virginia law. Courts universally impose, as a condition of probation, the requirement that the probationer be of good behavior during the period of probation. Good behavior includes the requirement that the probationer obey all federal, state, and local laws and ordinances. Accordingly, the claimant's conviction for a felony thirty-nine months after being placed on probation belies his allegation that those convictions should have been dismissed and expunged.

For these reasons, the Commission must conclude that the claimant was discharged for misconduct connected with his work and that he has failed to prove any mitigating circumstances. Accordingly, the disqualification provided in Section 60.2-618.2 of the Code of Virginia should be imposed.

DECISION

The Decision of Appeals Examiner is hereby affirmed. The claimant is disqualified from receiving benefits, effective March 13, 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.

M. Coleman Walsh, Jr.
Special Examiner

NOTICE TO CLAIMANT

IF THE DECISION STATES THAT YOU ARE DISQUALIFIED, YOU WILL BE REQUIRED TO REPAY ALL BENEFITS YOU MAY HAVE RECEIVED AFTER THE EFFECTIVE DATE OF THE DISQUALIFICATION. IF THE DECISION STATES THAT YOU ARE INELIGIBLE FOR A CERTAIN PERIOD, YOU WILL BE REQUIRED TO REPAY THOSE BENEFITS YOU HAVE RECEIVED WHICH WERE PAID FOR THE WEEK OR WEEKS YOU HAVE BEEN HELD INELIGIBLE. IF YOU THINK THE DISQUALIFICATION OR PERIOD OF INELIGIBILITY IS CONTRARY TO LAW, YOU SHOULD APPEAL THIS DECISION TO THE CIRCUIT COURT. (SEE NOTICE ATTACHED)