-DECISION-

Claimant:
NANCY L KLETT

Decision No.: 5999-BR-12

Date: December 26, 2012

Appeal No.: 1215821

S.S. No.:

Employer:
SIGMA PHARMACEUTICALS INC
SUITE 500

L.O. No.: 65

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: January 25, 2013

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact and conclusions of law.

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).*

A threshold issue in this case is whether the claimant voluntarily quit or whether the claimant was discharged. For the following reasons, the Board affirms the hearing examiner's decision that the claimant was discharged.

The burden of proof in this case is allocated according to whether the claimant voluntarily quit or whether the employer discharged the claimant. 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.*

When a claimant voluntarily leaves work, he has the burden of proving that he left for good cause or valid circumstances based upon a preponderance of the credible evidence in the record. *Hargrove v. City of Baltimore, 2033-BH-83; Chisholm v. Johns Hopkins Hospital, 66-BR-89.* Purely personal reasons, no matter how compelling, cannot constitute good cause as a matter of law. *Bd. Of Educ. Of Montgomery County v. Paynter, 303 Md. 22 (1985).* An objective standard is used to determine if the average employee would have left work in that situation; in addition, a determination is made as to whether a particular employee left in good faith, and an element of good faith is whether the claimant has exhausted all reasonable alternatives before leaving work. *Board of Educ. v. Paynter, 303 Md. 22 (1985); also see Bohrer v. Sheetz, Inc., Law No. 13361, (Cir. Ct. for Washington Co., Apr. 24, 1984).* The "necessitous or compelling" requirement relating to a cause for leaving work voluntarily does not apply to "good cause". *Board of Educ. v. Paynter, 303 Md. 22 (1985).* A resignation in lieu of discharge is a discharge under *§§ 8-1002, 8-1002.1,* and *8-1003. Miller v. William T. Burnette and Company, Inc., 442-BR-82.*

The intent to discharge or the intent to voluntarily quit can be manifested by words or actions. "Due to leaving work voluntarily" has a plain, definite and sensible meaning, free of ambiguity. It expresses a clear legislative intent that to disqualify a claimant from benefits, the evidence must establish that the claimant, by his or her own choice, intentionally and of his or her own free will, terminated the employment. *Allen v. Core Target Youth Program, 275 Md. 69 (1975).* A claimant's intent or state of mind is a factual issue for the Board of Appeals to resolve. *Dept. of Econ. & Empl. Dev. v. Taylor, 108 Md. 250(1996), aff'd sub. nom., 344 Md. 687 (1997).* An intent to quit one's job can be manifested by actions as well as words. *Lawson v. Security Fence Supply Company, 1101-BH-82.* A resignation submitted in response to charges which *might* lead to discharge is a voluntary quit. *Hickman v. Crown Central Petroleum Corp., 973-BR-88; Brewington v. Dept. of Social Services, 1500-BH-82; Roffe v. South Carolina Wateroe River Correction Institute, 576-BR-88* (where a claimant quit because he feared a discharge was imminent, but he had not been informed that he was discharged is without good cause or

valid circumstances); *also see Cofield v. Apex Grounds Management, Inc., 309-BR-91.* When a claimant receives a medical leave of absence but is still believes she is unable to return upon the expiration of that leave and expresses that she will not return to work for an undefinable period, the claimant is held to have voluntarily quit. *See Sortino v. Western Auto Supply, 896-BR-83.*

The intent to discharge can be manifested by actions as well as words. The issue is whether the reasonable person in the position of the claimant believed in good faith that he was discharged. *See Dei Svaldi v. Martin Taubenfeld, D.D.S., P.A., 1074-BR-88* (the claimant was discharged after a telephone conversation during which she stated her anger at the employer and the employer stated to her, "If that's the way you feel, then you might as well not come in anymore." The claimant's reply of "Fine" does not make it a quit). *Compare, Lawson v. Security Fence Supply Company, 1101-BH-82.* A quit in lieu of discharge is a discharge for unemployment insurance purposes. *Tressler v. Anchor Motor Freight, 105-BR-83.*

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."

The Board found in *Gasch v. AFS, Inc., 3-BR-87* that under the terms of the sale of the business, the claimant had no choice but to leave if he failed to meet certain conditions to purchase the business, and the employer wanted him to leave, the claimant's departure is a discharge, but not for misconduct.

Where a claimant was told that a new person was replacing her in her supervisory position and that the claimant would "have other things to do", she was discharged from her supervisory position. The claimant lacked the requisite "intent" to have voluntarily quit her supervisory position. Accordingly, the claimant was discharged, but not for gross misconduct or misconduct connected with the work. *Mettle v. Pikesville Nursing-Conva House of Baltimore County, Inc., 853-BR-01.*

In *Tenney v. Andrews Food Company, Inc., 153-BR-89,* the claimant was employed pursuant to a written, five-year contract. As the contract came to an end, neither the claimant nor the employer discussed extending the contract. The claimant correctly believed that the employer did not want him in the position anymore, although the employer did not communicate this to the claimant. If the claimant had asked to continue his job, his request would have been denied. Therefore, the claimant did not quit. He was discharged, but not for misconduct or gross misconduct connected with the work.

In the instant case, the employer argues that the claimant was not discharged, but instead voluntarily resigned her position when her contract was not renewed under its current terms.

The claimant was employed pursuant to a contract that was set to expire on February 29, 2012. The claimant offered the employer the opportunity to extend the contract, as written *(Claimant Exhibit 5)*. The employer counter offered with an extension agreement that materially altered the claimant's original contract terms. The claimant was to receive a substantial bonus on February 29, 2012. The employer's proposed contract extension agreement voided the bonus component of the claimant's original contract. *(Claimant Exhibit 6)*. The claimant was to either accept this counter-offer by executing the extension agreement or by reporting to work on March 1, 2012. The claimant declined to execute this contract and did not report to work on March 1, 2012.

The Board has consistently held that the evidence must establish that the claimant, by his or her own choice, intentionally and of his or her own free will, terminated the employment. *Allen v. Core Target Youth Program, 275 Md. 69 (1975)*. A claimant's intent or state of mind is a factual issue for the Board of Appeals to resolve. *Dept. of Econ. & Empl. Dev. v. Taylor, 108 Md. 250(1996), aff'd sub. nom., 344 Md. 687 (1997)*. An intent to quit one's job can be manifested by actions as well as words. *Lawson v. Security Fence Supply Company, 1101-BH-82.*

In the instant case, the claimant's intent is clear—she was willing to continue her employment under the current terms of her written contract, which included the payment of her bonus payable on February 29, 2012. The claimant did not manifest an intension to voluntary resign her position. The employer's intent in its counter offer to claimant's extension was to discharge the claimant if she did not agree to the new radically modified contract terms. Thus, the Board concurs with the hearing examiner that the claimant was discharged. The employer offered no evidence to show that the claimant's discharge was due to misconduct connected with the work.[1]

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 has not met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct or misconduct within the meaning of *§§8-1002* or *8-1003*. The decision shall be affirmed for the reasons stated herein and in the hearing examiner's decision.

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[1] Even ***if*** [emphasis added] the Board found that the claimant manifested an intent to voluntarily quit employment, the Board's precedent conclusively shows that it would be for good cause. The obligations of the employment contract are reciprocal. While the employee has the obligation to work diligently and in good faith for the employer, the employer has an obligation to pay the remuneration agreed upon in a timely manner. *Quina v. Marlo Furniture Company, Inc., 1121-BR-92*; *Kimmell v. Dennis J. Smith, et.al., 2065-BR-92*. The failure to pay wages correctly and on time may constitute good cause for quitting one's employment. *Quina v. Marlo Furniture Company, Inc., 1121-BR-92*; *Kimmell v. Dennis J. Smith, et.al., 2065-BR-92.*

Changes in the method or amount of payment may constitute good cause. *See Butka v. John Ferguson Company, 225-BR-89*; *Smith v. James Hondroulis, 1687-BR-92*. If wages are not paid correctly and on time, the damage to the claimant has already been done. *Kimmell v. Dennis J. Smith, et.al., 2065-BR-92.*

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 the claimant's separation from employment with SIGMA PHARMACEUTICALS, INC.

The Hearing Examiner's decision is affirmed.

Clayton A. Mitchell, Sr., Associate Member

Donna Watts-Lamont, Chairperson

RD/mr
Copies mailed to:
NANCY L. KLETT
SIGMA PHARMACEUTICALS INC
WILLIAM MANDYCZ ESQ.
JAMES P. HEAD ESQ.
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

NANCY L KLETT

SSN #

Claimant

vs.

SIGMA PHARMACEUTICALS INC

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: 1215821
Appellant: Claimant
Local Office : 65 / SALISBURY CLAIM CENTER

June 18, 2012

For the Claimant: PRESENT, WILLIAM MANDYCZ, ESQ.

For the Employer: PRESENT, JAMES P. HEAD, ESQ., DAVID SANDOVAL

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 1001 (Voluntary Quit for good cause), 1002 - 1002.1 (Gross/Aggravated Misconduct connected with the work), or 1003 (Misconduct connected with the work).

FINDINGS OF FACT

The claimant, Nancy Klett, filed a claim for benefits establishing a benefit year beginning March 4, 2012.

The claimant began working for the employer, Sigma-Tau Pharmaceuticals, Inc., on or about November 1, 2006. At the time of separation, the claimant was employed as a Senior Director of Human Resources, earning an annual salary of $175,000, plus deferred and applicable bonus compensation. The claimant last worked for the employer on or about February 29, 2012.

In early 2008, the employer's Board of Directors adopted a Long-Term Bonus Plan ("LTBP") for the benefit of certain members of senior management. (Clmt. Exh. #1) The LTBP provided for a cash bonus, based upon the growth in the company's market value, and payable on or before February 29, 2012 (i.e., within 60 days of the Plan's termination as defined therein).

On or about September 8, 2011, the claimant and employer entered into an Employment Agreement to continue the claimant's employment for the term of January 1 – December 31, 2011. (Clmt. Exh. #2) This Agreement provided, in pertinent part (Paragraph 3), for the claimant's participation in the LTBP, payable in full no later than February 29, 2012, subject to an accurate LTBP calculation and the claimant remaining employed through December 31, 2011.

On or about December 15, 2011, the claimant and employer entered into an agreement extending the terms of the Employment Agreement through February 29, 2012 and affirming, inter alia, that "nothing in [the extension agreement was] intended to affect the provisions of Paragraph 3 of the Employment Agreement." The claimant executed this Extension Agreement (Clmt. Exh. #3), as a "courtesy" to the employer, in anticipation of the completion of the company valuation for calculation of the LTBP bonus, and in expectation of the bonus (the claimant's share of which was projected to be in the vicinity of $4,000,000) being paid on or before February 29. In or around late January 2012, the claimant (and other similarly-affected members of senior management) was informed by employer's counsel that the LTBP was considered to be "null, void, and unenforceable." (Clmt. Exh. 4) The employer had concerns regarding the valuation component (Empl. Exh. 1), particularly with regard to information that may have been supplied to Price-Waterhouse-Coopers by members of the senior management team. The management team was subsequently advised that a special committee of the Board of Directors was reviewing the company's obligations under the original LTBP. Following the employer's rejection of the claimant's proposal (Clmt. Exh. 5) to further extend the Employment Agreement - with the effect of Paragraph 3 remaining intact - the company counter-offered a second extension of the Employment Agreement (through April 15, 2012) which no longer recognized the effect of Paragraph 3, and memorialized that no payment would be made under the LTBP by March 1. (Clmt. Exh. #6) The claimant was asked to indicate her acceptance via execution, or by reporting to work on March 1. The claimant declined to sign the extension offer and did not report to work following the expiration of the Extension Agreement. On or about March 2, 2012, the employer's president, Trevor Jones, "accepted" the claimant's "voluntary resignation." (Empl. Exh. 3)

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).

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

The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the Facts on the credible evidence as determined by the Hearing Examiner.

Notwithstanding the employer's characterization of the claimant's rejection of the proposed second extension of her employment agreement as a "voluntary resignation," the phrase "leaving work voluntarily" has a plain, definite, and sensible meaning, free of ambiguity. It expresses a clear legislative intent that to disqualify a claimant from benefits, the evidence must establish that the claimant, by his own choice, intentionally, of his own free will, terminated the employment. Allen v. CORE Target City Youth Program, 275 Md. 69, 338 A.2d 237 (1975). It was virtually uncontroverted that the claimant fulfilled the terms and conditions of her employment agreement, through and including its expiration as of February 29, 2012. Moreover, the evidence established that the proposed second extension envisioned a material change in the employer's obligations under the current employment agreement. Even assuming, *aguendo*, that the employer was acting in good faith, and that any modification of the agreement may not have ultimately inured to the claimant's detriment, the fact that the parties could not agree on the terms and conditions of another extension thereof does not constitute a voluntary resignation on the claimant's part. The employment agreement between the parties expired, thus effectively and correspondingly ending the employment relationship. Continuing work was not available absent any renewal or extension, by mutual assent of the parties. Accordingly, the claimant's separation must be considered as a discharge for the purpose of applying Maryland Unemployment Insurance Law. As such, the employer has the burden to show, by a preponderance of the credible evidence, that the claimant was discharged for some degree of misconduct connected with the work. Ivey v. Catterton Printing Company, 441-BH-89. The only implication of any wrongful action on the claimant's part was a suggestion that she and other members of senior management may have provided "misleading" information to the third-party firm hired to perform the company valuation. This testimony was, however, not offered to establish misconduct (as the basis of the separation) – but, rather, in purported explanation of the employer's decision to reassess the legality and/or enforceability of the LTBP. Accordingly, it lacks probative value in terms of a determination as to whether the employer has met its evidentiary burden (as defined hereinabove). Similarly non-dispositive of the issue would be the parties' reciprocal allegations of lack of candor and/or good faith, as well as evidence regarding whether the company intended, or ultimately intends, to honor the terms of the LTBP.

In sum, it must be determined that the claimant's separation was essentially the result of a lack of work The claimant could not report on March 1st, without accepting the materially modified terms put forth by the employer governing her further employment. There being insufficient reliable evidence of misconduct under the applicable provisions of Maryland Unemployment Insurance Law, a disqualification, therefore, is not warranted.

DECISION

IT IS HELD THAT the claimant was discharged, but not for misconduct connected with the work within

the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. No disqualification is imposed based upon the claimant's separation from employment with the above-identified employer. The claimant is 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.

E B Steinberg, 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 July 3, 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: May 30, 2012
DAH/Specialist ID: USB5E
Seq No: 001
Copies mailed on June 18, 2012 to:
NANCY L. KLETT
SIGMA PHARMACEUTICALS INC
LOCAL OFFICE #65
WILLIAM MANDYCZ ESQ.
JAMES P. HEAD ESQ.