COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Arthur C. Robinson
[redacted]

Security Transcontinental, Inc.
Norfolk, Virginia

Date of Appeal to Commission: June 13, 1994

Date of Hearing: August 16, 1994

Place: RICHMOND, VIRGINIA

Decision No.: 45948-C

Date of Mailing: August 26, 1994

Final Date to File Appeal with Circuit Court: September 15, 1994

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9405531), mailed May 24, 1994.

APPEARANCES

Employer Representative
Two Observers

ISSUES

Should the Commission grant the employer's request to present additional evidence as provided in Section 60.2-622 of the Code of Virginia and Regulation VR 300-01-4.3B of the Regulations and General Rules Affecting Unemployment Compensation?

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 June 13, 1994, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified him for benefits, effective March 4, 1994. The basis for that disqualification was the Appeals Examiner's conclusion that the claimant had been discharged for misconduct connected with work.

When the claimant filed his appeal, he requested a hearing before the Commission. Accordingly, a hearing was scheduled for 1:45 p.m. on August 16, 1994, to receive oral argument. Both parties were duly notified of that hearing; however, the claimant did not appear or file a written argument in lieu of a personal appearance.

After the claimant filed his appeal, a Notice of Appeal was mailed to both parties on June 20, 1994. The following instructions are among those that appear on the Notice of Appeal:

> The Commission will not automatically schedule a hearing in this case. If either party wishes a hearing to present additional testimony, evidence, or oral argument, a written request setting forth the grounds must be submitted to the Clerk of the Commission within fourteen (14) days from the mailing of this notice.

Prior to the August 16, 1994 hearing, the Commission had not received a request from either party to permit the submission of additional evidence. At the Commission hearing, the employer representative asked the Commission to consider receiving the testimony of the course instructor. This individual had been out of the country when the appeals hearing was initially scheduled. The Appeals Examiner granted the employer's request for a postponement of the appeals hearing that was scheduled for April 18, 1994. The case was rescheduled for May 17, 1994. At that time, the course instructor was still out of the country; however, the employer elected to proceed with the hearing and no further request for a postponement was made. At the Commission hearing, the course instructor was permitted to proffer what his testimony would have been had he appeared at the appeals hearing.

With the exception of the last sentence of the fifth paragraph, the findings of fact of the Appeals Examiner are adopted by the Commission with the following modifications and additions.

The date "December 1, 1994" is deleted from the second line of the second paragraph of the findings of fact, and the date "January 31, 1994" is substituted in its place. The second and third sentences of the third paragraph of the findings of fact are revised as follows:

> The claimant had seven years of experience as a security officer, and his license expired on January 31, 1994. It is a violation of the law for a security officer to work without a license or for a security company to employ a security officer who does not have an active license.

The Chief of Security was aware that there had been a change in the class scheduled for 8:00 a.m. on January 30, 1994. On January 28, 1994, he informed the claimant that there had been a change of some sort and he needed to check into the change.

OPINION

Section 60.2-622 of the Code of Virginia authorizes the Commission to direct the taking of additional evidence and testimony in any case pending before it. In order to ensure that the discretion granted by this statute is fairly and consistently exercised, the Commission has adopted certain guidelines which appear in the agency's rules and regulations.

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.
>
> A party wishing to present additional evidence or oral argument before the Commission must make a written request to the Office of Commission Appeals within fourteen days from the date of delivery or mailing of the Notice of Appeal. The Commission shall notify the parties of the time and place where additional evidence will be taken or oral argument will be hearing. Such notice shall be mailed to the parties and their last known representatives at least seven days in advance of the scheduled hearing. A request to present additional evidence will be granted only if the aforementioned

> guidelines are met. A request for oral argument will be automatically granted provided it is made in a timely fashion and is not thereafter withdrawn in writing by the party requesting it.

Here, the employer requested the opportunity to present additional evidence in the case. That request was not made until August 16, 1994, the day oral argument was heard. This request was clearly outside the 14 day period specified in the regulation. Even if the request was timely, the Commission is of the opinion that the evidence in question could have been presented at the hearing below through the exercise of due diligence. Since the witness in question was still out of the country when the appeals hearing was held on May 17, 1994, the employer could have requested another postponement. Also, the employer had adequate time to secure an affidavit from the witness, particularly in light of the fact that the hearing had been postponed one time previously.

Accordingly, the Commission must conclude that the employer's request to submit additional evidence does not meet the criteria set out in the regulation. Accordingly, the request must be denied, and the Commission's decision shall be based exclusively on the evidence and testimony in the record from the appeals hearing.

Section 60.2-618(2) of the Code of Virginia provides a disqualification if the Commission finds that a claimant was discharged for misconduct in connection 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 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).

In Osborne v. Transit Management of Alexandria, Inc., Commission Decision 41247-C (June 4, 1993), the Commission stated:

> It is not unusual for workers in certain occupations to be required as a condition of employment to have a certain type of license or certification in order to work. The Commission has held in past cases that the failure of an employee to maintain the licensure or certification that is required for continued employment could constitute misconduct in connection with work. Goad v. Rental Uniform Service of Bedford, Inc., Commission Decision 19292-C (September 2, 1982); Spencer v. Regis Hair Stylist, Commission Decision 34061-C (February 6, 1991); Brady v. U.S. Military District of Washington, Commission Decision UCFE-479 (August 1, 1979).

Here, the claimant's employment came to an end when he failed to secure a renewal of his license by February 1, 1994. The claimant's failure to secure the timely renewal of his license was attributable to his own acts and omissions. The claimant knew at least two months in advance that his license would expire on January 31, 1994, and must be renewed. He made the conscious decision to take the last class that was offered prior to his renewal date. Furthermore, the claimant was aware on January 28, 1994, that there had been some change concerning the class on January 30, 1994; however, he apparently took no steps to discover what had been changed. Consequently, he missed the class and his license expired, resulting in his termination.

Under these circumstances, the claimant's failure to secure the renewal of his license in a timely fashion amounted to a willful disregard of the employer's legitimate business interests and of his duties and obligations to the employer. Therefore, in order to avoid the statutory disqualification, the claimant must prove mitigating circumstances.

First, the claimant maintained that he never received notification of the change in time when the class would meet on January 30, 1994. Although he might not have received word of the new time, the evidence is sufficient to show that he knew two days earlier that there had been a change. The record fails to reveal that he took any steps to ascertain the nature of the change.

Second, the claimant attempted to justify his decision to take the class on January 30, 1994, by contending that the course instructor told him that he would have ample time to get his license renewed without any interruption in his employment. The Commission does not find that to be a credible explanation for two reasons. First, if the claimant mailed all of the required paperwork on January 30, 1994, the earliest those documents could have been received by the licensing authorities was the next day. Those authorities would need to act on the claimant's application and issue the license by the following day. In order to return to work, the claimant would have needed to show some proof that he had been duly licensed. It was wholly unreasonable to assume that all of this could have been accomplished in the short time frame created by the claimant's decision to take the last possible class. Second, there is no evidence to establish that on previous occasions when he was recertified that the claimant had ever experienced the type of short turnaround time he apparently expected in January of 1994.

For these reasons, the Commission must conclude that the claimant was discharged for misconduct connected with work for which no mitigating circumstances were proven. Accordingly, he must be disqualified for benefits.

DECISION

The employer's request to submit additional evidence is denied.

The decision of the Appeals Examiner is affirmed. The claimant is disqualified from receiving benefits, effective February 6, 1994, because he was discharged for misconduct connected with work.

This disqualification shall remain in effect for any week benefits are claimed until the claimant performs services for an employer during 30 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 Benefit Payment Control Unit to determine the amount of benefits the claimant has been overpaid and is liable to repay the Commission as a result of the disqualification imposed by this decision.

M. Coleman Walsh Jr.

M. Coleman Walsh, Jr.
Special Examiner