

-DECISION-

Claimant:
JAY SCHAEFER

Decision No.: 898-BH-06

Date: April 25, 2006

Appeal No.: 0522754

Employer:
NSA - OGC

S.S. No.:

L.O. No.: 63

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: May 25, 2006

- APPEARANCES -

FOR THE CLAIMANT:
Present
Dennis Sysko-Esq.

FOR THE EMPLOYER:
Renee Frank-Esq.

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

The Board held a hearing for legal argument only on March 14, 2006. After consideration of the well-prepared arguments by both counsel, and after a review on the record, the Board is persuaded that the claimant was discharged for gross misconduct within the meaning of Section 8-1002 based upon a preponderance of the credible evidence in the record.

The material facts of this case are not in dispute. The Board finds that the employer is not required to prove that the claimant committed a crime in order to establish gross misconduct in this case. The employer certainly does not have the burden of proving the elements of a crime "beyond a reasonable doubt" but only simple or gross misconduct within the meaning of Section 8-1002 or Section 8-1003 upon a preponderance of the credible evidence in the record.

The Board noted that the claimant volunteered the information regarding his sexual misconduct when he requested a transfer with the employer. The Board also noted that the claimant had an exemplary service record and was otherwise a good employee. Had the claimant committed only a single act of sexual misconduct upon a minor some two decades ago, the Board may have found the event as too remote in the time and may have found that youth and inexperience was a factor. However, the Board cannot overlook the fact that the claimant was employed by the National Security Agency (NSA) at the time of the sexual misconduct and was aware of his duties and obligations to secure his security clearance.

The Board notes that there were repeated sexual incident and that the victim was a minor. The claimant knew or should have known at the time of the permanent ramifications and wrongfulness of his repeated acts at the time of each of the occurrences. The claimant owed a duty to his employer to refrain from such conduct, whether on or off duty. The claimant, as the holder of a security clearance, and because of the nature of the employer's business, is held to a higher standard than a "regular" employee. The Board is persuaded that the claimant had a continuing duty to refrain from committing statutory violations which show moral turpitude. The claimant breached his duty in this regard. *See, e.g., Johnson v. Baltimore City Police Department, 952-BH-83; Handy v. Baltimore City Police Department, 1059-BH-90; Skelton v. Maryland House of corrections, 111-BR-84.*

The Board is convinced that the NSA was within its rights to summarily discharge the claimant within the Executive Branch's discretionary powers. *Dept. of the Navy v. Egan, 484-U.S. 518 (1988)*. The Board finds that, in light of Egan, supra, the claimant was afforded adequate due process prior to his discharge.

FINDINGS OF FACT

The claimant was employed as a full time employee from August 30, 1982 through September 19, 2005. He is unemployed as the result of a discharge.

The claimant possessed a top secret security clearance. The NSA is the government agency vested with the responsibilities and duties related to national security. In 2004 the claimant applied for a transfer from Fort Meade to the Pentagon. The employer performed a required background check during the course of the transfer approval process.

The claimant voluntarily admitted during the background check that during his employment with the NSA in the mid-1980's he had repeated sexual contact with a 16 year-old male. At the time of these incidents the claimant was over the age of 21. The Board takes judicial notice that repeated sexual acts performed on a minor by an adult over the age of 21 is a crime. The claimant was suspended and placed on administrative leave on September 19, 2005 pending an investigation.

As a result of the information provided by the claimant and after investigation, the claimant was discharged. His last day of work was September 19, 2005.

CONCLUSIONS OF LAW

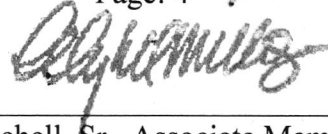
Section 8-1002 of the Labor and Employment Article defines gross misconduct as conduct of an employee that is a deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit or repeated violations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

The evaluation of the evidence and findings of fact are incorporated herein by reference. The Board finds based upon a preponderance of the credible evidence in the record, that the claimant was discharged for gross misconduct within the meaning of Section 8-1002. The hearing examiner's decision shall be reversed.

DECISION

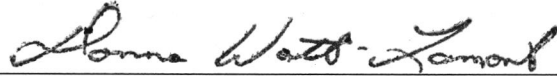
It is held that the claimant was discharged for gross misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002. He is disqualified from receiving benefits from the week beginning September 18, 2005 and until he becomes re-employed, earns at least twenty times his weekly benefit amount and thereafter becomes unemployed through no fault of his own.

The decision of the Hearing Examiner is reversed.



Clayton A. Mitchell, Sr., Associate Member

Francis E. Sliwka, Jr., Associate Member



Donna Watts-Lamont, Associate Member

Date of hearing: March 14, 2006

Copies mailed to:

JAY SCHAEFER

NSA - OGC

DENNIS J. SYSKO ESQ.

RENEE M. FRANK ESQ.

Michael Taylor, Agency Representative

UNEMPLOYMENT INSURANCE APPEALS DECISION

JAY SCHAEFER

SSN #

Claimant

vs.

NATIONAL SECURITY AGENCY

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: 0522754

Appellant: Employer

Local Office : 63 / CUMBERLAND
CLAIM CENTER

January 03, 2006

For the Claimant: PRESENT, DENNIS J. SYSKO, ATTORNEY

For the Employer: PRESENT, KELLY WILSON, RENEE FRANK, ESQ.

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 8-1001 (voluntary quit for good cause), 8-1002 - 1002.1 (gross/aggravated misconduct connected with the work) or 8-1003 (misconduct connected with the work).

FINDINGS OF FACT

The claimant began working for the employer during 1982 in a secured position that required the claimant to possess a top secret security clearance. In order to retain that top secret security clearance, the claimant was prohibited from committing a criminal act.

In 2004, when the claimant applied for a transfer (from his Fort Meade location to the Pentagon), the claimant was required to submit to another background investigation. During the course of that investigation, the claimant admitted to having committed sexual acts (it is unclear whether he committed three or six of them) with a 16-year-old boy approximately 20 years prior, at a time when the claimant was in his late 20's or early 30's. Believing the claimant's actions to constitute criminal conduct, and thus rendering the claimant a security risk, the claimant was found to have violated the terms of his employment, his security clearance was revoked, and he was terminated.

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

Counsel for the claimant sought to raise numerous legal issues concerning whether the claimant's separation from this employment should be disqualifying within the meaning of Maryland Unemployment Insurance Law. The Hearing Examiner, finds that he need not resolve most of those issues, however, because the Hearing Examiner finds as a fact that the employer failed to adequately prove that the claimant had committed a criminal act in Maryland during the early 1980's (the time when the claimant's offending conduct occurred).

Not only has the employer failed to adequately prove that the claimant committed a crime in the early 1980's (the time when the alleged behavior occurred), even under the laws as they currently exist it has not been proven that the claimant committed a crime. Moreover, even had the employer been able to prove that the claimant committed a crime under present law or under the law as it existed in the mid 1980's, the employer has failed, as a matter of factual proof, to identify which specific statute the claimant is alleged to have violated and upon which the claimant's termination is based.

Merely by way of example, the Hearing Examiner attempted to determine whether the claimant's alleged behavior violated current law. The closest statutes that the Hearing Examiner found was in the Annotated Code of Maryland, Criminal Law Article, Section 3-308, which prohibits a sexual act with another if the victim is 14 or 15 years old and the person performing the sexual act is at least 4 years older than the victim (which would not be applicable in the current case because the alleged victim was proved to be 16 years old), and Section 3-321, which prohibits acts of sodomy (which would not be applicable in the present case because, as testified to by the employer, the basis for the claimant's termination was not the fact that the claimant committed sodomy but that he engaged in a sexual act with a minor).

That is to say, the employer has failed to factually prove that the claimant committed a crime. Absent that factual proof, the employer has failed to carry its burden of proving that the claimant's actions show

misconduct in connection with his work within the meaning of Section 8-1003. No disqualification is therefore imposed based upon his separation from this employment.

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 National Security Agency. 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 affirmed.

D Sandhaus, 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 the overpayment within 30 days from the date the overpayment is established. 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 January 18, 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: December 13, 2005

DA/Specialist ID: WCU3P

Seq No: 001

Copies mailed on January 03, 2006 to:

JAY SCHAEFER
NATIONAL SECURITY AGENCY
LOCAL OFFICE #63
DENNIS J. SYSKO ATTORNEY
RENEE FRANK. ESQ.