

- DECISION -

Claimant:	Decision No.:	919-BR-13
GALLEN G FLOYD	Date:	March 29, 2013
	Appeal No.:	1233289
	S.S. No.:	
Employer:	L.O. No.:	65
ANNE ARUNDEL COUNTY GOVERNMENT	Appellant:	Employer

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: April 28, 2013

REVIEW OF THE RECORD

After a review of the record, after deleting the word "alleged" from the first sentence of the second paragraph, and after deleting the last sentence of the last paragraph, the Board adopts the hearing examiner's modified findings of fact. However, the Board concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's decision.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., §8-102(c)*.

Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training*, 309 Md. 28 (1987).

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner, or evidence that the Board may direct to be taken, or may remand any case to a hearing examiner for purposes it may direct. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d)*; *COMAR 09.32.06.04*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

In a discharge case, the employer has the burden of demonstrating that the claimant's actions rise to the level of misconduct, gross misconduct or aggravated misconduct based upon a preponderance of the credible evidence in the record. *Hartman v. Polystyrene Products Co., Inc.*, 164-BH-83; *Ward v. Maryland Permalite, Inc.*, 30-BR-85; *Weimer v. Dept. of Transportation*, 869-BH-87; *Scruggs v. Division of Correction*, 347-BH-89; *Ivey v. Catterton Printing Co.*, 441-BH-89.

As the Court of Appeals explained in *Department of Labor, Licensing and Regulation v. Hider*, 349 Md. 71, 82, 706 A.2d 1073 (1998), "in enacting the unemployment compensation program, the legislature created a graduated, three-tiered system of disqualifications from benefits based on employee misconduct. The severity of the disqualification increases in proportion to the seriousness of the misconduct."

Dept. of Labor, Licensing & Regulation v. Boardley, 164 Md. 404, 408 fn.1 (2005).

Section 8-1002 of the Labor and Employment Article defines gross misconduct as conduct of an employee that is a deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit or repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

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, within the meaning of Section 8-1003 of the Labor and Employment Article. (See, *Rogers v. Radio Shack*, 271 Md. 126, 314 A.2d 113).

Simple misconduct within the meaning of §8-1003 does not require intentional misbehavior. *DLLR v. Hider*, 349 Md. 71 (1998); also see *Johns Hopkins University v. Board of Labor, Licensing and Regulation*, 134 Md. App. 653, 662-63 (2000)(psychiatric condition which prevented claimant from conforming his/her conduct to accepted norms did not except that conduct from the category of misconduct under §8-1003). Misconduct must be connected with the work; the mere fact that misconduct adversely affects the employer's interests is not enough. *Fino v. Maryland Emp. Sec. Bd.*, 218 Md. 504 (1959). Although not sufficient in itself, a breach of duty to an employer is an essential element to make an act connected with the work. *Empl. Sec. Bd. v. LeCates*, 218 Md. 202 (1958). Misconduct, however, need not occur during the hours of employment or the employer's premises. *Id.*

Without sufficient evidence of a willful and wanton disregard of an employee's obligations or gross indifference to the employer's interests, there can be no finding of gross misconduct. *Lehman v. Baker Protective Services, Inc.*, 221-BR-89. Where a showing of gross misconduct is based on a single action, the employer must show the employee demonstrated gross indifference to the employer's interests. *DLLR v. Muddiman*, 120 Md. App. 725, 737 (1998).

In determining whether an employee has committed gross misconduct, "[t]he important element to be considered is the nature of the misconduct and how seriously it affects the claimant's employment or the employer's rights." *Dept. of Econ. & Empl. Dev. v. Jones*, 79 Md. App. 531, 536 (1989). "It is also proper to note that what is 'deliberate and willful misconduct' will vary with each particular case. Here we 'are not looking simply for substandard conduct...but for a willful or wanton state of mind accompanying the engaging in substandard conduct.'" *Employment Sec. Bd. v. LeCates*, 218 Md. 202, 207 (1958)(internal citation omitted); also see *Hernandez v. DLLR*, 122 Md. App. 19, 25 (1998).

Aggravated misconduct is an amplification of gross misconduct where the claimant engages in "behavior committed with actual malice and deliberate disregard for the property, safety or life of others that...affects the employer, fellow employees, subcontractors, invitees of the employer, members of the public, or the ultimate consumer of the employer's products or services...and consists of either a physical assault or property loss so serious that the penalties of misconduct or gross misconduct are not sufficient."

In the employer's appeal, its representative contends:

The employer provided overwhelming evidence in the form of documentation to clearly show the he [sic] claimant and another employee were engaged in activity of removing manhole covers and additional scrap and taking them to a scrap metal company and obtain [sic] remuneration for same...the employer believes the conduct demonstrated a gross indifference to the employer's best interest.

The Board agrees with the contentions of the employer's representative.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the record, or a failure of due process. The record is complete. Both parties appeared and testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing or take additional evidence in this matter.

The Board has thoroughly reviewed the record from the hearing. The Board finds, contrary to the hearing examiner's conclusion, that the employer's evidence was sufficient to support a finding of gross misconduct.

The employer presented documentary evidence, from independent third parties, neither of which had any interest in the outcome of this matter, that the claimant sold manhole covers on several occasions. The claimant would have had no reason to personally possess manhole covers. Certainly the claimant had the right to engage in the recovery and sale of various items of scrap metal, on his own time. But, that did not include the sale of scrap metal belonging to the employer.

The scrap metal dealer had purchased many things from the claimant in the past. The police detective learned that the dealer was unaware a customer would have to provide a letter of authorization before the customer could sell certain types of property. It was interesting, and informative that neither the claimant, nor the other employee involved sold a manhole cover after the scrap dealer learned of the authorization requirement. More important, the scrap metal dealer was not a party to this proceeding and had no interest in the outcome. The scrap metal dealer's records were his business records, maintained for a purpose other than unemployment benefits hearings. The dealer had no reason to have used or included inaccurate information in the reports of sales to the claimant. Likewise, the police detective had no reason to not rely upon the content and authenticity of those reports.

Similarly, the detailed report of the police detective was a collection and summarization of information obtained for a purpose unrelated to the claimant's unemployment insurance claim. The detective was investigating a criminal matter. The detective had no interest or stake in the outcome of the claimant's hearing. The detective must be able to substantiate the content of his report in the event a court proceeding results from his investigation. The detective's report was inherently reliable and an important piece of evidence.

The hearing examiner mistakenly discounted the employer's evidence as hearsay. Clearly, it was hearsay. It was, however, very reliable hearsay and should have been given substantially more evidentiary weight. The purpose of the rules regarding hearsay is to allow the fact-finder to test the accuracy, reliability and potential bias of a declarant who is not present to be cross-examined. Documentary evidence prepared by an uninterested and uninvolved third party is inherently reliable and lacks bias. Both types of documentary evidence in this matter were also worthy of being deemed accurate as both were prepared or maintain for other legal purposes.

The Board has given the documentary evidence significantly more weight than the hearing examiner. Based upon that, the Board finds that the employer had provided sufficient evidence to meet its burden of proof in this matter. The greater weight of the evidence, the claimant's denials notwithstanding, established that the claimant took property which he knew belonged to his employer and sold that property for his own personal gain. This is theft and theft is gross misconduct.

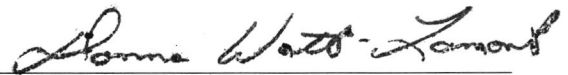
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the employer met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of §8-1002. The decision shall be reversed for the reasons stated herein and in the hearing examiner's decision.


DECISION

It is held that the claimant was discharged for gross misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002. The claimant is disqualified from receiving benefits from the week beginning July 15, 2012, and until the claimant becomes re-employed, earns at least twenty five times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

KJK/mw

Copies mailed to:

GALLEN G. FLOYD

ANNE ARUNDEL COUNTY GOVERNMENT

KEVIN M. TABE ESQ.

JAMES A. STULLER

ANNE ARUNDEL COUNTY GOVERNMENT

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

GALLEN G FLOYD

SSN #

Claimant

vs.

ANNE ARUNDEL COUNTY GOVERNMENT

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: 1233289

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

October 23, 2012

For the Claimant: PRESENT, KEVIN M. TABE, ESQ.

For the Employer: PRESENT, JAMES A. STULLER, MARK TYLER

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, Gallen G Floyd, began working for this employer, Anne Arundel County Government, on September 15, 1988, and his last day worked was July 18, 2012. At the time of his discharge, the claimant worked full-time as a mechanical technician II.

The claimant was discharged for alleged theft of county property and funds. The county has been in the process of changing the county's iron manhole covers and replacing them with plastic covers. The iron manholes were collected and transferred to a facility in Glen Burnie, MD. The manhole covers were placed in a scrap metal dumpster along with other county property. The manhole covers were then sold to a scrap metal company and the proceeds from those sales went back into the county coffers. On October 10, 2011,

the county had transported 100-150 manhole covers to the Glen Burnie location. On October 24, 2011, a metal basket full of manhole covers was observed sitting outside the scrap metal dumpster. On October 28, 2011, the county received a phone call from a detective with the Anne Arundel police department who asked whether the claimant and another employee were employees of the county because their names had appeared in the Regional Automated Property Information Database (RAPID) as having sold manhole covers for scrap. The transactions appeared as having taken place on October 27, 2011. The county went back to the facility on October 28, 2011 and confirmed that the basket of manhole covers was no longer there. Generally, manhole covers can belong to a county or other governmental or private entity.

At that point, the county opened an internal investigation of its own into the matter. However, the personnel matter was placed on hold while the criminal investigation was ongoing. No criminal charges were ever brought against the claimant for the alleged theft. The detective investigating the matter provided to the employer a copy of his investigative report original dated December 18, 2011 and later dated April 16, 2012. In the report, it is noted that the claimant denied the allegations against him and that there was no video surveillance footage or independent witnesses (with the exception of the other employee accused of theft of this same property) who observed the claimant removing the manholes from the Glen Burnie facility and selling them for scrap at the scrap metal company. The claimant has sold scrap metal at this same company and his information, including his driver's license information, is in the company's database. The claimant did not steal county property or funds.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1003 provides for a disqualification from benefits where the claimant is discharged or suspended as a disciplinary measure for misconduct connected with the work. The term "misconduct" is undefined in the statute but has been defined as "...a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction of 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." [Rogers v. Radio Shack, 271 Md. 126, 132 (1974)].

In Leitzel v. Select Temporary Services, 493-BR-90, the Board of Appeals held "The claimant's employment ended due to a lack of work or other reason not related to the claimant's misconduct and no disqualification was imposed."

In Todd v. Harkless Construction, Inc., 714-BR-89, the Board of Appeals held "A mere showing of substandard performance is not sufficient to prove gross misconduct or misconduct."

In Scruggs v. Division of Correction, 347-BH-89, the Board of Appeals held "The claimant correctional officer was discharged because three female inmates alleged the claimant had sexual relations with each of them. The three inmates did not testify at the hearing. The employer's witnesses had no personal knowledge about the alleged misconduct. The claimant denied having sexual relationships with these inmates. There was insufficient evidence to sustain a finding of misconduct or gross misconduct."

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, the claimant's

termination was for conduct which rose to the level of misconduct or gross misconduct, pursuant to the Maryland Unemployment Insurance Law. (See Hartman v. Polystyrene Products Company, Inc., 164-BH-83). In the case at bar, the employer did not meet this burden.

In this case, the employer learned of the alleged theft after being contacted by a detective from the Anne Arundel police department. Based on the information provided by this officer, and the investigative report provided by him to the employer, the employer concluded that the claimant had engaged in illegal activity. The employer based its decision on the findings of the detective in question, and the receipts provided to the police by the scrap metal company. There is no video surveillance footage or other witnesses to establish that the claimant stole the property of the county and sold it for scrap. The records evidencing the claimant's access to the Glen Burnie facility on the days in question also reveal that other employees had access to the facility. The receipts provided by the scrap metal company do not indicate that the property for which it allegedly paid the claimant was in any way labeled as the property of the county. At all times during the hearing, the claimant denied stealing and selling county property. The claimant's testimony in this respect is more direct and reliable than the hearsay statements of a detective who was not present at the hearing and whose findings are based on his summary of interviews of individuals not present to testify at the hearing, and documents that fail to identify the property sold by the claimant as county property. In the absence of sufficient evidence to establish, by a preponderance of the credible evidence, an actual link between the theft of the county's property and the subsequent sale of manhole or other scrap to a scrap metal company by the claimant, a finding of misconduct cannot be established.

Accordingly, the employer failed to meet its burden in this case and the claimant's discharge was for non-disqualifying reasons. Benefits are, therefore, allowed.

DECISION

IT IS HELD the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002 or 8-1003. No disqualification is imposed based upon the claimant's separation from employment with this employer Anne Arundel County Government. The claimant will then be eligible for benefits so long as all other eligibility requirements are met. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at ui@dllr.state.md.us or call 410-949-0022 from the Baltimore region, or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at 410-767-2727, or outside the Baltimore area at 1-800-827-4400.

The determination of the Claims Specialist is reversed.

V. Nunez

V. Nunez, 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 410-767-2404. 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.

Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.

Notice of Right of Further Appeal

Any party may request a further appeal 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 07, 2012. 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
Phone 410-767-2781

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

Date of hearing: October 15, 2012
DW/Specialist ID: USB12
Seq No: 001
Copies mailed on October 23, 2012 to:
GALLEN G. FLOYD
ANNE ARUNDEL COUNTY GOVERNMENT
LOCAL OFFICE #65
KEVIN M. TABE ESQ.
JAMES A. STULLER
ANNE ARUNDEL COUNTY GOVERNMENT