DEPARTMENT OF HUMAN RESOURCES

STATE OF MARYLAND
HARRY HUGHES
Governor

RUTH MASSINGA
Secretary

EMPLOYMENT SECURITY ADMINISTRATION
1100 North Eutaw Street
Baltimore, Maryland 21201
Telephone: 383-5032

—DECISION—

DECISION NO: 952-BH-83

DATE: August 8, 1983

CLAIMANT: Edwindoria L. Johnson

APPEAL NO.: 00827

S.S.NO.:

EMPLOYER: Baltimore City Police Department
c/o Charles Spinner

L.O.NO.: 1

APPELLANT: EMPLOYER

ISSUE

Whether the Claimant was discharged for gross misconduct, connetted with the work, within the meaning of §6(b) of the Law; and whether the Claimant was discharged for misconduct, connetted with the work, within the meaning of § 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 TAKEN 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 September 7, 1983

—APPEARANCE—

FOR THE CLAIMANT:
Edwindoria L. Johnson - Claimant
Betty Pettiford - Witness
Christopher Freyer - Witness
Jason Frank - Attorney

FOR THE EMPLOYER:
Charles Spinner - Civil Service
Steven Engelhaupt - Witness
James Crane - Witness
Sgt. Barry Johnson - Witness
Sqt. Brooks Bruce - Witness
Sgt. Charles Henchen - Witness

EVIDENCE CONSIDERED

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 into this case as well as Employment 'Security Administration's documents in the appeal file. The Board does not find credible the Claimant's version of the events of March 1, 1982.

FINDINGS OF FACT

The Claimant worked from July 19, 1979, until December 10, 1982, as a Police Officer for the Baltimore City Police Department.

The Claimant had been hospitalized for ailments not related to her work in approximately the middle or end of February, 1982. On March 1, 1982, the Claimant was on sick leave. The Employer's policy required that persons on sick leave (other than those on sick leave on account of work-related injuries) call in every day if they were planning to leave the home. The requirement was that the office be notified on each occasion that the sick person intended to leave the home and be notified of where the person was intending to go. After having made a call informing the office that she was performing various errands, the Claimant visited a shopping center in order to attend to some business. The attendance at the shopping center was in compliance with her Employer's sick leave policy.

At least within the jurisdiction of Baltimore City, the Baltimore City police officers who are off duty immediately become on duty if they are a witness to a crime occurring in their presence. Exactly which type of criminal activity will suffice to transform an off duty officer into an on duty officer is not entirely clear, and the duties of off duty officers towards criminal investigations depends somewhat on the circumstances of each case.

The Claimant, on March 1, 1982, while parking her car in the shopping center, drove the bumper of her car into the side of another car, causing damage to both doors of the other car. The Claimant observed this damage immediately and was well aware that her car had caused the damage.

The Claimant made some inquiries in order to ascertain the identity of the owner of the car which she had hit. She did not locate the owner. The Claimant then completed her business at the shopping center and drove away without putting any notice or message on the car that she had hit.

As a result of a later police investigation, the Claimant was later given two traffic citations, one for leaving the scene of a property damage accident and another for striking an unattended vehicle. One of these charges was later dismissed. Another charge gave rise to a finding of probation before verdict.

In the course of the investigation of this incident, the Claimant several times made statements that she had not hit the car in question and that she believed a truck or van had hit the car. These statements were known by the Claimant to be false when she made them.

CONCLUSIONS OF LAW

The Board concludes that the Claimant was discharged for gross misconduct, within the meaning of § 6(b) of the Maryland Unemployment Insurance Law. The gross misconduct does not consist of accidently striking a vehicle on a shopping center parking lot. The gross misconduct is the Claimant's deliberate violation of § 20-105 of the Transporation Article. That section makes it clear that any citizen who strikes an unattended vehicle has a duty to leave in a conspicuous, secure place or in the damaged vehicle, sufficient identifying information so as to notify the owner of the damaged vehicle who has perpetrated the damage upon it. Section 27-101(c) (16) makes violation of this section of the law punishable by a fine of up to $500 and/or imprisonment for up to a period of two months.

The Claimant also committed gross misconduct by making false statements to the police department concerning this incident.

The Board is well aware of the rulings in Fino v. Maryland Employment Security Board, 218 Md. 504, 147 A.2d 738 (1959) and in Employment Security Board v. LeCates 218 Md. 202, 145 A.2d 840 (1958). In these cases the Court of Appeals affirmed the concept that, for misconduct to be of the type which would disqualify a Claimant for unemployment insurance benefits, that misconduct must be connected with the work. In the Fino case, the Court ruled that a Claimant who was a waitress in a drug store had not committed misconduct connected with her work when she was cited by the House Un-American Activities Committee for refusal to answer questions about her affiliation with the Communist party. In LeCates, the Court of Appeals held that misconduct may be connected with an employee's work even when it occurs outside of the normal work hours of the employee.

One issue which the Court of Appeals has never explicitly decided, however, is the extent to which off-duty misconduct (unconnected with the Employer's property) can be related to the work.

The Board has dealt with this issue in recent cases. In the case of Thompson v. Martin Marietta Corporation, Board Decision No. 142-BH-83, the Board ruled that the conviction of a drop-hammer operator on charges of posession with intent to distribute dangerous narcotic drugs was not in any way connected with the work, within the meaning of § 6(b) of the Law. Likewise, in Hubatka v. Department of Health and Human Services case, Board Decision No. 1-BH-83, the Board ruled that convictions for criminal sexual offenses while off duty were not in any way connected with the work of the claimant, a government typist.

The rationale 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. A teacher of children, for example, has a duty to his Employer, at all times, to serve as an example to his students, at least to the extent of not being convicted of criminal activities involving moral turpitude. The same cannot be said for a drop-hammer operator or a government typist. The Board concludes that a police officer has a continuing duty to her Employer to refrain from committing criminal acts which show moral turpitude. The commission of such an act, even while off duty, is a deliberate and willful disregard of standards of behavior which her Employer has a right to expect, showing a gross disregard for the Employer's interest.

The Employer in this case did have the right to expect the Claimant to refrain from deliberate violation of the Transportation Article (violation of which is punishable by up to two months in jail and up to $500 in fines) because the integrity of the police department could be damaged by such conduct. For this same reason, the Claimant's actions also showed a gross disregard for her Employer's interest.

The Claimant's false statements to the Employer during the investigation also amount to gross misconduct, since the Employer clearly had a right to expect her to tell the truth during all police investigations. The attempt to cover up misconduct already committed by making false statements during an investigation is an additional deliberate disregard of standards the Employer had a right to expect.

DECISION

The Claimant was discharged for gross misconduct, connected with the work, within the meaning of § 6(b) of the Maryland Unemployment Insurance Law. She is disqualified from the receipt of benefits for the week beginning January 2, 1983, and until she becomes re-employed, earns ten times her weekly benefit amount ($1,530) and thereafter becomes unemployed through no fault of her own.

The decision of the Appeals Referee is reversed.

Thomas W. Keech
Chairman

Hazel A. Warnick
Associate Member

K:W
dp

DISSENT

The Claimant was employed as a police officer by the Baltimore City Police Department on July 19, 1979. She was generally a good police officer, and there was never any reason to question her veracity.

However, the Claimant had been instrumental in having a fellow officer fired. Friends of the dismissed officer harbored latent resentment toward the Claimant for that reason.

On March 1, 1982, the Claimant was off duty. She had recently been released from the hospital, where she had undergone an operation. The Claimant was off duty with the permission of the Employer by reason of her health; she had not worked in several weeks, and her off duty status was continuing indefinitely. The Claimant went to a shopping center to have a prescription filled. While there she investigated a damaged vehicle on the parking lot.

Steven Englehaupt, a witness for the Employer, stated that it was the Claimant who caused the damage to the vehicle when she accidently drove her own automobile into it. Although he did not actually see the accident, he stated that it occurred within his presence. He also stated to the police officer who investigated the accident that the Claimant was driving a car with a maroon roof. The car driven by the Claimant that day was silver with no such roof. Before the Board, that witness testified that the Claimant was driving a silver vehicle on the day in question.

The Claimant was discharged from her position for the Employer determined that the Claimant violated the Transporation Code of Maryland in that she failed to give proper notice upon striking an unattended vehicle. The Claimant denied involvement in the accident, but since the Employer determined that the Claimant was involved, the Employer further determined that her denial constituted a false statement . The Employer has a rule the substance of which is that a police officer must never tell a lie. However, enforcement of this rule is, of course, arbitrary.

The State of Maryland brought charges against the Claimant for the aforementioned traffic offense. However, the traffic court granted probation without rendering a verdict. The owner of the damaged vehicle sued the Claimant for the damage to his vehicle. However, the civil court found the Claimant not liable for the accident. Thus, the question of whether the Claimant committed the act alleged was judicially determined on two occasions prior to the hearing before the Board. Each time the question was resolved in favor of the Claimant.

I have carefully considered all the evidence in this case including the testimony of the Claimant and her witnesses whose testimony generally corroborates that of the Claimant. I have also considered the testimony of the Employer's witnesses including the prior inconsistent statement regarding the description of the Claimant's car made by the only witness for the Employer who alleged that the accident occurred in his presence. I have also considered the fact that the Employer's witnesses, although adverse to the Claimant, attested to her credibility as a person, I find the Claimant to be a credible witness . Accordingly, I find that the evidence that the Claimant committed the acts alleged which resulted in her discharge is insufficient in this case in view of the record as a whole. Since the Claimant has established herself as a credible person, even among her adversaries, I feel she is entitled to the benefits of any doubt. The credibility of the alleged eyewitness for the employer is unknown even to the proponent of his testimony, and I am convinced that he said different things at different times, at least with respect to the description of the Claimant's car.

I dissent further for I conclude that even if the Claimant committed the acts alleged, the acts were not "connected with her work" within the meaning of the unemployment insurance law.

Before a disqualification for unemployment insurance benefits can be imposed under § 6(c) or 6(b) of the Law, it must be determined that the Claimant was discharged or suspended for misconduct or gross misconduct which is "connected with her work." Thus, the disqualification is not for misconduct in general, but for a particular kind of misconduct-misconduct connected with the work. The unemployment insurance disqualification was not intended to supplement the criminal statute, to provide an additional penalty for a violation of the traffic code, to regulate morals, or to force off duty teachers to set examples for students. Any argument that unemployment insurance law was so intended is refuted by an analysis of the public policy of the law which is to alleviate the consequences of widespread unemployment. See, Section 2, "Declaration of Policy. "

Moreover, the term "connected with his work" cannot be confused with those rules which many employers use to select an employee from among various applicants for a job. One law writer stated this point succinctly 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 workers and give notice that workers whose retention is inconsistent with the rules will be dimissed. 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.

The Courts of Maryland have long been in the forefront in ascertaining the meaning of the phrase "connected with the work" as used in the unemployment statute. In Employment Security Board v. LeCates, 218 Md. 202, 145 A.2d 840 (1958), the Court of Appeals of Maryland discussed the "connected with the work" aspect of misconduct and held that a breach of duty to the employer, although not in itself sufficient, is an essential element to make the act one connected with the work. Misconduct need not occur during the hours of employment or on the employer's premises, however, misconduct must be, as a matter of law, connected with the work before any disqualification can be imposed.

Circumstances to be considered in determining whether misconduct is connected with the work in the statutory sense, the Court held are as follows:

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.

In the case sub judice, the Claimant's alleged act did not occur during the hours of work; she had been off duty for several weeks with the permission of the Employer by reason of her health. It did not occur on the Employer's premises; it did not occur while she was engaged in her work, and it cannot be said that the Claimant took advantage of the employment relation in order to commit the alleged act. To be sure, it is the Employer who is attempting to take advantage of the employment relation to show that an alleged off duty act can be the basis for a disqualification for benefits. Moreover, the alleged act of the Claimant involved no breach of duty to the Employer the statutory sense. If the act occurred it may have violated the Employer's rules of selection, provided the Claimant was made aware that off duty police officers were not allowed to become involved in disputed traffic offenses. In this connection, it is interesting to note that one witness for the Employer testified that to his knowledge no police officer had ever been discharged for such an offense.

In Fino v. Maryland Employment Security Board, 218 Md. 504, 147 A.2d 738 (1959), the Court of Appeals of Maryland further discussed the "connected with the work" language and held that the mere fact that misconduct of an employee "adversely affects the employer's interests," "hurt the business" "materially affected the future usefulness of an employee to an employer, " or "rendered her unsuitable to continue in employment" were all insufficient to make the employee's act connected with the work for purpose of unemployment insurance. The Court stated:

> Conduct may materially affect the future usefulness of an employee to an employer, and yet be wholly unrelated to the employment status, as, for example, where an employee beats his wife and the fact receives wide publicity. It would be a different matter if he assaulted a customer or a fellow employee. No doubt there is a distinction between obligations arising out of an employment contract, and the general obligations of citizenship or to the community at large.

The Court in Fino also observed that the unemployment insurance statute previously set up a disqualication for benefits if a claimant was discharged for a "dishonest or criminal act committed in connection with or materially affecting his work." However, the Court noted, that provision was repealed by chapter 441, Act of 1957. Thus, there is absolutely no merit in the notion that an off duty police officer who commits a crime of moral turpitude is thereby ineligible for unemployment insurance benefits. Indeed, a traffic violation is not a "crime of moral turpitude." Moreover, this Board has no authority to revive legislation which has been repealed under the guise of statutory interpretation. Even if the Employer expected a certain mode of behavior from the Claimant while off duty, it had no "riqht" to expect it for purposes of unemployment insurance law.

The matter of whether an act is "connected with the work" is completely objective. It is not a vague notion susceptible to personal prejudice and whim. This Board has recognized as much in a series of cases of recent vintage. In Thompson v. Maritin Marietta Aerospace, 142-BH-83, this Board held that a claimant who was arrested and convicted for the sale of narcotics while off duty was not disqualified from receiving unemployment insurance benefits because the misconduct was not "connected with his work" within the contemplation of unemployment insurance law even though the employer's rules provided for discharge upon conviction for an off duty offense. In Hubatka v. Department of Health and Human Services, 1-BH-83, this very same Board held that the claimant there, a grown man, convicted of sexually molesting young boys was not disqualified for benefits because his acts were not "connected with his work." Further, complaints about police officers are not new to this Board. In Collins v. Baltimore County Police Department, 444-BR-82, this Board held that a police officer discharged for insubordination while off duty was not disqualified for benefits because his act was neither misconduct nor connected with his work within the meaning of unemployment insurance law. When the Baltimore County Police Department appealed the case to court, the Circuit Court for Baltimore County affirmed the decision of the Board at case no. 141/11 82-L-1081, February 3, 1983.

Why then, is this Claimant disqualified for benefits? Is it because she was a Baltimore City police officer, and not a Baltimore County police officer? Why?

I dissent further for to hold that misconduct of a police officer whether on or off duty is always connected with her work renders the term "connected with the work" superfluous. If that interpreation is correct, the only inquiry as far as a police officer is concerned is whether there was misconduct, because any misconduct would be connected with his work. That interpretation violates elementary rules of statutory construction. A statute should be so read and construed, if possible, that no word, clause, sentence, or phrase is rendered inoperative, superfluous, meaningless, void, insiqnificant, or nuqatory. Fisher v. Bethesda Discount Corporation, 221 Md. 271, 157 A.2d 265 (1960).

Finally, I dissent from the suggestion that, in contruing the term "connected with the work," this Board is permitted to discriminate among claimants for unemployment insurance benefits based upon the kind of work they performed-when they had a job. I submit that that suggestion is plain wrong, invidious, and has no place in the administration of the statute. As has been seen, the term "connected with the work" is an objective term. If an

act is not connected with the work in the objective sense of the word, then discrimination can't make it so. I agree with the majority that a police officer has a continuing duty to refrain from committing criminal acts which show moral turpitude. However, I hasten to add all persons are under a continuing duty to refrain therefrom, and this requirement is not unique to claimants for unemployment insurance benefits who once were police officers.

For the foregoing reasons, I dissent. I think the Claimant is entitled to benefits.

Maurice E. Dill
Associate Member

MD:dp

DATE OF HEARING: June 21, 1983
COPIES MAILED TO:

CLAIMANT

EMPLOYER

Jason A. Frank, Esquire
522 S. Clinton St.
Baltimore, Maryland 21224

UNEMPLOYMENT INSURANCE - BALTIMORE

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BOARD OF APPEALS
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Administrative
Hearings Examiner

– DECISION –

DATE: February 17, 1983

LAIMANT: Edwindoria L. Johnson

APPEAL NO.: 00827

S.S.NO.:

MPLOYER: Baltimore City Police Department
c/o Charlie Spinner
111 N. Calvert Street
Baltimore, Maryland 21202

L.O.NO.: 1

APPELLANT: Claimant

SSUE: Whether the claimant was discharged for gross 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 MAYBE 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 FURTHER APPEAL EXPIRES AT MIDNIGHT ON March 4, 1983

-APPEARANCES-

FOR THE CLAIMANT:

Edwindoria L. Johnson - Claimant
Jason A. Frank, Esquire

FOR THE EMPLOYER:

Charlie Spinner -
Personnel Technician
Supervisor

FINDINGS OF FACT

The claimant was employed by the Baltimore City Police Department from July 19, 1979, as a police officer, earning $626.69 hi-weekly. She was terminated from the employment effective December 10, 1982.

On March 1, 1982 the claimant had just gotten out of the hospital and was on sick leave. The claimant went to a shopping center to get a prescription filled and to do some other

shopping. While pulling into a vacant spot, the claimant struck a parked car. At this time, the claimant was driving her own car and not in uniform, and was on sick leave. When the claimant finished shopping, she returned to her car and found the police there . In a statement given to the police by the claimant, she admitted to striking the car. However, at the claimant's Departmental Hearing, she denied striking the car. As a result of this discrepancy, the claimant was discharged from the employment.

As of the time of the hearing, the claimant was unemployed.

CONCLUSIONS OF LAW

The Appeals Referee, although aware that a police officer is on call twenty-four hours a day, does not find this incident related to police work. As the claimant was on sick leave and off duty, and not in uniform, a finding of gross misconduct under Section 6(b) of the Law is too harsh.

However, it will be found that the claimant was discharged for misconduct connected with her work within the meaning of Section 6(c) of the Maryland Unemployment Insurance Law.

DECISION

The claimant was discharged for misconduct connected with the work within the meaning of Section 6(c) of the Maryland Unemployment Insurance Law. Benefits are denied for the week beginning December 5, 1982 and the five weeks immediately following.

The determination of the Claims Examiner is reversed.

This denial of unemployment insurance benefits for a specified number of weeks will also result in ineligibility for Extended Benefits, and Federal Supplemental Compensation (FSC), unless the claimant has been employed after the date of the disqualification.

John G. Hennegan
APPEALS REFEREE

DATE OF HEARING: February 8, 1983
ras
(832 & 820 -- Stanley

copies mailed to:

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