COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

David A. Lambert

Department of the Army
Warrenton, Virginia

Date of Appeal
to Commission: October 16, 1990

Date of Review: November 8, 1990

Place: RICHMOND, VIRGINIA

Decision No.: 34603-C

Date of Mailing: November 29, 1990

Final Date to File Appeal
with Circuit Court: December 19, 1990

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This case is before the Commission on appeal filed by the employer from Appeals Examiner's decision UCFE-8903586, mailed September 27, 1990.

## ISSUE

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

## FINDINGS OF FACT

The employer filed a timely appeal from the Appeals Examiner's decision which affirmed an earlier Deputy's determination and found the claimant to be qualified for unemployment compensation, effective February 12, 1989, with respect to his separation from the employer's services.

Prior to filing his claim, the claimant last worked as a civilian employee of the United States Army at Vint Hill Farms Station in Warrenton, Virginia, between March, 1987 and February 8, 1989. His position was that of an engineer.

The claimant's job required a security clearance, which he already possessed. He still had to fill out an application listing various relevant background information concerning such things as foreign travel, correspondence with foreigners, violations of any laws, whether he had ever been reprimanded at any previous employer, and whether he had been discharged or had resigned after being informed of an intention that he be discharged, from any prior employment. After filling out an extensive background questionnaire, the claimant was interviewed by an army captain who went over his answers in detail. This individual particularly remembered his interview with the claimant because, out of the numerous people with whom he had conducted such interviews, the claimant was the only one who brought his attorney with him.

The claimant soon established himself as somewhat of a gadfly in his department. After a memorandum came around indicating that all employees should participate in airline "frequent flyer" programs so that any mileage they accumulated on government business could be used to buy discount tickets, the claimant flatly refused to disclose the airlines or the account numbers where he was already accumulating frequent flyer miles before he went to work for the agency. In a strongly worded memorandum, he informed his supervisor that he considered the request for such information to be a violation of his privacy. Ultimately, the attempt to require all employees to enroll was dropped.

In June, 1988, the claimant was counselled for two separate alleged policy violations. One involved the charge that he had made improper disclosures of potentially classified information during a lunchtime conversation at the local NCO club. The other was that he had failed to follow unwritten office procedures regarding the dissemination of written materials. He vigorously pursued grievances against both of these charges.

Coincidentally, also in June, 1988, the claimant had a telephone conversation with an official at a private firm in California which was doing contracting work for the agency. The claimant knew that the work was behind schedule and, during the course of the conversation, he realized that it was not entirely the fault of the contractor, since his agency was not supplying needed materials in a timely fashion. Apparently, the contractor sought to either pursue a claim or justify its tardiness by holding the agency at fault, and it was reported back that the entire idea had come from the claimant. Several months after the conversation occurred, the individual in California gave a written statement which implied that the claimant may have been acting disloyally to his employer. Although this statement, in the form of an affidavit, was introduced into the record as an exhibit, the individual making it did not testify at the hearing. The claimant specifically denied that he had ever made the suggestion that the company should pursue a claim against the government.

On September 23, 1988, the claimant was presented with a Notice of Proposed Removal which accused him of acting in violation of federal regulations by placing his own interests above loyalty to his country, ethical principles, and law, or failing to avoid any action which might result in or could reasonably be expected to create the appearance of impeding government efficiency or economy. He was also accused of engaging in conduct prejudicial to the government. Just as the claimant sought to respond to this notice, it was amended to include additional charges that he had either misrepresented or failed to disclose crucial information during the process of applying for work with the employer.

Specifically, the claimant had failed to note that in 1983 he had been suspended from a previous federal government job. The employer's reasoning was that a suspension was actually worse than a reprimand; therefore, the claimant's failure to include it when asked if he had been reprimanded by a previous employer, amounted to a deliberate and willful withholding of facts. Additionally, the claimant had not shown that he had received a speeding ticket on June 5, 1986. He had shown other similar traffic violations and he had a copy of his driving record with him at the time he filled out the application. The violation in question was listed on the second page of his driving record which had become detached, and he simply overlooked it when filling out his application.

The claimant had disclosed that he had resigned a job after being notified of a prior employer's intention to dismiss him in February, 1987. In his explanation, he stated that there had been a dispute over his failure to work overtime which was due to his concerns over his dying dog. In any event, the notice of termination was removed from his file, the claimant was allowed to resign, and he received a good recommendation. When contacted by the employer in 1988, the previous employer indicated that the initial decision to terminate the claimant had been triggered by his use of profane language at work.

Although the claimant challenged the authority of the employer to initiate a private investigation of the claimant's background after the initial notice of the proposed removal had been sent to him, the employer rejected his protest and proceeded with the removal action. He was discharged as of February 8, 1989.

## OPINION

Section 60.2-618.2 of the Code of Virginia provides a disqualification if it is found that a claimant was discharged from employment due to misconduct in connection with work.

In the case of Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978), the Supreme Court of Virginia defined misconduct as follows:

> 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 Branch case involved the interpretation of an employer rule concerning garnishments. In that case, it was specifically held that an employer rule must be construed most strictly against its maker and most liberally in favor of the employee.

In the case of Miller v. J. Henry Holland Corporation, Commission Decision 7470-C (February 9, 1976), the Commission went on to state:

> On the other hand, mere inefficiency, incapability, mistake or misjudgment has never been tantamount to misconduct. The Commission has also consistently held that the burden is upon the employer to prove misconduct.

Since the employer made no contention that the claimant's opposition to the attempt to get him to disclose his frequent flyer account numbers, or the circumstances leading to the two grievances he filed in June, 1988, had anything to do with his discharge, the Commission sees no need to consider these matters any further. It must be also noted that the employer has failed to show by a preponderance of the evidence that the claimant said what was alleged by the representative of the civilian contractor in California with regard to the June, 1988, conversation they had on the telephone. Even if this burden had been carried, the Commission would not be persuaded that the claimant had violated the regulation cited in the Notice of Proposed Removal. No evidence was presented to indicate that any private parties stood to gain anything more than they might have been legally entitled to as a result of the alleged statement. Indeed, it could be strongly argued that, by pointing out where his agency had failed to make a timely delivery of components to a subcontractor, the claimant was acting to further the overall efficiency of the Department of the Army.

The Commission is also concerned about the propriety of the background check which the employer decided to do on the claimant two years after he had been hired, so as to come up with the additional charges against him in the amended Notice of Proposed Removal. Nevertheless, even assuming that the employer properly followed all

applicable procedures in deciding to bolster the initial charges through this investigation, the Commission concludes that, so far as unemployment compensation is concerned, this effort has failed.

If the claimant had been asked to disclose all instances where he may have been in the receipt of any form of discipline from a former employer, then he would have been obligated to disclose the suspension he received in 1983, during a previous period of government employment. Despite this, he was only asked to disclose instances where he had been reprimanded, and he did so. He was entitled to rely upon the language used in the question, and he was not obligated to go beyond it. The Commission agrees with the claimant that although a suspension and a reprimand both can constitute forms of discipline, they are still distinct forms, each with its own precise definition.

The failure of the claimant to list the 1986 speeding conviction did represent an omission on his part which, if done deliberately, would have constituted misconduct. Nevertheless, the Commission has no reason to disbelieve his story that the omission was inadvertent. It is further apparent that it was really of no significance, since there is no evidence that the claimant's driving record would have disqualified him from the job in question.

There is little doubt but that the claimant sought to present his resignation in lieu of termination from his previous job in 1987, in a light most favorable to himself. The obvious question to ask is what applicant in a similarly situated position would not have done the same? The important thing is that the claimant disclosed that he had resigned under the threat of termination, that it had something to do with his failure to work overtime, and that it occurred at just about the same time that he was emotionally distraught over the final illness and death of his pet dog. Certainly, if the employer felt that this was something which deserved further investigation, that should have been done before the claimant was hired. At most, the employer has shown that the claimant exercised poor judgement in not being more candid in his disclosure; nevertheless, this is insufficient to establish misconduct in connection with his work so as to impose a disqualification under this section of the Code.

## DECISION

The decision of the Appeals Examiner is hereby affirmed.

It is held that the claimant is qualified for unemployment compensation, effective February 12, 1989, with respect to his separation from the services of the Department of the Army.

Charles A. Young, III
Special Examiner