COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

William E. Liberty, Jr.
[redacted]

Hampton Roads Vending & Food Service, Inc.
Hampton, Virginia

Date of Appeal to Commission: November 30, 1993

Date of Hearing: February 10, 1994

Place: RICHMOND, VIRGINIA

Decision No.: 44291-C

Date of Mailing: February 12, 1994

Final Date to File Appeal with Circuit Court: March 4, 1994

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9317641), mailed November 9, 1993.

APPEARANCES

Claimant, Employer Representative

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 November 30, 1993, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified him from receiving benefits, effective September 19, 1993. The basis for that disqualification was the Appeals Examiner's conclusion that the claimant had been discharged for misconduct connected with his work.

Prior to filing his claim for benefits, the claimant worked as a route salesman for Hampton Roads Vending & Food Service of Hampton, Virginia. He worked for this employer from November 4, 1991, through September 17, 1993. He was a full-time employee and was paid $7.50 an hour.

The claimant was responsible for stocking, cleaning, and taking care of the company's vending machines that were located at various business establishments throughout the area. In addition, employees such as the claimant were expected to maintain good customer relations, and this was stressed by the employer. The claimant had been informed that he should report any problems involving his accounts to his supervisor or the owner of the company.

On July 22, 1993, the claimant received a one day suspension and was placed on probation for 90 days because of an incident that occurred at one of his accounts, Virginia Natural Gas. The incident also occurred on July 22, 1993. The owner of the company received a telephone call from the personnel director at Virginia Natural Gas. The personnel director reported that an argument had taken place between the claimant and an employee of VNG. The owner dispatched another management official to speak with individuals at VNG regarding the claimant's conduct. As a result of that investigation, the claimant was accused of cursing a VNG employee during a dispute over a bag of chips.

The claimant serviced the VNG account on Monday, July 20, 1993. When he arrived a bag of Fritos chips had been taped to the front of the machine. The claimant usually checked with the receptionist concerning refunds or complaints. The secretary was not at her duty station. Therefore, the claimant serviced the machine and put the bag of Fritos chips back on the vending machine as he found them.

When the claimant returned to the account several days later, he was confronted by a female employee of the VNG regarding the bag of Fritos. The claimant explained to her that she should have given the Fritos to the receptionist rather than taping them to the machine. He offered her a refund; however, she took some of the Fritos, crumbled them in her hand, shoved them into his face and told him to eat them. The claimant never cursed at this individual. He did, however, fail to call the owner or his supervisor to advise one of them that he had experienced a problem at the account.

On September 10, 1993, the claimant visited Saville Peninsula Produce, which was one of his accounts. When he arrived, the door was locked; however, an employee of the Saville Peninsula Produce admitted him to the premises. This occurred during the middle of

the day. The claimant asked this employee if the company had adopted some new procedure. She explained that they were locking their doors during that part of the day so that their trucks could be loaded without any distractions from walk-in customers. The claimant asked if there would be any problem with him gaining access to the building during those hours to service the vending machines, and he received a negative response. Four days later, the claimant returned at approximately the same time to service the vending machines. He was permitted access to them, and he was not told that there was any restriction on when he could enter the building to service the machines.

On September 17, 1993, the claimant arrived at Saville Peninsula Produce at approximately 12:40 p.m. to service the vending machines. A different employee answered the door when he knocked. There was some discussion about whether the claimant would have access to the building, so he informed the employee that if he could not get to the machines that day, he would not be back until Tuesday. The employee referred this matter to the warehouse manager. The warehouse manager asked for the claimant's name and then told him that the wanted the vending machines removed from the premises. The claimant was not argumentative, aggressive, or antagonistic during this incident.

The claimant did not immediately contact his supervisor or the owner regarding this situation. Saville Peninsula Produce was the claimant's last account for the day and was located a very short distance from the employer's place of business. Accordingly, the claimant drove directly to the company's office and reported the situation to the owner. By the time he arrived, the owner had received a call from someone at Saville Peninsula Produce. Based upon that call, the owner dispatched the operations manager to investigate the situation. After the operations manager returned from Saville Peninsula Produce, he met with the claimant and told him that he had no recourse other than to dismiss him because he was still on his 90 day probation.

When the claimant filed the present appeal, he requested the Commission to reopen the record because he had not been represented by an attorney and he wished to subpoena witnesses to testify on his behalf. By letter dated January 27, 1994, the Commission denied the claimant's request to present additional evidence. In denying his request, the Commission pointed out that the Notice of Appeal and the hearing notice informed the claimant of his right to subpoena witnesses and his right to be represented by an attorney. Both of those documents also explained the procedure to follow for requesting the issuance of subpoenas. At the February 10, 1994, hearing, the claimant renewed his request to submit additional evidence.

OPINION

As a preliminary matter, the agency must address the claimant's renewed request to present additional evidence and testimony. The Commission has reviewed that request in light of the claimant's oral argument and the provisions of Regulation VR 300-01-4.3B of the Regulations and General Rules Affecting Unemployment Compensation. The claimant was informed of his right to counsel and his right to request that witnesses and documents be subpoenaed for the hearing. The claimant's failure to pursue those rights was attributable either to his own misunderstanding or his failure to completely read all of the information provided to him by the agency regarding the appeal process. Therefore, his request to submit additional evidence must be denied since the due diligence test set out in the regulation has not been met.

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 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 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).

In this case, there is no doubt that good customer relations was an important aspect of the claimant's job. The employer had a right to expect all of the company employees to conduct

themselves in a manner which showed proper courtesy and respect for all customers. Implicit in any employer-employee relationship is the understanding that employees will be respectful and courteous to the employer's customers and patrons. Repeated acts of rudeness and discourtesy to customers, if proven, could constitute misconduct connected with work. Stevens v. Copy Systems, Commission Decision 25853-C (December 12, 1985), appeal dismissed, Circuit Court of Henrico County, Case #85C1342 (February 4, 1991); Garrett v. Chester Drugs, Inc., Commission Decision 28209-C (March 1, 1993), aff'd, Circuit Court of Chesterfield County, Case #CH93-376 (October 25, 1993).

In this case, the Commission disagrees with the conclusion reached by the Appeals Examiner. The employer did not offer any testimony or evidence from witnesses who had direct, firsthand knowledge of the events in question. The owner's testimony regarding the incident at VNG was based upon information provided to him by the VNG personnel director and the company official he dispatched to investigate the incident. The claimant's testimony concerning that incident, which was not patently incredible or unbelievable, does not show that he deliberately violated company policy by willfully engaging in discourteous, disrespectful conduct.

The employer's evidence regarding the incident at Saville Peninsula Produce was also exclusively hearsay. In contrast, the claimant's sworn testimony under oath established that he had not been restricted from the premises during any particular time, and that he did not demonstrate an argumentative, aggressive, or antagonistic attitude on that occasion.

The claimant conceded that he was wrong by failing to contact the owner or his supervisor after the VNG incident. Although he did not call the employer following the Saville Peninsula Produce incident, he drove immediately from that location to the employer's facility and reported it to the owner. He didn't call because of the short distance involved between the two locations. Under these circumstances, his failure to call the owner by telephone was nothing more than an error in judgment.

It is a well established principle that hearsay evidence is admissible in proceedings conducted by the Virginia Employment Commission. Baker v. Babcock & Wilcox Co., 11 Va. App. 419, 399 S.E.2d 630 (1990). Nevertheless, hearsay testimony does not usually have the same probative value as the sworn testimony of a party or a witness who had firsthand knowledge of the events in question. That is the situation in this case. After reviewing the record and the arguments presented, the Commission must conclude that the employer did not present sufficient probative evidence to establish that the claimant was rude or discourteous during the two

incidents that caused his dismissal. Consequently, no disqualification may be imposed upon the claimant's receipt of unemployment insurance benefits.

If the employer had presented direct testimony or affidavits from the witnesses who observed the claimant's actions and demeanor during the incidents in question, it is quite possible that the Commission may have reached a different result. However, the agency can decide disputed claims only on the basis of the evidence presented by the parties, and for the reasons stated, the employer's evidence was not sufficient to prove misconduct.

DECISION

The claimant's request to submit additional evidence and testimony is denied.

The Appeals Examiner's decision is reversed. The claimant is qualified to receive benefits, effective September 19, 1993, based upon his separation from work with Hampton Roads Vending & Food Service, Inc.

This case is referred to the local office Deputy who is requested to examine the claimant's claim for benefits and to determine if he has complied with all of the eligibility requirements of the statute for each week benefits have been claimed.

M. Coleman Walsh, Jr.
Special Examiner