COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Alvin D. Parker
[redacted]

Roadway Express
Chesapeake, Virginia

Date of Appeal
to Commission: September 16, 1991

Date of Hearing: January 16, 1992

Place: RICHMOND, VIRGINIA

Decision No.: 36653-C

Date of Mailing: July 22, 1992

Final Date to File Appeal
with Circuit Court: August 11, 1992

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9107539), mailed September 5, 1991.

APPEARANCES

Representative for Employer

ISSUE

Was the claimant discharged for misconduct connected with his work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On September 16, 1991, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified him from receiving benefits, effective March 17, 1991. That disqualification was based upon 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 Roadway Express in Chesapeake, Virginia. He was employed from April 28, 1985 through March 19, 1991, and held a variety of positions during that tenure. At the time of his separation, he was an operations supervisor and was paid $705 per week.

In October of 1990, the claimant received a written reprimand which primarily addressed management and personnel problems that the employer felt were attributable to the claimant's style of leadership. The claimant was specifically advised as follows:

> Effective immediately you are being put on notice due to the previous actions mentioned. This means that you have got to make four changes.
>
> A. Promote a direct line of communication with Debbie and accept her guidance. Carry out her instructions to the best of your abilities. Use the chain of command and establish a rapport to gain some of her knowledge to make you a more effective supervisor. Accept that Debbie is your boss and use her 19 years of experience to aid you.
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> B. Use the Quality Process and SLS with all members of the Norfolk team - everybody from the maintenance man to the terminal manager. Establish good communication and earn people's respect so they can earn your respect.
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> C. Talk to people in a professional manner, listen to their side, gather the facts before you make a decision. I do not want any confrontations with the employees on any level. Communicate to motivate, and abolish your dictatorship leadership. Again, no confrontation that "explode" due to your present leadership style.
>
> D. Insure that your demeanor and mannerism does not produce a "chilling" or negative effect on people. Insure that every action with any employee must be handled on a professional level that anything else will not be tolerated.

In this written reprimand, the employer emphasized to the claimant that he was being placed on notice. The employer also informed the claimant that, with reference to the four steps outlined, ". . . any single instance that is ignored will terminate his employment at Roadway Express." (Commission Exhibit #4).

In February of 1991, the employer decided that it should follow a strict interpretation of a labor agreement which addressed the scheduling of laid off or unassigned employees. This was communicated to the claimant and he carried out this instruction.

On February 27, 1991, the claimant's supervisor, who was the terminal operations manager, met with her supervisor, the union shop steward, and the union president to discuss some grievances. One of the issues addressed concerned the company's strict interpretation of the labor agreement for scheduling laid off and unassigned employees. The claimant's supervisor offered to attempt to devise a workable compromise. She provided her supervisor and the shop steward with a copy of her proposal on March 1, 1991.

On March 3, 1991, the claimant's supervisor and the shop steward discussed the proposal. The shop steward indicated that he felt that, overall, the proposal was a good agreement and that he had talked with most of the laborers who would be affected and they had agreed to its terms. They agreed to implement the proposal immediately, and the claimant's supervisor contacted one employee and scheduled him for work in accordance with the new agreement. The terminal operations manager could not reach the claimant to explain the new agreement. As a result, she left him a note with instructions on setting up the manpower in accordance with the new agreement.

Approximately 8:00 p.m. that night, the terminal operations manager arrived at home and was informed that the claimant and the shop steward had called and wished to speak with her. The terminal operations manager contacted the claimant, who immediately informed her that he set up his own manpower and that she should not do it for him. He further informed her that he was refusing to carry out her instructions to offer a choice of work to two particular employees. The claimant also told the terminal operations manager that he had spoken to her supervisor; that they had decided to follow the contract; and that she did not have anything to do with it. The claimant dominated the entire telephone conversation and would not listen to his supervisor. (Tr. 76-80; Commission Exhibit #6).

As a result of this confrontation between the claimant and his supervisor, the claimant received a final warning which was dated March 6, 1991. The warning was administered by the Internal Manager, who supervised the terminal operations manager. The

claimant was informed that his behavior towards his supervisor was insubordinate and unacceptable and that future conduct would result in his immediate termination.

On March 15, 1991, the claimant and other employee were involved in making an inside delivery to the U. S. District Court in Norfolk, Virginia. Two conference tables were being delivered to the chambers of Judge Rebecca Beach Smith. There was a dispute regarding whether "inside delivery" required that the furniture be delivered to the judge's chambers. The claimant informed court personnel that he was the driver's supervisor, that an inside delivery only required that the delivery be placed eight feet inside the door, and that he would not require the driver, who was a union employee, to make the delivery to the judge's third floor chambers.

The judge was upset with this situation and she called the terminal operations manager with her complaint. The two of them discussed the situation and it was agreed that some of the court personnel would be recruited to assist the claimant and the driver in delivering the tables to the judge's chambers. The terminal operations manager informed the claimant of the judge's willingness to recruit some people to assist him. She instructed the claimant to ask for the help and to wait until it arrived.

Approximately one hour after her first call, the judge contacted the terminal operations manager to inform her that the delivery had been made. She also complained about the claimant's conduct. She accused the claimant of being belligerent, uncooperative, and unwilling to listen to anyone. She also informed the terminal operations manager that the claimant had called her a "bitch." The judge's marshall also overheard that remark. The judge agreed to send the terminal operations manager a statement concerning the incident, and volunteered to have the marshall send her one, also.

The letter of complaint from the judge (Commission Exhibit #2) stated in pertinent part, as follows:

> Your delivery people, Alvin and Willie (only first names were reflected on the delivery people's identification), refused to deliver the tables in their boxes to my Chambers, Room 329. After much discussion with you, and after having to secure several law clerks to assist, we were able to get the tables delivered to my Chambers. However, in the process, the delivery person named Alvin conducted himself in a most unprofessional, unacceptable, belligerent, and uncooperative

> manner, including the use of profanity directed at court personnel and me. Frankly, I am not comfortable relating the language used in this letter.
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> The entire situation was quite upsetting and disconcerting to the court. I would note that at all times all court personnel conducted themselves professionally, never raising voices or using improper language, only insisting that, if a signature of acceptance for the Order was desired, the tables had to be delivered to my Chambers as reflected on the Order. Given these circumstances, I do not desire any further deliveries from your company to my Chambers. Further, by copy of this letter to the Administrative Office of the United States Courts and the General Services Administration, I advise them of this matter.

The statement from the marshall (Commission Exhibit #3), confirmed that the claimant referred to the judge as a "bitch." After he made this remark, the marshall directed the claimant to leave the judge's chambers and to wait outside.

The next day, the claimant discussed this incident with his supervisor. During that discussion, he characterized the judge by using the same profane word as he had used the previous day. He did so prior to being informed that a complaint had been made regarding his conduct, attitude, and use of profanity.

The employer reviewed this most recent incident in light of the reprimand and final warning that the claimant had received within the past five months. As a result, the claimant was discharged on March 19, 1991 for insubordination and unprofessional conduct.

OPINION

As a preliminary matter, the Commission needs to address the additional evidence which counsel for the claimant attached to the brief that was submitted in lieu of the presentation of oral argument. When such a submission is made, the agency's practice has been to consider the submission as a request that the Commission direct the taking of additional evidence and testimony.

Regulation VR 300-01-4.3B of the Regulations and General Rules Affecting Unemployment Compensation provides:

> Except as otherwise provided by this rule, all appeals to the Commission shall be decided on the basis of a review of the evidence in the record. The Commission, in its discretion, may direct the taking of additional evidence after giving written notice of such hearing to the parties, provided:
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> 1. It is affirmatively shown that the additional evidence is material, and not merely cumulative, corroborative, or collateral; could not have been presented at the prior hearing through the exercise of due diligence; and it is likely to produce a different result at a new hearing; or
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> 2. The record of proceedings before the appeals examiner is insufficient to enable the Commission to make proper, accurate, or complete findings of fact and conclusions of law.

The additional evidence does not meet any of these criteria. First, there is presently evidence in the record which would establish that the concurrence of all union members was necessary prior to any modified agreement being put into effect. Second, no explanation was offered why the four exhibits attached to the brief could not have been submitted at the Appeals Examiner's hearing through the exercise of due diligence. Third, these exhibits would not materially affect the outcome of the case because the egregious conduct manifested by the claimant was his disrespectful manner in dealing with the supervisor regarding this issue, and not the fact that the agreement had been put into effect prematurely. Since the evidentiary record is otherwise sufficient to enable the Commission to make proper, accurate and complete findings of fact and conclusions of law, the additional evidence submitted by the claimant cannot be considered in rendering a decision in the case.

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, 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. 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).

The evidence establishes that the claimant received a written reprimand in October of 1990 because of management and personnel problems that the employer believed were attributable to his management style. The claimant has vigorously disputed the justification for this reprimand. Nevertheless, the true significance of this reprimand to the present case is the fact that the claimant was put on notice that the employer perceived his management style and his method of handling interpersonal communications as being unacceptable and inconsistent with the interests of the company. It is against this backdrop that the two incidents that occurred in March of 1991 must be viewed.

On March 3, 1991, the claimant was manifestly insubordinate to his immediate supervisor. The claimant's objection to her decision to implement a new scheduling agreement were not without foundation, and the Commission does not question his motivation for raising the issue. Nevertheless, the manner in which he dealt with his supervisor manifested a flagrant disrespect for her position and authority and as such, constituted an act of insubordination. Accord, Ware v. Adesso Precision Machine Co., Commission Decision 31397-C (July 25, 1989).

The last incident, which occurred at the U. S. District Court in Norfolk, Virginia on March 5, 1991, involved a clear case of unprofessional conduct by the claimant. On that occasion, the claimant was assisting a driver in delivering some heavy furniture to the courthouse. A dispute arose concerning whether the "inside delivery" required that the furniture be delivered to the judge's

chambers on the third floor. The claimant's supervisor was instrumental in resolving this impasse when she reached an agreement with the judge for some court personnel to be recruited to assist in delivering the conference tables to the third floor.

The claimant demonstrated a belligerent, uncooperative attitude and referred to the judge as a "bitch." Both the judge and her marshall heard the remark and complained to the employer. Since the judge informed the Administrative Office of the United States Courts and the General Services Administration regarding this incident, it is apparent that the employer's legitimate business interests were not well served by the claimant's conduct. For these reasons, the Commission must conclude that a prima facie case of misconduct has been established. Therefore, the burden of proof is on the claimant to demonstrate mitigating circumstances.

In his brief, counsel for the claimant contended that the alleged insubordinate conduct on March 3, 1991, requires a finding that the employer's request for the claimant to perform a certain task was reasonable. Since the more liberal interpretation of the labor agreement had not been approved by all of the affected union employees, the claimant's refusal to comply with the new agreement was justified. The Commission is not persuaded by this argument.

As previously noted, the claimant's motivation in questioning the change is not the true issue. Instead, it was his flagrant disrespect for his supervisor which he demonstrated in her telephone conversation in March 3, 1991. The claimant did not merely question the propriety of putting into effect the new agreement. He directly challenged her authority to exercise any control over his scheduling of employees and had countermanded the arrangements that she had put in place. Regardless of the propriety of implementing the modified agreement on March 3, 1991, the claimant could have raised his concerns and attempted to solve the problems he perceived without engaging in contentious, disrespectful, and insubordinate conduct. In light of the written reprimand he had received five months earlier, this single incident could have warranted a finding of misconduct in connection with work had the employer elected to discharge him at that point. Instead, the claimant was given a reprieve through the issuance of a final warning.

With respect to the final incident, the claimant appears to have advanced two separate arguments. First, in his brief, counsel for the claimant emphasized that the claimant was off duty on March 15, 1991, and had simply volunteered to help the driver make his deliveries. Although it was not specifically argued, it appears that counsel is suggesting that any misconduct that might have occurred was not connected with the claimant's work by virtue of his off duty status. The Commission does not agree. The

Commission addressed this issue in the case of Coan v. Consolidated Cigar Corporation, Commission Decision 29542-C (February 5, 1988), when it held:

> An act of misconduct which occurred outside the scope of employment or while the claimant was off duty will be connected with his work if (a) there is a reasonable nexus between the claimant's job duties and the misconduct; or (b) if the misconduct had a substantive detrimental impact on the employer; or (c) if the misconduct constituted a violation of any duty or obligation owed to the employer, whether expressed or implied.

Even if the claimant was technically off duty, he was integrally involved in the delivery of the furniture to the courthouse. He held himself out to be the driver's supervisor, discussed the details of the delivery with the Judge and other courthouse personnel, and received instructions from his supervisor over the telephone. By cloaking himself with all of the indicia of a company supervisor, the people with whom he was dealing had every right to believe that he was acting on behalf of his employer. Therefore, he was obligated to conduct himself in a professional manner, despite his off duty status. In failing to do so, he violated that obligation.

Furthermore, as evidenced by the judge's letter, his conduct had a substantive detrimental impact on the employer. The judge requested that no further deliveries by the employer be made to her chambers, and she informed two administrative agencies of the federal government of the problems that she had experienced. For these reasons, the claimant's conduct was connected with his work.

The primary argument that counsel has raised with respect to this issue concerns the weight that the Appeals Examiner attached to the evidence presented by the employer. That evidence consisted of the testimony that the claimant's supervisor regarding the conversations that she had with Judge Smith, and the unsworn letters from the judge and her marshall. In opposition, the claimant denied their allegations in his sworn testimony. Also, the driver who worked with the claimant on that day testified that he did not hear the claimant use any profanity, although he admitted that he was not in the claimant's presence during the entire time.

It is well established law that hearsay evidence is admissible in administrative proceedings such as those conducted by the Virginia Employment Commission. Baker v. Babcox & Wilcox, Co., 11 Va. App. 419, 399 S.E.2d 630 (1990). Although the Court of

Appeals in Baker found it unnecessary to reach the issue of whether hearsay alone can support a finding of fact made by the agency, at least one other court has answered that question in the affirmative. In the case of Casey v. V.E.C., Circuit Court for the County of Frederick, Chancery No. C-86-168 (April 27, 1987), the court provided a detailed analysis regarding the issue of hearsay evidence in administrative hearings. In his letter opinion dated April 7, 1987, Judge (now Justice) Whiting opined:

> The Court concludes that hearsay is admissible in unemployment compensation hearings, and if its probative effect was more than a scintilla of evidence and sufficient from which a rational mind could draw an inference of the truth of the matters asserted therein this would enough to justify a finding thereon despite contradictory testimonial evidence adduced at the hearing.

The Commission is of the opinion that the test set out Casey has been met and that the employer did carry its burden of proof. First, as the Appeals Examiner noted, the claimant discussed the particular incident with the terminal manager on March 16, 1991. During that discussion, he referred to the judge using the same terminology that was overheard by both the judge and her marshall. This is significant because the claimant made this remark to the terminal manager prior to being informed of the accusation made against him. The Appeals Examiner properly exercised his discretion in weighing that factor against the claimant's denial of wrongdoing. Second, the delivery driver candidly admitted that he was not in the claimant's presence throughout the entire time they were at the courthouse. Consequently, it is possible that the claimant used the profanity in question at a time when the driver was not present and not in a position to hear what was said.

Third, the Commission cannot ignore the fact that the complaints registered against the claimant were made a U. S. District Judge and a law enforcement officer. That does not mean that the unsworn statement of any judge or law enforcement officer will be afforded an irrebuttable presumption of truthfulness. Nevertheless, their positions in the judiciary a law enforcement branches of government serves to enhance the probative value of their statements. An analogy could be drawn to those cases involving a claimant's decision to leave work for medical reasons. The Commission has consistently attached great weight to the recommendations of the claimant's attending physician which, more often than not, are presented in the form of an unsworn letter which outlines that doctor's diagnosis, treatment protocol, recommendations, and prognosis. Although hearsay, that type of unsworn evidence has enhanced probative value in an administrative proceeding.

Finally, the Commission must observe that both the judge and the marshall are completely disinterested parties to this litigation. Neither of them has any vested interest in how the Commission resolves the claimant's entitlement to receive unemployment insurance benefits. This factor also serves to enhance the probative value that can be accorded their unsworn statements.

Counsel for the claimant also argued that under the Dimes case, previously cited, the hearsay evidence of the employer cannot be afforded greater weight than the sworn testimony of the claimant or the claimant's witness. That is not a correct characterization of the Commission's holding in that case. Dimes was an absenteeism case where a key factual issue involved whether the employer had received notification of the claimant's absences. The claimant's wife testified under oath that she had made the calls on her husband's behalf and left messages with the employer's daughter. The employer's testimony was that he never received the messages. The Commission stated:

> The hearsay testimony of the employer that those messages were not received simply cannot be accorded greater weight than sworn testimony that the claimant's wife. Furthermore, the testimony of the claimant's wife is very credible in light of the fact that the claimant testified on at least three separation occasions that he was aware that the employer expected to be notified and that he could lose his job for his failure to do so. Also, the employer admitted that the claimant's family members generally called whenever he had been absent previously.

From the preceding passage, it is clear that the Commission's decision in the Dimes case did not involve the mechanical application of a doctrine that would suggest that all sworn testimony will automatically receive greater weight than hearsay evidence. Instead, there were independent factors which supported the Commission's conclusion that the testimony of the claimant's wife should be believed. The Commission's holding and analysis in Dimes is in harmony with both the principles enunciated in the Casey case, as well as the Commission's evaluation of the probative value of the evidence submitted here.

In conclusion, the Commission finds that the employer has carried its burden of proving that the claimant was guilty of misconduct in connection with his work. The claimant has failed to prove mitigating circumstances for his conduct. Therefore, he must be disqualified from receiving benefits.

DECISION

The claimant's request that additional evidence be considered is hereby denied.

The decision of the Appeals Examiner is hereby affirmed. The claimant is disqualified from receiving benefits, effective March 17, 1991, because he was discharged for misconduct connected with his work. This disqualification shall remain in effect for any week benefits are claimed until the claimant 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 referred to the Deputy who is requested to examine the claimant's claim for benefits and to determine if he has been overpaid any sum of benefits to which he was not entitled and which he is liable to repay the Commission as a result of the disqualification imposed by this decision.

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)