DEPARTMENT OF EMPLOYMENT AND TRAINING

STATE MARYLAND
HA UGHES
nor

BOARD OF APPEALS
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

(301) 383-5032

— DECISION —

Decision No.: 937-BH-85

Date: October 18, 198.5

Claimant: Glen Gaumnitz

Appeal No.: 13930

S. S. No.:

Employer: Social Security Admin.
c/o Ms . Ginger Ensor

L.O. No.: 45

Appellant: CLAIMANT

Issue:

Whether the claimant was discharged for gross misconduct or misconduct, connected with his work, within the meaning of §§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 TAKE IN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF 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 November 17, 1985

— APPEARANCES —

FOR THE CLAIMANT:
Charles Lee Nutt, Esq.

FOR THE EMPLOYER:
Ginger Ensor,
Agency Rep.

EVALUATION OF EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Employment and Training's documents in the appeal file. The second hearing was legal argument only.

FINDINGS OF FACT

The claimant was employed from 1973 until October 23, 1984 for the employer, the Social Security Administration. He was discharged on the latter date.

The claimant was an Employee Relations Specialist. As part of his duties, the claimant counseled employees of the Social Security Administration concerning problems that they had. Part of this assignment included the counseling of employees who had drug and alcohol problems.

In February of 1984, after a return flight from Jamaica, the claimant was arrested for attempting to smuggle through customs a small quantity of marijuana. He was charged with conspiracy to bring a large amount (fourteen pounds) of marijuana into the country, but as a result of a plea bargain, the claimant entered a guilty plea to the charge of possession of a controlled dangerous substance only. As a result of his plea and his later testimony, the claimant was placed on probation under Art. 27, §292 of the Maryland Code. (This provision states that the plea for a finding of guilty in a §292 conviction may not be used against the defendant in a civil proceeding after the completion of the probationary period.)

The employer discharged the claimant because of the conviction and because the claimant admitted smuggling at least a small amount of marijuana into the country and admitted using marijuana for ten years. The stated reason for dismissal was essentially conduct which would bring the Social Security Administration into disrepute and which would lesser. the credibility of the counseling program for which the claimant was employed.

CONCLUSIONS OF LAW

The claimant's attorney argued that, even though the claimant's probation is not yet successfully completed within the meaning of §292, his conviction under that section cannot be used against him in a civil proceeding. This contention directly contradicts the Board's holding in the case of Hayden v. Dept. of Juvenile Services (39-BR-85). The claimant's contention, however, appears to be correct. As the claimant points out, in the recent case of Tate v. Board of Education of Kent County, 485 A.2d 688 (1985), the Court of Special Appeals explicitly ruled

that a conviction under §292 may not be used against the defendant in any civil proceeding even prior to the expiration of the probation period. The Board concludes that the Tate case, although it was not an unemployment insurance case, effectively establishes the proposition that a $292 conviction cannot be used against the defendant at any time in any civil proceeding. Therefore, the Board recognizes that its ruling in the Hayden case will no longer be valid with respect to future unemployment insurance cases .

Factually, however, this case is different from the Hayden case. In the Hayden case, there was absolutely no evidence in the record whatsoever that the claimant had committed the crime other than the $292 conviction. In this case, however the claimant has clearly admitted that he did commit the offense in question. The employer's own exhibits, constituting the claimant's sworn testimony in court, clearly established both that the claimant attempted to smuggle an amount of marijuana illegally into the state and that he was a user of that substance for the prior ten years. In the instant case, therefore , the overruling of the Hayden case has no effect, since the claimant's illegal use of a controlled dangerous substance was clearly established by evidence other than the 292 conviction.

The next question which the Board must reach was whether the claimant's misconduct was "connected with the work" within the meaning of §6(b) of the Maryland Unemployment Insurance Law.

In the cases of Employment Security Board v. LeCates, 218 Md. 202, 145 A.2d 8.40 (1958) and Fino v. Maryland Employment Security Board, 218 Md. 504, 147 A.2d 748 (1969), the Court of Appeals discussed at length what is "connected with the work" within the meaning of §6 of the Maryland Unemployment Insurance Law. Some of the questions left unanswered by those cases (but subsequently addressed by the Board) are whether off-duty statutory violations by employees constitute misconduct connected with the work. Thus, the Board has found that the commission of a serious statutory violation involving moral turpitude was "connected with the work" of being a police officer. Johnson v. Civil Service Commission (148-BH-84). The Board has found that criminal narcotics violations were connected with the work of being a correctional officer, but the Board pointed out that correctional officers did not owe as high a duty to their employers as police officers. Skelton v. Maryland House of Correction (111-BR-84). In the case of Dent v. Baltimore City Jail (234-BH-85), the Board found that the possession of controlled dangerous substances on the part of a correctional officer shortly after exiting his work place constituted misconduct connected with the work. On the other hand, the Board has found that the conviction of off-duty sexual offenses was not connected with the work of an obscure governmental typist, Hubatka v. Dept. of Health & Human Services (1-BH-83). Off-duty drug

offenses were found to be not connected to the work of a school janitor, Ebb v. Howard Co. Board of Education (214-BH-85), or a drop hammer operator, Thompson v. Martin Marietta Aerospace (142-BH-83).

The rationale behind all of these cases is that the duties owed to an employer (and thereby connected with the work) necessarily vary, depending on the type of work that is being performed.

Applying this rationale to the instant case, the Board of Appeals concludes that, since the claimant was employed as a counselor and since some of his counseling involved the treatment of other employees who had drug or alcohol problems, the claimant's use and smuggling of marijuana was connected with his employment within the meaning of the statute. The claimant's job duties were intimately connected with drug abuse problems experienced by fellow employees. The claimant was expected not only to help the other employees with their personal problems with drugs but also aid them in abiding by the laws relating to controlled dangerous substances. The claimant was performing the very types of acts which he was counseling against, In this situation, the Board will conclude that the claimant did have a duty to his employer which continued beyond the strict limits of his working hours and that this duty included the refraining from those particular types of criminal offenses against which he was counseling other employees as part of his job duties.

Since the evidence, even without the $292 conviction, supports the finding that the claimant smuggled a controlled dangerous substance into the country and also used it over a ten-year period in time, the Board will find that the claimant committed gross misconduct and that this is connected with the work within the meaning of §6(b) of the Maryland Unemployment Insurance Law. This conduct was a deliberate violation of standards the employer had a right to expect, showing a gross indifference to the employer's interest.

DECISION

The claimant was discharged for gross misconduct , connected with his work, within the meaning of §6(b) of the Maryland Unemployment Insurance Law. He is disqualified from receiving benefits from the week beginning October 21, 1984 and until such time as he becomes re-employed and earns at least ten times his weekly benefit amount ($1,750) and thereafter becomes unemployed through no fault of his own.

The decision of the Hearing Examiner is affirmed.

Thomas W. Keech
Chairman

Hazel A. Warnick
Associate Member

K:W

DISSENTING OPINION

On February 24, 1984, the claimant was arrested at the Baltimore-Washington International Airport located in Anne Arundel County, Maryland, and charged with possession of marijuana and related offenses. At the time of the incident, the claimant was off-duty, many miles away from the employer's premises, and about his own affairs. The Circuit Court for Anne Arundel County Maryland disposed of the charges by granting probation before judgment pursuant to Art. 27, §292 of the Maryland Code. What this means in practical terms is that the claimant was not convicted, and that his arrest cannot be taken into account insofar as employment, civil rights or licensing are concerned. See, Tate v. Board of Education of Kent County, _____ Md. App. ____ , 485 A.2d 688 (1985).

Nevertheless, the claimant was discharged from his job as an Employee Relations Specialist when the employer learned of the off-duty incident. The employer felt that the incident adversely affected its business interests, especially in view of the claimant's duties, which sometimes involved counseling others.

At issue is the proper application of the phrase "connected with the work" as used in the unemployment insurance statute. Both §6(c), providing a disqualification for misconduct, and §6(b), providing a disqualification for gross misconduct, require that the misconduct or gross misconduct which causes the discharge of the claimant to be "connected with the work."

In Employment Security Board v. LeCates, 218 Md. 202, 145 A.2d 840 (1985), our Court of Appeals observed that law writers generally agree that a breach of duty to the employer is not in itself sufficient, although it is an essential element to make the act one connected with the work. Citing Sanders, Disqualification for Unemployment Insurance 8 Vand. L. Rev. 307, 336 the Court wrote:

> The 'connected with the work' aspect of misconduct normally results in disregard to the employee's conduct away from the working premises or while he is not in the course of his employment even though he is discharged for such conduct. However, it is recognized that the interests of the employer may nevertheless be adversely affected by such conduct . . . Id. at 210-11, 145 A.2d at 845.

Another law writer further discussed the point when she said:

> On the other hand, breach of duty to the employer does not alone make the act one 'connected with the work' in the statutory sense. Certainly it would be inconsistent with the policy of the unemployment compensation laws to permit an employer to connect any behavior with the work simply by obtaining an express promise from the employee not to engage in that type of behavior. Even duties which would be implied from the employment relation are not necessarily connected with the work within the meaning of the statutory

> disqualification. Whether or not they are part of the employment contract, rules for conduct off the job and off the premises are generally rules of selection or as sometimes stated, conditions of employment. They merely state the policy of the employer in respect to the hiring and retention of the workers and give notice that workers whose retention is inconsistent with the rules will be dismissed. It is immaterial that compliance or noncompliance with the conditions is in the control of the worker. Kempfer, Disqualification for Voluntary Leaving and Misconduct, 55 Yale L. J. 142, 163.

Thus, the law establishes a distinction between conduct which merely breaches a duty owed to an employer, and conduct which is "connected with the work". It appears, then, that what duties are owed to an employer is relevant on the issue of whether the employee committed misconduct, and not relevant on the issue of connection with the work.

Citing Kempfer, op. cit. supra, the Court in LeCates noted the circumstances to be considered in determining whether an act is connected with the work in the sense intended by the statute. They were:

1. Whether the act occurred during the hours of work;

2. Whether the act occurred on the employer's premises;

3. Whether the act occurred while the employee was engaged in his work; and

4. Whether the employee took advantage of the employment relation in order to commit the act.

Id. at 211, 145 A.2d at 845.

To be sure, LeCates, supra, held that the legislature did not intend to limit misconduct "connected with" the claimant's work to misconduct which occurred during the hours of work or on the employer's premises. Indeed, the Court in LeCates found that the off-duty misconduct of the claimant there was connected with his work. The claimant in LeCates, because he was a supervisor, was privileged to possess a key to the employer's plant. While off duty, and without authority to do so, that claimant used the key to gain access to the plant to remove a company truck for personal use. At the time, his license to drive had been suspended or revoked. He became involved in an accident with the truck which he did not report to the employer or to the police. Instead, he left the truck parked outside the employer's plant. When the employer became aware of the damage to its truck, and when the police became aware of the accident, the claimant admitted his involvement . The claimant was arrested, but he forfeited collateral. Based upon these facts, the Court in LeCates concluded that the claimant's misconduct was connected with his work although it occurred while he was off duty. The connection with the work was not based on the claimant's job

classification as supervisor, or the employer's subjective feelings about how employees of such classification should behave themselves while off duty. Rather, the Court reasoned that he had taken advantage of the employment relation in order to commit the act. It is apparent, then, that whether an act is connected with the work is judged objectively. To do otherwise would be to accept without question the judgment of individual employers on this, a question of law. Only the Board of Appeals has final authority to determine the applicability of the law to the facts involved in claims for unemployment compensation, within the administrative agency. Secretary, Md. Department of Human Resources v. Wilson, 286 Md. 639, 409 A.2d 714 (1979).

In Fino v. Maryland Employment Security Board, 218 Md. 504, 147 A.2d 738 (1959), the Court of Appeals further examined the "connected with the work" language. There, the claimant had been employed as a waitress by Sun Ray Drug Company at Mondawmin in Baltimore. She had been a good and faithful servant who, for 50 cents per hour, toiled dutifully in her employer's vineyard. However, great publicity arose one day when she was identified as a member of the Communist party, and was summoned to appear before the Unamerican Activities Committee, where she invoked "the Fifth Amendment". She was identified through various news media to the public at large as an employee of the Sun Ray Drug Company. When the employer's manager learned of this, he concluded that he simply couldn't "use" her. When the claimant applied for unemployment insurance benefits, the employer argued, most strenuously, that her off-duty conduct was connected with her work because it "hurt his business." The employer also argued that "her continued employment would have adversely affected the business interests of the employer and that her conduct rendered her unsuitable to continue in the employment." (This latter contention is very similar to the position of the employer herein.) The Court rejected all of these contentions and held, that the claimant's alleged misconduct was not "connected with her work" so as to disqualify her for unemployment insurance benefits. The Court stated, "The mere fact that misconduct adversely affects the employer's interests is not enough. It must be incident to the work, or directly related to the employment status." Id. at 508, 147 A.2d at 741. As to the claim that the claimant's alleged misconduct was connected with her work because it rendered her "unsuitable" to continue in the employment, the Court, citing Kempfer, op. cit. supra, held:

> The theory . . . that misconduct, although not occurring in the course of employment, may be connected with the work if it evidences unsuitability for the work and makes retention of the worker incompatible with the employer's interests, seems unsound. Ibid.

Finally, the Court noted that the unemployment insurance statute previously provided a disqualification for benefits if an employee was discharged for a "dishonest or criminal act committed in connection with or materially affecting his work." However, the Court further noted that the provision was repealed by Chapter 441, Acts of 1957. Id. at 507, 147 A.2d at 740.

In the case sub judice, the claimant's misconduct did not occur during the hours of work; it did not occur on the employer's premises; it did not occur while he was engaged in his work; and it cannot be said that he took advantage of the employment relation in order to commit the act within the factual matrix before the Court in LeCates, supra.

For these reasons, the off-duty behavior of this claimant, for which he was discharged, was not connected with his work within the meaning intended by the unemployment insurance statute, even though it may have "adversely affected" the employer's business interests , or rendered the claimant "unsuitable" to continue in the employment, according to the employer's subjective feelings.

The Board has ruled on the issue of whether off-duty behavior was connected with the work in the following cases, among others: Thompson v. Martin Marietta Aerospace, 142-BH-83 (conviction for sale of narcotics while off duty, held not connected with the work); Hubatka v. Department of Health and Human Services, 1-BH-83 (conviction for sexually molesting young boys while off duty, held not connected with the work); Collins v. Baltimore County Police Department, 444-BR-82 (police officer's insubordination while off duty held not connected with his work. Board's Decision affirmed by the Circuit Court for Baltimore County in Case No. 141/11 82-L-1081, February 3, 1983.); Ebb v. Howard County Board of Education, 214-BH-85 (elementary school employee' s conviction for narcotics law violation while off duty, held not connected.)

Accordingly, I would reverse the decision of the Hearing Examiner and award unemployment insurance benefits to this claimant.

Maurice E. Dill
Associate Member

D
kbm
Date of Hearing: August 27, 1985

COPIES MAILED TO:

CLAIMANT

EMPLOYER

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UNEMPLOYMENT INSURANCE - NORTHWEST

DEPARTMENT OF EMPLOYMENT AND TRAINING

STATE OF MARYLAND
1100 NORTH EUTAW STREET
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(301) 383-5040

— DECISION —

Date: Mailed 3/19/85

Claimant: Glen Gaumnitz

Appeal No.: 13930-EP

S.S. No.:

Employer: Social Security Administration
c/o Mr. Louis Curry

L.O. No.: 45

Appellant: Employer

Issue:

Whether the claim ant was discharged fix 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 April 3, 1985

— APPEARANCES —

FOR THE CLAIMANT:

Claimant-Present
Charles Lee Nutt, Esquire

FOR THE EMPLOYER:

Ginger Ensor-
Esquire:
Alfred A. Dummond-
Director of
Personnel Operations

FINDINGS OF FACT

The claimant held employment with the employer of record from 29 May, 1973 until 23 October, 1984, at which time he was separated through discharge. His most recent duty assignment was as an "Employee Relations Specialist". As part of his duties, the

claimant counseled employees of the Social Security Administration with "psycho-social problems," giving them general guidance and advice. A portion of this assignment included counseling of employees with drug and alcohol problems. (See Employer's Exhibit No. 7, page 2)

During the period of employment the claimant travelled to Jamaica on personal business. Upon his return to the United States, the claimant and his traveling companion were both apprehended in an attempt to bring 14 pounds of a controlled dangerous substance, i.e. marijuana, into the United States and were placed under arrest and charged, As part of a plea bargain arrangement, the claimant entered a guilty plea to the charge of possession of a controlled, dangerous substance on 14 June 1984. (See Employer's Exhibits Nos. 5 & 6)

The arrest and subsequent criminal proceedings were not brought to the attention of the employer by the claimant, but were discovered by the employer through other routine means when the Federal Agency was subsequently notified by an Agency of the State of Maryland. The employer then began its own investigation of the matter. On 29 July 84, the claimant entered a 30-day period of court-ordered counseling and treatment for drug and alcohol abuse. As a result of the employer's investigation, a proposal for the claimant's discharge was prepared and presented to him on 11 August, 1984. It recited his long period of his service, the sensitivity of his duties, the "potential damage done to the counseling program," "direct conflict," of the claimant's actions with "duties of (his) position," the destruction of trust, and the "lessening of the credibility of the counseling program and the loss of confidence of the claimant's supervisors." (See Employer's Exhibit No. 1).

The employer's rules provide that employees must be "persons of integrity and must observe high standards of honesty, impartiality and behavior . . . . and must avoid conflicts of private interests with public duties". (See Employer's Exhibit No. 2) Employees are specifically advised that possession of illegal drugs, whether on or off premises is a criminal offense and a violation of regulation and may subject an employee to discharge. (See Employer's Exhibit No. 3, Page 3). The formal personnel regulations contain similar provision (See Employer's Exhibit No. 4, Page 374).

The formal notice of the decision to implement the proposal to discharge was given on 16 October, 1984 (See Employer's Exhibit No. 8) and signed by the claimant on that date. The claimant's removal from Federal Service became effective on 23 October 1984. The claimant was represented by legal counsel through at least the latter portion of the removal proceedings.

EVALUATION OF THE EVIDENCE

It appeared from documents in the Appeal file that this case might involve collateral litigation. Accordingly, to preserve the rights of the parties, and as a courtesy, a pre-hearing conference was held with legal counsel for both claimant and employer and the possible ramifications of the decision in Ross vs. Communications Satellite Corporation, 34 FEP 260 (February 1984) were discussed. Counsel for the claimant conferred at length with his client on the potential effect of collateral estoppel arising from this Administrative Hearing as it may be applied in other contemplated litigation. The claimant elected to proceed.

A hearing of approximately two hours duration followed, at which the issues of misconduct and gross misconduct as described in Sections 6(c) and 6(b) of the Article 95A were explored and argued at length. Ninety pages of exhibits, including transcripts of the claimant's testimony in attendant criminal proceedings and relevant pleadings, were entered.

Despite some recent diminishment, Maryland still follows the doctrine of "at will" employment and the employer's right to discharge the claimant remains virtually absolute. See Adler vs. American Standard Corporation, 290 Md. 615, 432 Atlantic 2nd 464 (1981). The tort and /or contract relationship between the claimant and the employer, or any subsequent litigation flowing from those relationships, is not the province of this Appeal. The issue here is narrow and limited, and is simply stated on the Hearing Notice provided to the parties, i.e. "Whether the claimant was suspended or discharged for misconduct or gross misconduct within the meaning of Section 6(b) or Section 6(c) of the Law."

There is neither evidence nor allegation that the claimant failed to discharge his on-premises duties as an "Employee Relations Specialist" in other than an acceptable manner. There is no evidence of warning or suspension arising from the manner in which he carried out his duties. The sole reason offered for the claimant's discharge is his arrest at Baltimore-Washington International Airport for attempt to smuggle contraband into the United States and his plea bargained admission of guilt in the possession of a controlled, dangerous substance.

It is a requirement of the unemployment insurance Law that for a finding of misconduct or gross misconduct to disqualify a claimant from benefits that it must be "connected with work." (See Fino vs. Maryland Employment Security Board, 219 Md. 504, 147 Atlantic 2nd 738 (1959) and Employment Security Board vs. LeCates, 218 Md. 202, 145 Atlantic 2nd 840 (1958). In the

instant case, it is indisputable that the claimant's actions were "misconduct" in the broad sense of the word in that they constituted an indictable offense to which the claimant entered a guilty plea in the criminal proceeding.

It is equally clear that the claimant's activities not only meet the judicial definition of misconduct as offered in Rogers vs. Radio Shack, 271 Md. 126, 314 A.2d 113 (1974), but also constitute "a deliberate and willful disregard of standards which his employer has a right to expect, showing a gross indifference to the employer's interest" as to constitute gross misconduct within the meaning of Article 95A Section 6(b).

The question then presented is whether his actions were sufficiently "connected with the work" to constitute misconduct or gross misconduct within the meaning of Article 95A Section 6(c) or Section 6(b).

A case very similar on the facts in the instant case was before the Board of Appeals in Hayden vs. Dept. of Juvenile Services, 39-BR-85. In that case, the claimant was a juvenile counselor whose activities included, among other duties, counseling relating to drug abuse. The Board held that the claimant's guilty plea to possession of marijuna was admissible and could be used as the basis or a finding of gross misconduct. The Board ruled that the "use of a guilty plea against a defendant in a civil proceeding only takes effect upon the successful completion of the probation." In Hayden, as in the instant case, the claimant was on probation at the time of the Administrative Appeal. In Hayden, the Board decided that the conviction of a counselor for posession of a controlled substance was gross misconduct "since the claimant had a continuing duty to refrain from the types of activities that he was counseling against."

Upon a full review of the record and exhibits and a consideration of relevant case Law and Board of Appeals precedent, it will be held that the claimant was discharged from his employment for reasons of gross misconduct within the meaning of Article 95A, Section 6(b).

DECISION

The claimant was discharged for gross misconduct connected with his work, within the meaning of Section 6(b) of the Maryland Unemployment Insurance Law. He is disqualified from receiving benefits from the week beginning October 21, 1984 and until such

time as he becomes reemployed and earns at least ten times his weekly benefit amount ($1750) and thereafter becomes involuntarily unemployed.

The determination of the Claims Examiner is reversed.

Louis William Steinwedel

SENIOR HEARING EXAMINER

Date of hearing: January 28, 1985

Cassette: 8635 (84), 8634

hf (Mrs. J. Shannon)

COPIES MAILED ON 3/19/85 TO:

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