

-DECISION-

CORRECTED

Claimant:
MICHAEL G CACCAVO

Decision No.: 902-BH-07

Date: May 08, 2007

Appeal No.: 0615992

S.S. No.:

L.O. No.: 64

Appellant: Claimant

Issue: Whether the claimant was discharged for misconduct or gross misconduct connected with the work within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 8-1002 or 1003.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the Maryland Rules of Procedure, Title 7, Chapter 200.

The period for filing an appeal expires: June 07, 2007

- APPEARANCES -

FOR THE CLAIMANT:

Present

Cornelia Bright Gordon, Esquire

Joyce Diggs Legal Aid

FOR THE EMPLOYER:

Not Present

EVALUATION OF THE EVIDENCE

The Board held a hearing for legal argument only on January 23, 2007. The Board considered the credible and competent evidence in the record when rendering this decision. The Board notes that the employer and the agency, duly notified of the date, time and place of the hearings, were not present. The Board finds the claimant's first-hand testimony credible.

The Board is persuaded that the hearing examiner gave undue weight to the Agency records. The hearing examiner additionally did not explain the reasons why the Agency records outweighed the claimant's credible first-hand testimony in the decision. The hearing examiner, over the claimant's objection, entered the Agency file into the record. *Agency Exhibit 1*. The Agency file not only included the claims specialist's determination, but also documents forwarded to the claims specialist by the employer. The Board notes that the employer's documents were not identified or authenticated for the record by a testifying witness. None of the parties were under oath at the claims specialist level. Although the employer documents were forwarded to the claims specialist, in this case it was improper to have the employer exhibits entered as evidence at the *de novo* hearing examiner hearing over the objection of the claimant.

In the case of a discharge, the employer, **not the Agency**, has the burden of proof. *See Hartman v. Polystyrene Products Co., Inc., 164-BH-83*. For the employer to get its documents "in evidence" merely by providing them to the claims specialist for use in future proceedings circumvents the allocation of the burden of proof and the process of having a *de novo* hearing before a hearing examiner. The Agency's claims specialists are not a vehicle by which a party may "make its [subsequent] case" before a hearing examiner and avoid participating in the administrative hearing process. Although a hearing examiner has "...the power to...introduce into the record documentary or other evidence..."¹, he must do so in comport with due process.

In the instant case, the claimant did not have the opportunity to cross-examine any employer witnesses as to the content, authenticity or genuineness of the employer's documents. The claimant properly and timely noted an objection to these documents for these reasons. The hearing examiner did not explain why he admitted all of the documents into evidence or the reasons for overruling the claimant's objection.² The Board finds, without an authenticating witness and in light of the claimant's proper and timely objection, the employer's documents were improperly admitted into the record. The Board, therefore, strikes the portion of the record containing these documents and the related testimony.

¹ See COMAR 09.32.06.02(G).

² The Board notes that the hearing examiner admitted the Agency and employer documents as *Agency Exhibit 1*. The hearing examiner did not formally rule on the objection on the record other than stating, "I understand I can note that objection".

Unlike the employer documents, however, the hearing examiner may take official notice of Agency documents and admit them into the record and consider them when formulating his findings of fact.³ See by analogy, *Md. Code Ann., State Gov't art., § 10-214(1)*. However, due process requires that any party may cite a reasoned objection as to their admission. The hearing examiner must rule on the objection on the record. Although the hearing examiner admitted the claims specialist's determination into the record, he did not explain in his decision why the claims specialist's documents warranted any weight in light of the claimant's testimony and evidence.

If the hearing examiner finds that the Agency records outweigh a party's testimony and evidence, he must explain in his decision the reasoning for his findings otherwise the decision is insufficient. For example, in a recent decision from the Circuit Court for Baltimore City, *McCallum v. K-Mart, 24-C-06-00776*, the court noted, "Section 8-806(g)(3) provides that a Hearing Examiner shall make findings of fact and conclusions of law and on the basis of those affirm, modify, or reverse a determination. It is not clear if the Hearing Examiner was relying in part on the decision of the Claims Examiner in reaching the decision in this case. That should be clarified." The Board agrees.

The Board is persuaded that the preponderance of the credible evidence does not support a finding of misconduct within the meaning of § 8-1003. The employer has not met its burden of proof; therefore, the hearing examiner's decision shall be reversed.

FINDINGS OF FACT

The claimant was employed as a Conventions Services Manager from February 15, 2002 through July 14, 2006. He is unemployed as the result of a discharge.

The claimant was discharged for failing to release a "hold" on a space because he allegedly did not further contact the requesting convention group. There were other co-employees who were also working with the group regarding the requested space. The claimant worked to the best of his abilities and followed company protocol. There was no misconduct.

CONCLUSIONS OF LAW

Section 8-1001 of the Labor and Employment Article provides that individuals shall be disqualified from the receipt of benefits where their unemployment is due to leaving work voluntarily, without good cause arising from or connected with the conditions of employment or actions of the employer or without serious, valid circumstances. A circumstance for voluntarily leaving work is valid if it is a substantial cause that is directly attributable to, arising from, or connected with the conditions of employment or actions of the employing unit or of such necessitous or compelling nature that the individual had no reasonable alternative other than leaving the employment.

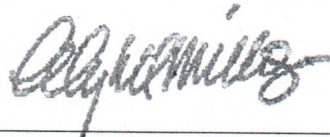
³ The Board, when reading *COMAR 09.32.06.02(E)*, *COMAR 09.32.06.02(G)* and *COMAR 09.32.06.02(I)* in harmony with one another, finds that the hearing examiner may introduce into evidence documents in the Agency file.

The evaluation of the evidence and findings of fact are incorporated herein by reference. The Board finds that based upon a preponderance of the credible evidence, the actions of the claimant do not rise to the level of misconduct within the meaning of § 8-1001. The hearing examiner's decision shall be reversed.

DECISION

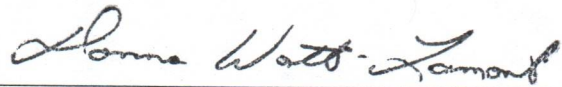
It is held that the claimant was discharged, but not for gross misconduct or misconduct, connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002 or 1003. No disqualification is imposed based upon his separation from employment with HYATT CORP.

The decision of the Hearing Examiner is reversed.



Clayton A. Mitchell, Sr., Associate Member

Francis E. Sliwka, Jr., Associate Member



Donna Watts-Lamont, Chairperson

Date of hearing: January 23, 2007

Copies mailed to:

MICHAEL G. CACCAVO
HYATT CORP
JOYCE DIGGS PARALEGAL
CORNELIA BRIGHT GORDON ESQ.
DONNA WOODS
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MICHAEL G CACCAVO

SSN #

Claimant

vs.

HYATT CORP
TAX DEPARTMENT

Employer/Agency

Before the:

**Maryland Department of Labor,
Licensing and Regulation
Division of Appeals**
1100 North Eutaw Street
Room 511
Baltimore, MD 21201
(410) 767-2421

Appeal Number: 0615992
Appellant: Claimant
Local Office : 64 / BALTOMETRO
CALL CENTER

October 23, 2006

For the Claimant : PRESENT , JOYCE DIGGS

For the Employer :

For the Agency:

ISSUE(S)

Whether the claimant's separation from this employment was for a disqualifying reason within the meaning of the MD. Code Annotated Labor and Employment Article, Title 8, Sections 1002 - 1002.1 (Gross/Aggravated Misconduct connected with the work), 1003 (Misconduct connected with the work) or 1001 (Voluntary Quit for good cause).

FINDINGS OF FACT

The claimant worked for the above captioned employer from February 15, 2002 to July 14, 2006. At the time the claimant was terminated, he/she was employed as a convention services manager, earning \$55,000., 00 per year, in a full-time capacity. The claimant previously worked with this employer from 1986 until 1994.

The claimant was terminated for performance issues related to a significant loss of revenue due to the claimant's negligence. The claimant was suspended for five days from June 28 to July 5, 2006 for sending what was considered to be an inappropriate and unprofessional letter to another manager. (See Agency Exhibit #1) The claimant denies that the letter was inappropriate but agrees that he was frustrated with a

review that he received prior to sending the letter.

The claimant also disputes that he received yearly reviews but agrees that he did receive the termination letter from the employer which was contained in the file. (See Agency Exhibit #1). In that letter the employer references substandard reviews for 2004, 2005 and 2006. The culminating incident which led to the claimant's termination was his failure to contact a client for whom the employer was holding a significant number of rooms under a block reservation. It wasn't until sometime on or about July 10, 2006, that the employer learned that this client was not aware that rooms were being reserved for their function. At that time, the employer was told that there was no need for the blocked rooms and the client should have been contacted regarding this prior to call that the client received from the sales manager on June 20, 2006. (See Agency Exhibit #1). The decision was made to terminate the claimant based upon that failure on the part of the claimant as well as his prior poor performance and suspension.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits where he or she is discharged or suspended from employment because of behavior which demonstrates gross misconduct. The statute defines gross misconduct as conduct that is a deliberate and willful disregard of standards that an employer has a right to expect and that shows a gross indifference to the employer's interests. Employment Sec. Bd. v. LeCates, 218 Md. 202, 145 A.2d 840 (1958); Painter v. Department of Emp. & Training, et al. 68 Md. App. 356, 511 A.2d 585 (1986); Department of Economic and Employment Dev. v. Hager, 96 Md. App. 362, 625 A.2d 342 (1993).

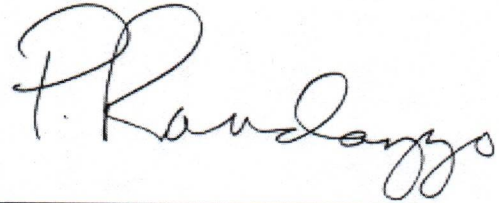
EVALUATION OF EVIDENCE

A claimant, who is terminated, is eligible for benefits unless it is established, by a preponderance of the evidence, that his termination was due to misconduct. In the case at bar, this burden has been met. Even though the employer was not present at the hearing, they provided documents previously to the Agency. These documents were considered in the benefit determination as well as this decision. Based upon these documents and the testimony of the claimant, there appear to be significant performance issues which directly resulted in financial loss on the part of the employer. Therefore, the prior determination will stand because the claimant's conduct was a deliberate and willful disregard of the standards and behavior that the employer had a right to expect.

DECISION

IT IS HELD THAT the claimant was discharged for gross misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002(a)(1)(i). The claimant is disqualified from receiving benefits from the week beginning July 9, 2006 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 20 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is affirmed.



P G Randazzo, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-949-0022 or 1-800-827-4839. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Notice of Right to Petition for Review

Any party may request a review either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A (1) appeals may not be filed by e-mail. Your appeal must be filed by November 08, 2006. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing: October 18, 2006

CH/Specialist ID: RBA28

Seq No: 002

Copies mailed on October 23, 2006 to:

MICHAEL G. CACCAVO

HYATT CORP

LOCAL OFFICE #64

JOYCE DIGGS

HYATT REGENCY BALTO