Maryland
Department of Economic & Employment Development

William Donald Schaefer, Governor
J. Randall Evans, Secretary

Board of Appeals
1100 North Eutaw Street
Baltimore, Maryland 21201
Telephone: (301) 333-5032

Board of Appeals
Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

—DECISION—

Decision No; 716-BR-89

Date: August 25, 1989

Claimant: Joann Bailey

Appeal No.: 8900808

S. S. No.:

Employer: Jail Board
c/o Civil Service Comm.
ATTN: Charlie Spinner

L.O. No.: 1

Appellant: EMPLOYER

Issue:

Whether the claimant was discharged for gross misconduct or misconduct, connected with her 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. 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 AT MIDNIGHT ON September 24, 1989

—APPEARANCES—

FOR THE CLAIMANT:

FOR THE EMPLOYER:

REVIEW ON THE RECORD

Upon review of the record in this case, the Board of Appeals reverses the decision of the Hearing Examiner and concludes that the claimant was discharged for gross misconduct, within the meaning of Section 6(b) of the law.

The Board disagrees with several conclusions of the Hearing Examiner. First, the Hearing Examiner's conclusion that because the claimant received "probation before judgment" ("PBJ") for the criminal charge, "the claimant's involvement in any illegal shoplifting and possible possession of any kind of narcotics cannot be considered" is an error of law. While it is true that the PBJ cannot be used as a basis for finding that the claimant committed the alleged act, see, Myers v. State, 303 Md. 639 (1985), other evidence of guilt may be admitted and, if sufficient, a finding of gross misconduct may be supported. See, Gaumnitz v. Social Security Administration, 937-BH-5, see also, Puffenbarger v. MATCOM SCU, 192-BH-86.

The Board concludes that the employer has proven, by a preponderance of the evidence, excluding totally the PBJ, that the claimant did have in her possession a controlled dangerous substance, namely heroin. When asked, on cross-examination, "what type of drug was found on you," the claimant answered, "heroin." She also admitted to having a drug problem, to being currently treated for a drug problem, and she admitted, by inference, that some of her late arrivals at work were due to her drug problem. By her own testimony, therefore, the claimant provided independent evidence of her misconduct.

Second, the Board disagrees with the Hearing Examiner's conclusion that the claimant "was not in a sensitive position" and therefore her off-duty possession of a controlled dangerous substance would not be connected with her work. Whether an employee's off-duty activity is connected with his or her work depends not only on the nature of the activity but also the nature and circumstances of the claimant's job and resulting duty to the employer.

This claimant worked inside the jail. While her job was clerical, the unrefuted evidence is that she worked in an area where she came in contact with many inmates on a regular basis. Drug abuse among inmates is a major concern of the employer. Under these circumstances, the Board concludes that the claimant had a duty to avoid illegal drug use and possession, even while off duty. See Todd V. Threshold, Inc. 302-BH-85 (a security officer monitoring activities of inmates who violated employer rule against use of drugs, even while off duty, was discharged for gross misconduct). See also, Gaumnitz, supra. While the claimant's job functions may have been less inmate-related than those of the claimant in Todd, supra, her daily contact with inmates is sufficient to hold her to the same duty to refrain from using illegal drugs. This is quite different from a case such as Ebb V. Howard County Board of Education, 214-BH-85, where the Board held that a school night shift custodian who never came in contact

with students and who was discharged for being convicted of a violation of state narcotics law, while off duty, was not discharged for misconduct connected with his work.

This conduct by itself, and in conjunction with the claimant's attendance problems, her failure to call the employer on September 23, and her providing of false information, easily meets the definition of gross misconduct, within the meaning of Section 6(b) of the law.

DECISION

The claimant was discharged for gross misconduct, connected with her work, within the meaning of Section 6(b) of the Maryland Unemployment Insurance Law. She is disqualified from receiving benefits from the week beginning September 25, 1988 and until she becomes re-employed, earns at least ten times her weekly benefit amount ($2,050), and thereafter becomes unemployed through no fault of her own.

The decision of the Hearing Examiner is reversed.

Associate Member

Thomas W. Keech
Chairman

HW:K
kbm
COPIES MAILED TO:

CLAIMANT

EMPLOYER

The City Union of Baltimore
ATTN: Sheila Sullivan
111 E. 25th Street, 1st Flr.
Baltimore, MD 21218

UNEMPLOYMENT INSURANCE - BALTIMORE

Maryland
Department of Economic & Employment Development

William Donald Schaefer
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— DECISION —

Mailed: 6/7/89

Joann Bailey

Claimant

Date: 8900808

Decision No.:

S. S. No.:

Jail Board
c/o Personnel Tech

Employer:

1

L.O. No.: Claimant

Appellant

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 OF FURTHER APPEAL —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL 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 6/22/89

— APPEARANCES —

FOR THE CLAIMANT
Claimant-Not Present

FOR THE EMPLOYER
Not Represented

FINDINGS OF FACT

The claimant worked from November 11, 1987 until October 1, 1988, as an Office Assistant in the Baltimore City Jail.

On September 23, 1988, the claimant was charged with shoplifting, resisting arrest and possession of cocaine. She was given probation before judgment in the District Court of Maryland on these charges.

On September 23, 1988, the claimant was scheduled to work and did not call to report that she would not come to work and did not show up for work. She had her sister call the Social Work

Department at 1:57 p.m. on that date. The claimant should have contacted the employer directly.

The claimant was suspended for two days in June 1988 for failing to comply with lateness policies and procedures and making false entry on a sign-in sheet. She reported on June 30, that she returned from lunch at 7:05 p.m., when in fact, she did not return until 7:28 p.m.

The claimant was then terminated under the general provisions of the City of Baltimore for terminating an employee for conduct "unbecoming an employee of the City of Baltimore."

CONCLUSIONS OF LAW

Judgment before verdict on criminal charges is insufficient to find that the claimant acts as was alleged in any subsequent civil proceedings. See Myers v. State 303 Md. 639, 496 Atlantic 2nd 312 (1985).

Therefore, the claimant's involvement in any alleged shoplifting and possible possession of any kind of narcotics cannot be considered in determining whether or not the claimant is eligible for unemployment insurance benefits. The claimant's conduct is not connected with the work in this regard and even if she was Convicted and thus might be considered as gross misconduct. However, this does not have to be decided in this case since there is no allegations of conviction and there is no proof of the charges. In any event, the claimant's alleged offense if it, in fact, did occur, happpened away from the work place and not during working hours and is definitely not connected with the work. The claimant was an Office Assistant and not in direct contact with the prison population, and therefore, her alleged conduct if it occurred would not be connected with the work, in any event and not the basis for a denial under Section 6 of the Maryland Unemployment Insurance Law.

The claimant was not in a sensitive position so that her off duty non-work related criminal offenses, if they occured would not be an impediment to her receipt of unemployment insurance benefits.

However, the claimant was in violation of the employer's attendance policy and therefore, this is an ingredient of misconduct connected with the work, within the meaning of that Section of the Law, of Section 6(c) of the Law. The claimant did not adhere to the attendance policy of the employer and, therefore, was discharged.

She did not call in on September 23, as she should have done and there was false information given about her attendance. This is the sole basis for a finding of misconduct which is disqualifying under Section 6(c) of the Maryland Unemployment Insurance Law.

DECISION

The claimant was discharged for misconduct connected with her work, within the meaning of Section 6(c) of the Maryland Unemployment Insurance Law. Benefits are denied for the week beginning September 25, 1988 and four weeks immediately thereafter.

The employer's protest is sustained.

J. Martin Whitman
Hearing Examiner

Date of hearing: 6/8/89
rc
(2041 & 2042)-Specialist ID: 01036
Copies mailed on 6/7/89 to:

Claimant
Employer
Unemployment Insurance - Baltimore - MABS

Board of Appeals