

Maryland

DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT

BOARD OF APPEALS

Thomas W. Keech
Chairman

Hazel A. Warnick
Associate Member

1100 North Eutaw Street
Baltimore, Maryland 21201
(301) 333-5033



William Donald Schaefer, Governor
J. Randall Evans, Secretary

Decision No.: 201 -BH-88
Date: March 8 , 1988
Claimant: Deborah L. Carroll
Appeal No.: 8709011
S. S. No.:
Employer: Montgomery County Public School L.O. No.: 43
c/o James E. Frick, Inc.
Appellant: EMPLOYER

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

— NOTICE OF RIGHT OF APPEAL TO COURT —

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

April 7, 1988

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON

— APPEARANCES —

FOR THE CLAIMANT:

Claimant not present

FOR THE EMPLOYER:

Judy Lynn Goldenberg -
Attorney
Charles Walker -
Employee Specialist

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 notes that the claimant has failed to appear at either the hearing before the Hearing Examiner or the Board of Appeals and has failed to refute the evidence presented by the employer. The employer has presented documentary evidence in the form of an affidavit by a police officer attesting to the claimant's possession of a controlled dangerous substance. While affidavits are generally less preferable to live testimony, they are admissible evidence and, where, as here, not refuted by live credible testimony, are sufficient evidence upon which to conclude that the claimant did in fact commit the act in question.

FINDINGS OF FACT

The claimant was employed as a school bus driver with the Montgomery County Public Schools from approximately October, 1979 until March 30, 1987. She was discharged effective March 30, 1987 after she was arrested near her home and charged with possession of drug paraphernalia and a controlled dangerous substance. At the time the employer learned of the claimant's arrest she was suspended.

It is the employer's written policy that any proven illegal action is grounds for dismissal. The claimant was aware of this policy and signed a statement to that effect at the time she was hired. After the employer received the affidavit from the police officer, the claimant was discharged. A hearing on the criminal charges is still pending against the claimant at this time.

The Board finds that the claimant did possess illegal drugs and paraphernalia.

CONCLUSIONS OF LAW

The facts in this case raise two issues. First, whether there is sufficient evidence to conclude that the claimant committed gross misconduct. Second, whether the alleged action was connected with her work, pursuant to Section 6(b).

With regard to the first issue, the Board has found as a fact, based on its evaluation of the evidence, that the claimant did have illegal drug paraphernalia and controlled dangerous substances in her possession. The claimant has never refuted these allegations in sworn testimony and the signed affidavit by a police officer is sufficient to support this finding. A criminal conviction is not required. See, Puffenbarger v. MATCOM SCU, 192-BH-86 (other evidence of guilt, besides a conviction, may be admitted for purposes of a civil action). The Board concludes that the claimant did commit an act constituting gross misconduct.

The Board also concludes that the gross misconduct was connected with her work within the meaning of Section 6(b) of the law. Although the claimant's use and possession of illegal drugs occurred off duty and off the employer's premises, the claimant, a school bus driver who came in contact with and was responsible for the safety of hundreds of school children every day, had a duty to refrain from such illegal activity. Not only was her activity illegal, the ingestion of the drugs could also potentially affect her ability to drive safely.

Board cases dealing with this issue have come to different conclusions, depending on the type of job that the claimant was performing and resulting duty to the employer, as well as the type of illegal activity involved. For example, the misconduct was not connected with the work where a night shift school custodian was discharged after being convicted of a violation of a state narcotics law that occurred off duty and away from the employer's premises. Ebb v. Howard County Board of Education, 214-BH-85. In that case the claimant had no contact with any students.

The facts in this case are more analagous to those in Gaumnitz v. Social Security Administration, 937-BH-85. In that case, the claimant was employed as an employee relations counselor with duties including counseling of employees with drug and alcohol problems. The Board concluded that the claimant's use and smuggling of marijuana, although occurring off duty and off the employer's premises, was clearly connected with his work and constituted gross misconduct. See also, Todd V. Threshold, Inc., 302-BH-85 (a security officer monitoring activities of inmates is in a position of trust in which his own integrity and avoidance of criminal action is relevant to his daily work; therefore, the employer's rule prohibiting the use of drugs even off duty and off premises was a reasonable rule and the claimant's breach of that rule constitute gross misconduct).

The Board concludes that a school bus driver has a duty to refrain from using or possessing controlled dangerous substances even while off duty and therefore concludes that the claimant was discharged for gross misconduct connected with her work within the meaning of Section 6(b) of the law.

DECISION

The claimant was discharged for gross misconduct, connected with the work within the meaning of Section 6(b) of the Maryland Unemployment Insurance Law. She is disqualified from receiving benefits from the week beginning March 29, 1987 and until she becomes reemployed, earns at least ten times her weekly benefit amount and thereafter becomes unemployed through no fault of her own.

The decision of the Hearing Examiner is reversed.


Associate Member


Chairman

W:K

kmb

DATE OF HEARING: February 23, 1988

COPIES MAILED TO:

CLAIMANT

EMPLOYER

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Towson, MD 21204

James E. Frick, Inc.
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Montgomery County Public Schools
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UNEMPLOYMENT INSURANCE - WEHATON

STATE OF MARYLAND
APPEALS DIVISION
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(301) 383-5040

STATE OF MARYLAND
William Donald Schafer
Governor

— DECISION —

Date: Mailed November 23, 1987

Claimant: Deborah L. Carroll

Appeal No.: 8709011

S. S. No.:

Employer: Montgomery County Public
Schools
c/o James E. Frick, Inc.

L.O. NO.: 43

Appellant: EMPLOYER

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

Whether there is good cause to reopen this dismissed case under COMAR 24.02.06.02N.

— NOTICE OF RIGHT TO PETITION FOR REVIEW —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A REVIEW AND SUCH PETITION FOR REVIEW MAY BE FILED IN ANY EMPLOYMENT SECURITY OFFICE 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 December 8, 1987

NOTICE: APPEALS FILED BY MAIL, INCLUDING SELF-METERED MAIL, ARE CONSIDERED FILED ON THE DATE OF THE U.S. POSTAL SERVICE POSTMARK.

— APPEARANCES —

FOR THE CLAIMANT:

NOT PRESENT

FOR THE EMPLOYER:

Represented by
Charles Walker,
Employment
Specialist

FINDINGS OF FACT

An employer's representative spoke to the Administrative Officer on September 16, 1987 requesting a postponement of the hearing scheduled for September 18, 1987. Mr. Cushing, Administrative Officer, granted the employer's request for a postponement. However, Hearing Examiner Selig Wolfe dismissed the appeal on September 18, 1987, because the employer did not show up for the hearing. Since the hearing was postponed before the date of the hearing by an Administrative Officer of the Agency, the issue of

whether there is good cause to reopen the dismissed case under COMAR 24:.02.06.02N does not apply.

The claimant was employed by Montgomery County Public Schools as a schoolbus driver from October 18, 1979 until March 30, 1987. The claimant was dismissed effective March 30, 1987, because of her arrest on March 20, 1987 near her home with drug paraphernalia and a controlled dangerous substance in her possession. The claimant was terminated because the arrest with personal possession of a controlled dangerous substance violated the employer's explicit rules on drug abuse.

The claimant's trial was set for the third week in October, but the claimant failed to show up. Thus, there is no conviction for the offense as of the date of the hearing.

CONCLUSIONS OF LAW

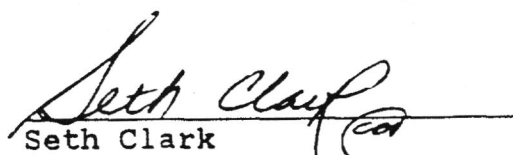
The term "misconduct," as used in the Statute, means a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction from duty, or a course of wrongful conduct committed by an employee within the scope of his employment relationship, during hours of employment or on the employer's premises. It is concluded from the evidence presented at the appeals hearing, that the claimant's behavior does not amount of misconduct within the meaning of Section 6 (c) of the Law, in that, the charges against the claimant are still pending and no decision has as yet been rendered. Until conviction, it cannot be concluded that the claimant was discharged for misconduct within the meaning of Section 6 (c) or 6 (b) of the Law.

DECISION

The claimant was discharged, but not for misconduct connected with the work, within the meaning of Section 6 of the Law.

The determination of the Claims Examiner is affirmed.

The Employer's Protest is denied.


Seth Clark
HEARING EXAMINER

DATE OF HEARING - 10/28/87

cd

6149/Carter

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Claimant
Employer
Unemployment Insurance - Wheaton (MABS)

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850 Hungerford Drive
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