Maryland
Department of Economic & Employment Development

William Donald Schaefer, Governor
Mark L. Wasserman, Secretary

Board of Appeals
1100 North Eutaw Street
Baltimore, Maryland 21201

Telephone: (410) 333-5032

— DECISION —

Decision No.: 1019 -BH-92

Date: June 26 , 1992

Claimant: Mark S. Taylor

Appeal No.: 9102414

S. S. No.:

Employer: A T & T Company

L. O. No.: 40

Appellant: EMPLOYER

Issue: Whether the claimant was discharged for gross misconduct, connected with the work, within the meaning of Section 8-1002 of the Labor and Employment Article and whether the employer filed a timely and valid appeal within the meaning of Section 8-509 of the Labor and Employment Article.

— NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAYBE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, IF YOU RESIDE IN BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES July 26, 1992

— APPEARANCES —

FOR THE CLAIMANT:

Mark S. Taylor - Claimant
Donald Daneman - Attorney
Allan Nelson - Witness

FOR THE EMPLOYER:

Joanne Finegan -
Gates, McDonald

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Economic and Employment Development's documents in the appeal file.

The Board marked the documents referred to at the hearing as Claimant's Exhibit B-1 and Employer's Exhibit B-2, in order to clarify that they are admitted as evidence.

FINDINGS OF FACT

The Hearing Examiner issued a decision in this case on March 15, 1991. By statute, Section 8-510(a), and regulation, COMAR 24.02.06.01B, the parties had 15 days to appeal. The 15th day was Friday, March 29, 1991. The Hearing Examiner's decision stated that the parties had until midnight on April 1, 1991 to file an appeal.

The employer's appeal came in an envelope that was not postmarked, but which was received by the Board of Appeals on April 3, 1991. A copy of the appeal letter sent to the claimant was postmarked April 2, 1991.

CONCLUSIONS OF LAW

The regulations at COMAR 24.02.06.01B(1), provide that appeals must be delivered or postmarked within fifteen days of the Hearing Examiner's decision. In this case, since the 15th day was March 29, 1991, a state holiday, and since the 30th and 31st were Saturday and Sunday, the Appeals Division extended the time until April 1, 1991.

The employer's appeal letter from the Gates, McDonald Company was delivered on April 3, 1991. It was not postmarked at all. On its face, the Gates' McDonald letter meets neither of the requirements of this regulation.

The next issue which arises is whether mailing an appeal letter by April 1, would meet the requirements of the statute. Although the regulation cited above specifically precludes this, the Hearing Examiner's decision contained language which might be interpreted as allowing an appeal to be merely mailed by the last date to appeal. Also, the Postal Service's obvious failure to postmark the letter should not be held against the appellant if the appellant actually mailed the letter in time for it to be postmarked by April 1, 1991. Therefore, for the purposes of this case, the Board will consider the appeal to be timely filed if mailed early enough that it would reasonably be expected to be postmarked on April 1.

The employer, however, has the burden of proving when the appeal letter was mailed. The only[1] evidence provided on this issue by the employer is an affidavit from an employee of the Gates, McDonald Company in Columbus, Ohio. This person was not present to be cross-examined. The affidavit was vague concerning the mailing procedures used at the Gates, McDonald Company, and it was insufficient to establish definitely that the envelope was deposited in the mail in the regular course of business on March 29th. The mailing procedure was not set out in any detail, nor was it proven that the procedure was a fixed routine. This affidavit was further weakened by the claimant's concrete evidence that his copy of the appeal letter was postmarked on April 2, 1991, and the affiant's vague and unconvincing explanation of this event. Had the affiant testified, she may have established that the letter was mailed on time -- if she established, even after cross-examination, that the office had a specific and unvarying mailing procedure and that it was used on that date. As it is, the affiant's assertion that the appeal was mailed on March 29th was viewed by the Board with considerable doubt, in the light of the other evidence in the case.

Since the employer did not prove when the appeal was mailed, the employer has not met the burden of showing mailing in time to be postmarked April 1, 1991.

The unfortunate result is that the Board cannot reach the merits of this case, but these procedural rules must be applied equally to both the employer and claimant.

DECISION

The employer failed to file a timely appeal to the Board within the meaning of Section 8-509 of the Labor and Employment Article.

The previous decision of the Board of Appeals is affirmed.

Thomas W. Keech
Chairman

Associate Member

K:H
kmb

[1] The evidence presented on how long it takes mail to be delivered from Columbus, Ohio, cuts both ways. If the claimant's letter took three days, why would the employer's take five?

COPIES MAILED TO:

CLAIMANT

EMPLOYER

Donald Daneman, Esquire

Joanne Finegan, Esquire

UNEMPLOYMENT INSURANCE - EASTPOINT

Maryland
Department of Economic & Employment Development

William Donald Schaefer, Governor
J. Randall Evans, Secretary

William R. Merriman, Chief Hearing Examiner
Louis Wm. Steinwedel, Deputy Hearing Examiner

1100 North Eutaw Street
Baltimore, Maryland 21201

Telephone: 333-5040

—DECISION—

Date: Mailed: March 15, 1991

Claimant: Mark S. Taylor

Appeal No.: 9102414

S. S. No.:

Employer: American T&T Company

L.O. No.: 40

Appellant: Employer

Issue: Whether the claimant was discharged for gross misconduct connected with the work, within the meaning of Section 6(b) of the Law.

— NOTICE OF RIGHT TO PETITION FOR REVIEW —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A REVIEW AND SUCH PETITION FOR REVIEW MAYBE FILED IN ANY OFFICE OF THE DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT OR WITH THE APPEALS DIVISION. ROOM 515,1100 NORTH EUTAW STREET BALTIMORE. MARYLAND 21201. EITHER IN PERSON OR BY MAIL

THE PERIOD FOR FILING A PETITION FOR REVIEW EXPIRES AT MIDNIGHT ON April 1, 1991

—APPEARANCES—

FOR THE CLAIMANT: Claimant - Present
Martin O' Malley, Esq.

FOR THE EMPLOYER: E . D . Wyand;
Willard Pierce,
Attorney for Gates, McDonald

FINDINGS OF FACT

The claimant began employment on July 7, 1989 and performed duties as a warehouse worker. He last worked on January 22, 1991 and was separated through discharge.

The employer's case is predicated solely upon the presentation of employer's exhibit #1 which is a written security report which describes the claimant as a principle in the conversion of employer's property.

CONCLUSIONS OF LAW

The evidence in this case does not consist of any witness who saw the actions of the claimant and complained nor is the preparer of the written report offered at the hearing. Thus, the sole presentation of the appellant/employer consists of hearsay evidence. The Court of Special Appeals in Kade v. The Charles A. Hickey School, et al., (80 Maryland Appellant 721, 1989) held that "hearsay is admissible in an administrative proceeding. Indeed, if hearsay is found to be credible and probative, it may be the sole basis for a decision of an administrative body." However, in the case above cited, the sole evidence consisted of written statement as in the instant case. In Kade, the Court of Special Appeals held that "even though the statements were relevant, there was no indication that this hearsay evidence was reliable, credible or competent. The statements which were submitted by appellant's co-workers are not under oath and do not reflect how they were obtained".

The evidence in the instant case is sufficiently parallel to that in Kade as to reach the same conclusion. In essence, the appellant here. presents a written statement with little or or further background testimony as to how and when it was 'obtained or prepared and under what circumstances. Under these conditions, it cannot be held that the hearsay evidence offered is "reliable, credible or competent."

Accordingly, the determination of the Claims Examiner shall be affirmed.

DECISION

It is held that the claimant was discharged but not for misconduct connected with the work, within the meaning of Section 6(c) of the Maryland Unemployment Insurance Law. No disqualification is imposed based upon the claimant's separation from American T&T Company. The claimant may contact his local office concerning other eligibility requirements of the Law.

The determination of the Claims Examiner is affirmed.

Louis Wm. Steinwedel
Deputy Hearing Examiner

Date of Hearing: 03/04/91
lbw/Specialist ID: 40309
Cassette No.: 2334
Copies mailed on 03/15/91 to:

Claimant
Employer
Unemployment Insurance - Eastpoint (MABS)

Martin O'Malley, Esq.

E.D. Wyand