

GUIDE FOR EFFECTIVE UNEMPLOYMENT INSURANCE ADJUDICATION

Office of Commission Appeals

VIRGINIA EMPLOYMENT COMMISSION

(Online edition)

Fifth Edition

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By

Virginia Employment Commission

Richmond, Virginia

FOREWORD

The Guide for Effective Unemployment Insurance Adjudication in Virginia is a synthesis of the basic legal principles followed by adjudicators and judges in resolving issues that arise under the Virginia Unemployment Compensation Act, Title 60.2. Its dual aims are to provide training for new Agency adjudicators and a reference for veteran adjudicators. Although it does not purport to cover every contingency, it does summarize the fundamental considerations and is designed to make the task of researching the law easier for adjudicators. Interested parties and their representatives, as well as the general public, will also find the Guide a useful tool in gaining a better understanding of unemployment law in Virginia. Unemployment insurance law in Virginia is constantly evolving; therefore, the material presented herein only represents the current state of evolution. The Guide will be updated periodically to reflect changes in the law.

The Guide was developed in 1992 by the Office of Commission Appeals, and went through an extensive revision in 2009-2010. The revisions encompassed changes in the statutory authority as well recent Court of Appeals cases that altered or explained past precedent. Also in 2010, the Guide graduated from a text-only booklet to a web-based resource available on the Virginia Employment Commission's website. This step was taken to promote access to this important tool.

The primary authors of the original edition were Patrice T. Johnson and Charles A. Young, III. J. Steven Sheppard, III provided invaluable editing and comments, and Ogene Pitts, Edwin R. Richards, and M. Coleman Walsh, Jr. contributed ideas, suggestions, and critical review that aided the authors immeasurably. Thanks are due to Norma C. Turner for her administrative assistance and Margie Chism for her fine graphic artwork.

M. Coleman Walsh
Chief Administrative
Law Judge

Dolores Esser
Commissioner

Date

Date

PREFACE

The purpose of this Guide is to familiarize the reader with the principles of unemployment insurance law in Virginia, including statutes, regulations, Commission decisions, and rulings of the Courts. It is organized into three main sections: **Eligibility, Disqualification,** and **Miscellaneous.** Generally, each topic includes a statement of the applicable law and, if appropriate, a digest of typical issues that cites decisions on point.

Citations of decisions include cross-references to the subsection of the Commission's Precedent Decision Manual in which the decision may be found. The Manual is organized into eight divisions, which are referred to herein by the following abbreviations:

Able and Available	AA
Labor Dispute	LD
Miscellaneous	MS
Misconduct	MT
Procedure	PR
Suitable Work	SW
Total and Partial Unemployment	TP
Voluntary Leaving	VL

Because each division is subdivided, the code number that follows the abbreviation refers to the Manual, which further describes the type of case. For example, Able and Available 155.1 refers to "Domestic Circumstances--Care of Children."

The Guide is intended to serve as a convenient reference tool to facilitate research. It is by no means all encompassing, and although it offers brief summaries of cases, it cannot substitute for the Precedent Decision Manual, which sets forth the full text of decisions. Similarly, it does not eliminate the need for examination of the Code and the Regulations.

The principles summarized herein are not set in stone and are subject to modification as changes in the statutes, regulations, and case law occur. With proper use, it should promote consistency in adjudication and provide meaningful assistance to interested parties, their advocates, and others who desire ready access to the law affecting unemployment compensation in Virginia.

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GLOSSARY OF TERMS

(Some found in the Employment and Training Administration (ETA) Glossary of Program Terms and Definitions, 1980, 3rd Edition.)

Additional Claim -- A claim for unemployment compensation benefits filed within an existing benefit year by a claimant who has had an intervening period of employment since filing a prior claim.

Agent State -- Any state in which an individual files a claim for benefits from another state.

Alien Claimant, Illegal -- An individual who (1) was not lawfully admitted for permanent residence at the time services were performed; (2) was not lawfully present for the purposes of performing services; (3) was not permanently residing in the United States under color of law at the time services were performed; and (4) whose eligibility for unemployment compensation is determined under appropriate sections of the Federal Unemployment Tax Act (FUTA).

Alternate Base Period -- The four most recent completed calendar quarters immediately preceding the first day of the claimant's benefit year.

Appeal -- A request for a hearing to be held by an appeals authority on an agency determination or re-determination, or a request for a review to be held by the Commission on a decision made by the lower appeals authority.

Appeal Decision -- The disposition of an appeal case by a written ruling that is issued to one or more parties.

Base Period -- The first four of the last five completed calendar quarters immediately preceding the first day of the individual's benefit year.

Benefit Rights Interview -- Information provided to a claimant for the purpose of explaining the individual's rights and responsibilities under Virginia or federal law.

Benefit Year -- A period of 52 consecutive weeks beginning with the first day of the week in which an individual files a new valid claim for benefits, except the benefit year shall be 53 weeks if filing a new valid claim would result in overlapping any quarter of the base period with a previously filed new claim.

Claim -- A notice of unemployment filed to request a determination of eligibility and the amount of benefit entitlement or to claim benefits.

Claim Series -- A series of claims filed for continuous weeks of total, part-total, or partial unemployment.

Claim Week -- A period of seven consecutive days beginning and ending at Saturday midnight, used as a unit in the measurement of employment, unemployment, and insured unemployment.

Claimant -- A person who files either an initial claim or a continued claim under the Virginia, or a federal, unemployment compensation program.

Combined-Wage Claim -- A claim filed in one state against wage credits earned in two or more states.

Contested Claim -- A claim which has not yet reached an appeal stage but benefit rights, for either a monetary or nonmonetary reason, are questioned by the claimant or the employer.

Continued Claim -- A request for the payment of unemployment compensation benefits which is made after the filing of an initial claim.

Courtesy Claim -- An interstate claim for week(s) of unemployment taken by a state other than the regular agent state from a visiting claimant with the permission of the liable state.

Covered Employment -- Employment as defined in Section 60.2-612 through Section 60.2-618 of the Code of Virginia performed for a subject employer, or federal employment as defined in Chapter 85, Title 5, United States Code.

Covered Worker -- An individual who has earned wages in covered employment.

Denial of Benefits -- Action imposed by a nonmonetary determination or an appeals decision that reduces or postpones a claimant's benefit rights.

Disqualification Provisions -- The provisions of Virginia unemployment compensation laws or federal laws setting forth the conditions that bar an individual from receiving payment of compensation.

Eligibility Requirements -- Statutory requirements which must be satisfied by an individual with respect to each week of unemployment for which compensation payments are claimed before payment for the week is made.

Employer -- An employing unit subject to the provisions of Section

60.2-612 of the Code of Virginia (1950), as amended.

Employing Unit -- An individual or organization that employs one or more workers, subject to Section 60.2-611 of the Code of Virginia (1950), as amended.

Extended Benefits -- The supplemental program that pays extended compensation during a period of specified high unemployment to individuals for weeks of unemployment after (1) they draw the maximum potential entitlement to regular compensation within their benefit year or (2) after their benefit year ends while they are in continued unemployment status and have insufficient wage credits to establish a new claim provided, however, that the extended benefit period in Virginia began prior to the end of their benefit year. Extended benefits paid to a claimant under the Virginia Unemployment Compensation Act are jointly financed on a 50/50 basis by state and federal funds; extended benefits paid to unemployment compensation for federal employees (UCFE) and unemployment compensation for ex-servicemen (UCX) claimants are totally financed by federal funds.

Full-Time Work -- The number of hours or days per week currently established by schedule, custom, or otherwise as constituting a week of full-time work for the kind of service an individual performs for an employing unit.

Higher Authority Appeal (Commission Review) -- The second and final administrative stage of appeal as provided by Virginia unemployment compensation law to make decisions with respect to appeals. The higher authority appeal is adjudicated by a Special Examiner who may affirm, modify or set aside a lower authority decision on the basis of evidence previously submitted, and when necessary, additional evidence taken into the record.

Initial Claim -- Any new, additional, or reopened claim for unemployment compensation benefits.

In-Person Claim -- A claim filed in person at an unemployment compensation office.

Internet Claim - A claim filed using the Commission's agency website on the Internet.

Interstate Claim -- A claim filed in one (agent) state based on monetary entitlement to compensation in another (liable) state.

Intrastate Claim -- A claim filed in the same state in which the individual's wage credits were earned.

Intrastate Combined-Wage Claim -- A combined-wage claim in which

the paying state is also the state in which the claim is filed and to which the other state or states will transfer wage credits.

Job Order -- A single request for referral of one or more applicants to fill one or more job openings in a single occupational classification; also, the record of such request.

Job Referral -- The act of bringing to the attention of an employer an applicant or group of applicants who are available for a job; and also, the record of such a referral.

Labor Dispute -- Any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

Labor Market Area -- A geographic area consisting of a central city (or cities) and the surrounding territory, within a reasonable commuting distance.

Liable State -- Any state against which an individual files, through another state, a claim for benefits.

Local Office -- A full-time office of a state agency maintained for the purpose of providing placement and other services of the public employment service system and/or taking of claims and related unemployment insurance services.

Lower Authority Appeal -- The lower of two administrative stages of appeal as provided by Virginia unemployment compensation law to make decisions with respect to appeals. The lower authority appeal is adjudicated by an Appeals Examiner who conducts an evidentiary hearing of record.

Mail Claim -- A claim filed by mail instead of being filed in-person at an unemployment insurance office.

Mass Separation -- A separation (permanently, for an indefinite period or for an expected duration of seven days or more) at or about the same time and for the same reasons (i) of twenty or more percent of the total number of workers employed in an establishment; or (ii) of fifty or more percent of the total number of workers employed in any division or department of an establishment; or (iii) notwithstanding any of the foregoing, a separation at or about the same time and for the same reason of twenty-five or more workers employed in a single establishment.

Mass Partial Unemployment -- Partial unemployment of a large number of workers in a given employing unit occurring at

approximately the same time and arising from a reason common to all such workers.

Maximum Benefit Amount -- The weekly benefit amount multiplied by the number of weeks included in the duration of the claim as shown on the monetary determination.

Monetary Determination -- A written notice issued to inform an individual whether or not he meets the employment and wage requirement necessary to establish entitlement to compensation under a specific unemployment insurance program, and, if entitled, the weekly and maximum benefit amounts the individual may receive and the duration of benefits payable.

Monetary Re-determination -- A record of a decision made after reconsideration and/or recomputation of a claimant's monetary entitlement based on the receipt of new employment and wage information.

New Claim -- A claim for unemployment compensation benefits filed in person at an unemployment insurance office, or other location designated by the Commission by an individual who does not have an existing benefit year established.

Nonmonetary Determination -- A decision made by the deputy based on facts related to an "issue" under the following conditions: (1) the present, past, or future benefit rights of a claimant are involved; (2) a week of unemployment is claimed and the determination affects such week or could result in a reduction of the monetary award; (3) there are identifiable documents showing the type and disposition of an issue, the material facts considered in arriving at the determination, and if it involves the denial of benefits, is issued in the form of a written determination notice to the claimant. (No determination denying benefits may be issued until the claimant has been afforded an opportunity to furnish any facts he may have relating to disqualifying information received from other sources.)

Nonmonetary Issue -- An act, circumstance or condition included in the definition of a nonmonetary determination in which there is a potential for a denial of benefits under state law.

Overpayment -- An amount of benefits paid to an individual to which the individual is not legally entitled regardless of whether or not the amount is subsequently recovered.

Partial Benefits -- Unemployment compensation of less than the full weekly benefit amount payable to a claimant.

Partially Unemployed Individual -- An individual who during a particular week (i) had earnings, but less than his weekly benefit amount; (ii) was employed by a regular employer; and (iii) worked,

but for fewer than his normal customary full-time hours for such regular employer because of a lack of full-time work.

Part-Time Work -- Employment in which a worker is regularly scheduled to work less than a full-time week.

Qualifying Wages -- The amount of wages in covered employment an individual must have within the two highest quarters within his base period in order to be entitled to compensation.

Registration -- The act of officially recording a person's availability for referral to job opportunities, training, and/or employability development services.

Regular Compensation -- Benefit payments to individuals with respect to their unemployment under any state unemployment compensation law, including payments pursuant to U.S.C., Chapter 85, but not including additional, extended benefits, Disaster Unemployment Assistance, or Trade Readjustment Allowances.

Reimbursable Employer -- Certain nonprofit organizations, state or local government and political subdivisions which elect or are required to pay into the state unemployment fund a sum based on actual benefits paid in lieu of unemployment taxes.

Reopened Claim - The first claim for unemployment compensation benefits filed within an existing benefit year after a break in the claim series caused by any reason other than intervening employment.

Reporting Requirements -- The rules, regulations or procedures of the Virginia Employment Commission concerning the manner, frequency and time required for claimants to report to offices of the agency either in person, by mail, weekly, or biweekly.

Residence -- An individual's principal dwelling or home. Maintenance of an address is not necessarily the same as residence.

Separations -- All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations. Transfers within the establishment or from regular activities to temporary activities are not considered separations.

Short-Term Layoff -- Unemployment for a brief period due to certain conditions with assurance of returning to work with the same employer.

Social Security Account Number -- The nine-digit identification number assigned to an individual by the Social Security Administration under the Social Security Act.

Trade Act of 1972 (TRA) -- The federal program for adjustment assistance allowances and employability services under the Trade Act of 1972.

Trade Readjustment Allowances (TRA) -- The federal program that pays trade readjustment allowances to workers whose unemployment is certified as attributable to the impact of foreign trade.

Training -- A planned, systematic sequence of instruction or other learning experience on an individual or group basis under competent supervision, which is designed to impart skills, knowledge, or abilities to prepare individuals for employment. The criteria for training approved by the Commission are set forth in Regulation 16 VAC 5-60-40 of the **Rules and Regulations Affecting Unemployment Compensation**.

Transferring State -- A state in which a combined-wage claimant had covered employment and wages in the base period of a paying state, and which transfers such employment and wages to the paying state for its use in determining the benefit rights of such claimant under its law.

Transient Claimant -- A claimant who is moving from place to place in search of work and who indicates to the agent state local office that he will be in the area served by the local office for less than a full claims reporting period.

Unemployment Compensation -- The state program that provides benefits to individuals covered under state and federal unemployment compensation laws, supplemental extended compensation (payable to eligible individuals under other provisions of state and/or federal laws during periods of high unemployment) and other special programs which compensate individuals involved in situations which adversely affect their employment status through no fault of their own.

Unemployment Compensation For Ex-Servicemen (UCX) -- The federal program that provides benefits to ex-servicemen established by 5 U.S.C., Chapter 85.

Unemployment Compensation for Federal Employees (UCFE) -- The federal program that provides benefits to federal employees established by 5 U.S.C., Chapter 85.

Unemployment Insurance -- The program term which encompasses all state and federal unemployment compensation laws and related programs administered by the state and federal Unemployment Insurance Services.

Unemployment Trust Fund -- A fund established in the Treasury of the United States which contains all monies deposited by state agencies to the credit of their unemployment fund accounts and federal unemployment taxes collected by the Internal Revenue Service (IRS).

Union -- Any local union affiliated with an international/national union.

Valid Claim -- A new claim on which a determination has been made that the claimant has met the wage requirements to establish a benefit year.

Wage and Separation Report -- Form VEC-B-10b used to request a report from an employer of the wages earned by the claimant and reason(s) for separation from employment.

Wages -- All remuneration payable for personal services including commission, bonuses, tips, back pay, dismissal pay, severance pay, and any payment made by an employer to an employee during his employment, and thereafter, and the cash value of all remuneration payable in any other medium other than cash.

Week of Partial Unemployment -- A week in which an individual works less than regular full-time hours for his regular employer because of lack of work, and earns more than the allowable earnings pre-scribed by the unemployment compensation law, so that, if eligible, the individual receives less than his full weekly benefit amount.

Week of Part-Total Unemployment -- A week of otherwise total unemployment in which an individual has odd jobs or subsidiary work with other than the individual's regular employer with earnings in excess of the allowable earnings prescribed by the state unemployment compensation law, so that, if eligible, the individual receives less than his full weekly benefit amount.

Week of Total Unemployment -- A week in which an individual performs no work and earns no wages or has less than full-time work and earns not more than the allowable earnings prescribed in the state unemployment compensation law, so that, if eligible, the individual receives his full weekly benefit amount. (An exception may be the final payment when an individual's benefit balance would preclude payment of the full weekly benefit amount or if the weekly benefit amount is reduced pursuant to Section 60.2-604.)

Week of Unemployment -- Calendar week beginning on Sunday and ending at midnight on Saturday during which an individual is totally, part-totally, or partially unemployed.

Weekly Benefit Amount -- The amount payable to a claimant for a

compensable week of total unemployment pursuant to Section 60.2-602.

Weeks Claimed -- The weeks covered by intrastate continued claims and interstate continued claims for which payment of compensation is requested.

Weeks Compensated -- The number of weeks claimed which are actually paid.

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Introduction to Eligibility

With the exception of monetary entitlement pursuant to Section 60.2-612(1) and monetary re-qualification pursuant to Section 60.2-614, Virginia does not have indefinite periods of ineligibility. There must be a set of specific dates within which a claimant's eligibility is considered. Only weeks actually claimed are considered by the adjudicator. Contrast this with a disqualification imposed under Section 60.2-618 which remains in effect until it is purged. To purge an ineligibility, a claimant merely comes forward to claim benefits in a subsequent week and shows that conditions have changed so that the ineligibility no longer applies. To a purist, monetary ineligibility under Section 60.2-612(1) and Section 60.2-614 would be more appropriately termed a disqualification because the claimant remains ineligible for an indefinite period, while the 52-week deprivation imposed under Section 60.2-618(4) is more appropriately an ineligibility because it is for a finite period of time. However, for the purposes of this Guide, the former will appear in this section while the latter will be treated in the section on disqualification.

In deciding whether a claim filed by an individual will ultimately result in a payment of benefits, the deputy considers issues in a certain order. Some eligibility issues under the provisions of Section 60.2-612 of the Code come first. These include monetary eligibility under subsection 1, the making of a claim in accordance with such regulations as the Commission may prescribe under subsection 6, the non-existence of a claim against another jurisdiction under subsection 3, and the non-existence of a labor dispute under subsection 2. After these preliminary eligibility considerations have been resolved, the deputy determines whether a separation issue might exist under the provisions of Section 60.2-618. Finally, the deputy returns to Section 60.2-612 to see whether the claimant has properly registered for work and continues to report under subsection 5, that the claimant is not on a bona fide paid vacation as defined under the provisions of subsection 4 and that the claimant has not given notice of resignation and was immediately terminated by his employer under conditions set forth in subsection 8. The last consideration under the provisions of Section 60.2-612 of the Code considering eligibility is set forth under subsection 7. Most deputy determinations regarding eligibility are made pursuant to this subsection.

I. **Unemployment**

A. **Statement of Law**

Section 60.2-226 of the **Code of Virginia**, as amended, provides as follows:

Unemployment. -- An individual shall be deemed "unemployed" in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount. Wages shall be deemed payable to an individual with respect to any week for which wages are due. An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the Commission may by regulation otherwise prescribe.

B. **Regulatory Interpretation**

Regulation 16 VAC 5-10-10 of the **Rules and Regulations Affecting Unemployment Compensation** establishes that "total unemployment" occurs with respect to any week in which an individual performs no work and has no wages payable to him, regardless of whether he is separated or attached to an employing unit's payroll.

The same Regulation provides that the term "part- total unemployment" means the unemployment of an individual during a week of less than full-time work in which he earns some remuneration (but less than his weekly benefit amount) and during which he is not attached to a regular employer or one who did not work, but received wages such as vacation and holiday pay totaling less than his weekly benefit amount, regardless of attachment to a regular employer. In addition, Regulation 16 VAC 5-10-10 defines a partially unemployed individual as one who during a particular week had earnings less than his weekly benefit amount, is employed by a regular employer, and works, but for fewer than his normal customary full-time hours for such regular employer because of a lack of full-time work. **See Bannister v. Quality Inn**, Commission Decision 24531-C, (February 20, 1985), TP 5, in which the claimant's transfer from night shift to day shift resulted in a reduction in her hours of work.

C. **Typical Issues**

1. **Back Pay**

A claimant who receives back pay which is allocated as wages for a period which includes his claim week is not unemployed if such back pay is equal to or exceeds his weekly benefit amount. Back

pay is included in the statutory definition of wages as provided in Section 60.2-229. Further, Section 60.2-634 provides that a claimant who receives back pay at his customary wage rate for any week in which he claimed benefits shall be liable to repay such benefits to the Commission.

2. Severance Pay

Severance pay (at no less than the claimant's average weekly wage over the last calendar quarter) may be allocated by the employer after separation so as to be counted as wages received in the allocated weeks. In re Lois B. Brown, Commission Decision 32196-C (August 17, 1989), MS 375.05. Income extension plans under which payments continue long after separation are not pensions, but severance pay. See Lewis v. Lynchburg Foundry, Commission Decision 27864-C, (January 13, 1987), VL 495. The 30-day limitation for allocation mentioned in the cited cases has been subsequently repealed, effective July 1, 1993. If no allocation of severance pay is made by an employer, it is automatically deemed allocated to the last day worked. See also 16 VAC 5-10-10.

3. Full-time Work

Salespersons who perform services for an employing unit but who are free to determine the amount of time they should work, the time they should start, and the time and place of solicitation are deemed to be employed full-time, and therefore, not "unemployed" within the meaning of the Code. Rideout v. Franklin Concrete Products Corporation, Commission Decision 12597-C, (November 1, 1979), TP 415.3.

4. On-Call, As Needed

A claimant, who performs services on an on-call or as needed basis and who earns wages in an amount which is less than his weekly benefit amount, is unemployed within the meaning of the statute. Eastern Motor Inns, Inc. v. VEC, 14 Va. App. 783, 418 S.E.2d 915 (1992). TP 80.1

II. Determination of the Correct Last Thirty-Day Employing Unit

Usually, the determination of a claimant's last 30-day employing unit is relatively straightforward. Nevertheless, there could be circumstances which would make such a determination much more difficult. The adjudicator should be able to recognize and deal with them systematically so as to reach results consistent with the applicable law.

A. **Statement of Law**

Section 60.2-528B(1) of the Code of Virginia provides:

The employing unit from whom such individual was separated, resulting in the current period of unemployment, shall be the most recent employing unit for whom such individual has performed services for remuneration during thirty days, whether or not such days are consecutive. If such individual's unemployment is caused by separation from an employer, such individual's "benefit charges" for such period of unemployment shall be deemed the responsibility of the last thirty-day employer prior to such period of unemployment.

B. **Typical Issues**

1. Where the Employing Unit is Exempt From the Payment of Unemployment Insurance Taxes

Many people assume that a worker is engaged to perform services either as an employee or as an independent contractor. There is actually a third category which, for the lack of a better term, may be called "exempt employment." A true self-employment situation will not be considered as constituting an individual's last 30-day employing unit for separation purposes. (See Section on "Employment" for criteria for establishing that an individual is self-employed.)

In the case of Frye v. Frye & Associates, Commission Decision 28602-C (October 23, 1987); aff'd by the Virginia Beach Circuit Court, CL87-2602 (October 6, 1989), the claimant had been the sole general partner in a construction company for which her husband and son had worked as employees. After it failed, she filed a claim and sought to establish monetary entitlement based upon payments made to her by the company. It was held that under a long-standing practice dating back to a 1938 Attorney's General opinion, bona fide partners are to be treated as employers rather than employees. The claimant showed that she had acted as an employer by having the separation report sent to her own address and by filling it out herself. Her earnings, although characterized by her as a salary, actually amounted to a distribution of profits and she remained liable in the event the partnership lost money. Thus, her earnings from the partnership could not be used to establish monetary eligibility.

If the same claimant had established monetary eligibility based on wages earned elsewhere during her base period, her work for the partnership could not be considered as her last 30-day employing unit. Partnership and sole proprietorship earnings from an employing unit are properly considered as self-employment.

Section 60.2-219 of the Code provides specific exclusions from liability from the payment of unemployment taxes for a number of specific occupations including some domestic service, cosmetology, real estate sales, insurance sales, taxi-driving, barbering and others. Claimants whose last thirty days of work were in one of these occupations and who have established monetary eligibility based on other wages during their base period are sometimes encountered. Frequently, the companies they last worked for will note that they did not pay unemployment taxes and contend that this means they are not the last 30-day employing unit. This assumption is incorrect.

The definition of "employing unit" in Section 60.2-211 of the Code is so broad as to include virtually any person or entity in the Commonwealth that employs the services of anyone. The term "employer" is defined in Section 60.2-210 of the Code as basically an employing unit which is liable to pay unemployment taxes. Section 60.2-528B(1) cited previously talks in terms of separation from the last 30-day employing unit, not the last 30-day employer. This means that a claimant who last worked 30 days as a taxicab driver, an insurance agent on commission, or as a library assistant in the college she was attending, would have the taxi company, the insurance company or the college properly joined as her last 30-day employing unit even though the wages paid to her were exempt from taxation. It must also be noted that there could be what appears to be an anomalous result regarding the purging of a disqualification due to the differences between the language used in Sections 60.2-528B(1) and 60.2-618 of the Code. (See introduction to the section on "Disqualification").

2. Where a Claimant is Still Working a Part-Time Job

Adjudicators may be faced with the situation in which a claimant has held two jobs more than thirty days, but only became separated from one of them before filing a claim. In such circumstances, the last 30-day employing unit is the one from which the separation occurred, even if there has been more than thirty 30 days of work with the second unit since that separation. For example, if a claimant worked through June for both Company A and Company B five days per week, quit Company A at the beginning of July, and then filed a claim in September without stopping work for Company B in the meantime, separation is taken against Company A. The claimant is not partially unemployed at this point because his hours have not been reduced by his regular employer due to a lack of work; nevertheless, he is "unemployed" if his wages from Company B are less than his weekly benefit amount. If after filing his claim, he becomes totally or partially separated from Company B, he immediately has a new 30-day employing unit at that time. Even if he qualified with respect to his first separation

(Company A), he could be disqualified with respect to the second (Company B). Furthermore, if he was disqualified from his first separation (Company A), it does not necessarily follow that he would have purged that disqualification if he was found qualified from his second separation (Company B). In order for him to purge a prior disqualification, he would have had to worked 30 days or 240 hours for Company B after the effective date of his separation from Company A. See Weakley v. World Book, Commission Order 29050-C (September 30, 1987), MS 60.2.

3. Where a Claimant is Separated From Two or More Overlapping Jobs

When a claimant has worked for two or more employers concurrently and becomes separated from both or all of them, the computation of the last 30-day employing unit will not be difficult so long as the adjudicator is careful to gather accurate information and visualize the process as one reaching back in time from the week when the claim is filed. Using a calendar, or a list of dates, start with the date the claimant actually filed his claim (not the effective date) and mark all the days worked for all employers distinctively (i.e., "X" for Company X, "Y" for Company Y, "Z" for Company Z, etc.). Keep doing this backwards in time until thirty marks for one company have accumulated. Don't forget that working any part of a calendar day counts as one day and that midnight shifts can carry over into two separate days. It does not matter if one job was full-time and another only part-time. Also, do not count days of paid vacation or sick leave when no services were performed. The first employing unit with thirty marks is the last 30-day employing unit. Consider this example assuming no weekend work:

A claimant files a claim on Friday, August 3, 1990, which is made effective Sunday, July 29, 1990. He worked full-time as a laborer for Company A for several years, before injuring himself on Sunday, July 15. He was then off on paid sick leave through July 27. He returned to work for one hour on Monday, July 30, before quitting. For the past year, he also had a part-time job after hours as a security guard for Company B, which he was able to continue during the time he was off on sick leave since it was sedentary work. On July 26, he was laid off from Company B due to lack of work.

It is obvious that the claimant worked over 30 days for both companies, and he last worked for Company A. Despite this, Company B is his last 30-day employing unit, since his sick leave days do not count as days when he performed services. Starting backwards from August 3, one will reach 30 "B" days before reaching 30 "A" days. Company B is considered the liable employer and Company A, the subsequent. Thus, his quitting of Company A

cannot be considered under the provisions of Section 60.2-618(1) of the Code.

If the claimant subsequently returned to work for Company A for two weeks and quit again, any additional claim filed thereafter will establish that company as his last 30-day employing unit. This is because the claimant will have last worked for Company A, and counting backwards from the last day of his subsequent separation from Company A, one will reach 30 A days before reaching 30 B days. While his subsequent voluntary separation from any employer would be appropriately considered under the provisions of Section 60.2-618.1 of the Code, under these circumstances, it would make a difference as to the joinder of the proper parties to the case.

III. Effective Date of Claim

A. Statement of Law

Section 60.2-612(6) of the Code provides that an unemployed individual shall be eligible to receive benefits with respect to any week only if "he has made a claim for benefits in accordance with regulations the Commission may prescribe."

B. Regulatory Interpretation

Regulation 16 VAC 5-60-10E of the Rules and Regulations Affecting Unemployment Compensation further provides in pertinent part that all total or part-total unemployment claims (initial or additional) shall be effective on the Sunday of the week in which an individual reports to a Commission local office or a location designated by the Commission to file a claim unless:

1. The Commission is at fault due to a representative of the Commission giving inadequate or misleading information to an individual about filing a claim;
2. A previous claim was filed against a wrong liable state;
3. Filing was delayed due to circumstances attributable to the Commission;
4. A transitional claim is filed within fourteen days from the date the Notice of Benefit Year Ending was mailed to the claimant by the Commission;
5. When claiming benefits under any special unemployment insurance program, the claimant

becomes eligible for regular unemployment insurance when the calendar quarter changes;

6. The wrong type of claim was taken by a field office;
7. With respect to reopened or additional claims only, when the claimant can show circumstances beyond his control which prevented or prohibited him from reporting earlier.

The effective date of a claim is important in establishing an individual's monetary eligibility, as well as the starting point for the period in which benefits may be paid. The Deputy uses the effective date to determine an individual's base period which is defined as the first four of the last five completed calendar quarters immediately preceding the first day of the individual's benefit year (See Code Section 60.2-204). The effective date of claim, as well as the base period and the base period wages, are among the information contained in the monetary determination which advises the claimant of the amount of benefits he is eligible to receive within his benefit year, provided the other eligibility requirements are met. In 2003, an amendment to 60.2-204 provided that if the claimant did not have sufficient wages in his regular base period to become eligible for benefits, the Commission shall look at the alternate base period, constituting the four most recent completed calendar quarters, to determine if there are sufficient wages in two quarters to establish a valid claim.

C. Typical Issues

1. Backdating Claims

Questions concerning the effective date of claim will arise most often because a claimant has not filed his claim during the first week of his unemployment and wants to have the claim backdated to the date his separation from employment occurred. The Commission has previously held that an individual does not become a claimant for unemployment compensation and is not entitled to receive benefits until he initiates a claim for benefits. One who delays in initiating his claim merely because he was unaware of his right to do so or because of his employer's failure to post and maintain notices informing its employees that it is liable for contributions may not claim retroactively for weeks which precede the Sunday immediately before the date filed. Walton v. American Air Filter, Decision UI-72- 2499, (December 6, 1972); aff'd by Commission Decision 5844-C, (January 8, 1973).

Caveat: Note that if the claimant's delay in initiating his claim

was caused by circumstances which fall within one or more of the exceptions set forth in Regulation 16 VAC 5-60-10E the general rule articulated in Walton will not apply. See Orgo v. A. R. S. Builders, Inc., Commission Decision 11180-C, (November 3, 1978), MS 95.25, in which it was held that because an agent state had erroneously instructed the claimant to file against the wrong liable state, the Virginia claim should be backdated.

2. Altering Effective Date to Increase Base Period Wages

Another question may occur because a claimant discovers that his base period does not include recent earnings which could have increased his monetary entitlement. Within this context, once a valid claim has been established (i.e., there are sufficient wages within the base period to entitle an individual to receive benefits), the Commission is without authority to alter the effective date of claim. See Hardy v. Herbert Brothers, Inc., Commission Decision 6584-C, (February 26, 1975), MS 60.15.

IV. Monetary Entitlement

A. Statement of Law

1. Weekly and Maximum Benefit Amounts

Section 60.2-612(1) of the Code provides that an unemployed individual shall be eligible to receive benefits for any week only if the Commission finds that he has, in the highest two quarters of earnings within his base period, been paid wages in employment for employers as set forth in the Benefit Table which appears in Section 60.2-602. Such wages must be earned in not less than two quarters. Therefore, as of July 6, 2008, a claimant is required to have been paid wages in at least two quarters of his base period totaling \$2,700 to meet the minimum monetary eligibility requirements. Such wages must also have been earned in two quarters.

2. Base Period and Benefit Year

An individual's monetary entitlement during a given year is determined by the wages he has earned in covered employment during his base period (the first four of the last five completed calendar quarters immediately preceding the first day of the individual's benefit year) or alternative base period (the four most recent completed calendar quarters immediately preceding the first day of the claimant's benefit year) as provided in Section 60.2-204. The benefit year is the 52-consecutive week period beginning the first day of the week in which an individual files a

new valid claim except that the benefit year is 53 weeks if filing a new valid claim results in overlap of any quarter of the base period of a previously filed claim (See Code Section 60.2-206).

An individual who files a claim for benefits, effective June 5, 2009, establishes a benefit year that continues until June 3, 2010 and a regular base period which begins January 1, 2008 and ends December 31, 2008 or an alternate base period that begins April 1, 2008 and ends March 31, 2009.

B. Regulatory Interpretation

Regulation 16 VAC 5-32-20 of the Rules and Regulations Affecting Unemployment Compensation requires each employer (as defined in Code Section 60.2-210) to report all wages payable to each worker who performs services in covered employment. This information is used to determine a claimant's base period wages which in turn form the basis for his monetary entitlement. A claimant may allege that he has earned wages in covered employment which are not recorded in his monetary determination.

1. Wages

Wages, as defined in Code Section 60.2-229, include all remuneration payable for personal services, including commissions, bonuses, tips, back pay, dismissal pay, severance pay, and any other payments made by an employer to an employee during his employment, and thereafter, and the cash value of all remuneration payable in any other medium other than cash. Those wages which are paid in back pay awards are to be allocated to and reported as being paid during the calendar quarter or quarters in which such back pay would have been earned. Severance shall be allocated to the last day of work unless otherwise allocated by the employer. If allocated over a period of weeks, the rate of pay must not be less than the employee's average weekly wage.

The term wages does not apply to:

- a. the amount of any payment paid to or on behalf of an employee or his dependents for retirement, sickness or disability payments which are received under a workers' compensation law, medical hospitalization expenses connected with sickness or accident disability, death benefits, or any private insurance benefit plan;
- b. payments on account of disability or medical or hospital expenses made by an employer after six months following the last month in which the employee worked;
- c. remuneration paid in any medium other than cash to an

employee for service not in the course of the employer's trade or business;

- d. payments other than vacation or sick pay made to an employee after the month the employee becomes 65 years of age if the employee did not work in the period for which such payment is made; or
- e. the payment made by the employer for social security taxes pursuant to Section 3101 of the Federal Internal Revenue Code.

2. Employment

Code Sections 60.2-212 through 60.2-218 list those circumstances in which services performed for remuneration constitute employment while Code Section 60.2-219 describes those services which are not considered employment. Generally, the issue as to whether or not a claimant's work constitutes employment arises in conjunction with the issue as to whether an employing unit is an employer which is liable for taxes under Title 60.2 (See Code Section 60.2-500). Such questions are resolved by the Commission as a result of a liability hearing. Prior to 2005, Section 60.2-212C required a finding that services performed by an individual for remuneration shall be considered employment unless it is found that:

- 1. Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and
- 2. Such service is either outside the usual course of the business for which such service is performed, or such service is performed outside of all the places of business of the enterprise for which such service is performed; or such individual, in the performance of such service, is engaged in an independently established trade, occupation, profession or business.

Of course, the "ABC Test" does not apply to the statutory exceptions to the definition of "employment" set forth in Section 60.2-212(1) and in subsections 1-25 of Code Section 60.2-219, such as service performed by insurance and real estate agents who are paid solely by commission, certain "direct sellers" of consumer products and certain taxicab and contract carrier courier drivers and certain court reporters.

During the 2005 legislative session, the Virginia General Assembly amended the provisions of Section 60.2-212(C) of the

Code of Virginia by repealing this statutory exclusion commonly known as the "ABC" test and replacing it with the 20-Factor test set out in Internal Revenue Service Revenue Ruling 87-41, which identified 20 Factors as indicating whether sufficient control is present to establish an employer-employee relationship. Those 20 factors as set out in Revenue Ruling 87-41 are: (1) instructions; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising and paying assistants; (6) continuing relationship; (7) set hours of work; (8) full time required; (9) doing work on employer's premises; (10) order or sequence set; (11) oral or written reports; (12) payment by hour, week, month; (13) payment of business and/or traveling expenses; (14) furnishing of tools and materials; (15) significant investment; (16) realization of profit or loss; (17) working for more than one firm at a time; (18) making service available to the general public; (19) right to discharge; and (20) right to terminate.

It is not necessary that all 20 factors be met in determining whether there is sufficient control to establish an employer/employee relationship. Revenue ruling 87-41 also provides that: "[A]n employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.

C. Typical Issues

1. Proof of Earnings

As concerns monetary entitlement, problems which arise most often are (1) establishment of a base period; (2) whether the claimant has sufficient earnings during the base period in covered employment to qualify for unemployment compensation and (3) whether all of the base period earnings have been considered in determining the claimant's monetary entitlement.

The critical inquiry concerns proof of earnings. Generally, such proof requires documentary evidence such as the employer's payroll record, payroll stubs, or a wage and tax information form (W-2) filed by the employer with the Internal Revenue Service. In the event a discrepancy exists between the employer's quarterly reports and the claimant's documentary evidence, further investigation is needed. The explanation for the discrepancy may be as simple as an incorrect social security number. Notice that even if the claimant's base period earnings exceed the minimum qualifying amount for eligibility, he is not monetarily entitled to benefits unless such earnings occurred in at least two separate

quarters. See In the Matter of Jerry H. Pogue, Commission Decision UCFE-1022, (March 29, 1985), MS 60.1.

2. Combined-Wage Claims

There are claimants who have insufficient wages in covered employment to establish a valid claim under the unemployment compensation law of one state unless they are permitted to combine those wages with wages earned in covered employment under the unemployment compensation laws of one or more other states. Additionally, there are claimants who may increase either their weekly benefit amount or maximum benefit amount by combining their covered wages under the unemployment compensation law of more than one state.

Pursuant to Section 60.2-609 of the Code and Regulation 16 VAC 5-70-20 of the Rules and Regulations Affecting Unemployment Compensation, such a claimant may elect to file a combined-wage claim. Under this arrangement, the paying state (i.e., the state in which the claimant files his claim for benefits) may use the claimant's base period wages earned in another state in determining his monetary entitlement. Of course, once wages from another state have been transferred and used in a determination to establish monetary entitlement for benefits in the paying state, they become unavailable for determining monetary eligibility under the unemployment insurance law of the transferring state, except to the extent that such wages are usable for re-determination purposes.

Note that a combined-wage claim may be withdrawn by the claimant at any time during the appeal period for the monetary determination. Such a withdrawal may occur because the claimant decides that it is to his benefit not to transfer the available base period wages to the paying state.

D. Other Factors Which May Affect Monetary Entitlement

1. Benefits Based on Employment by State or Political Subdivision, Educational Institutions, Certain Hospitals, and Charitable Organizations

a. Statement of Law

Code Section 60.2-615A provides in pertinent part that no benefits based on service in an instructional, research, or principal administrative capacity for an educational institution shall be paid to an individual for any claim week which begins during the period between two successive academic terms or two regular but not successive terms or during a period of paid sabbatical leave

if the individual performs such services in the first of such successive terms and there was a contract or a reasonable assurance of his performing any such services for any educational institution in the second of such terms.

Code Section 60.2-615B provides that no benefits based on service in any capacity other than instructional, research, or principal administrative capacity, for an educational institution shall be paid to an individual for any claim week which begins during a period between two successive academic terms if such individual performs such services in the first of such academic terms and there is a reasonable assurance that such individual will perform such services in the second of such terms.

Each of these provisions applies to persons who perform such services on a part-time or substitute basis.

If compensation is denied for a claim week which occurs during a period between academic terms under 60.2-615B (service in any capacity other than instructional, research, or principal administrative capacity), and such individual was not offered an opportunity to perform services for an educational institution in the second of such academic terms, he is entitled to retroactive payment for each claim week provided that the claim is timely filed and the application of this statute is the sole basis for the denial.

b. Typical Issues

Notice that these provisions apply to teachers, counselors, and administrators, as well as such support staff as bus drivers, maintenance and janitorial workers, food workers, etc. Also note that an educational institution which has established a pattern of using workers year-round may choose to lay them off for the summer recess and still benefit from these provisions of the Code. Whittaker v. Commonwealth of Virginia, Commission Decision 32256-C (September 1, 1989), MS 95.1.

The purpose of these provisions is to exclude certain wages from consideration in determining monetary entitlement. A claimant may have other wages earned in other employment in his base period with which to qualify for benefits. See Pruden v. Richmond City Jail, Commission Decision 12986-C, (March 5, 1980), MS 95.1, in which it was held that although a claimant was included on a list of substitute teachers, he had no base period wages earned from an educational institution so that he should not be denied benefits by application of the "between terms" provision.

There are two distinct categories created by these provisions, the professional, consisting of teachers, administrators, and

researchers, and the non-professional, consisting of teacher's aides, janitors, cafeteria workers, bus drivers, etc. When a claimant is crossing over from one category to the other, benefits will not be denied in the period between two successive academic years or terms. Patterson v. Staunton City School Board, Commission Decision 34342-C, (October 11, 1990) MS 60.05.

The provisions of this statute do not apply to employees of an organization which conducts educational programs but is not licensed as a school. In Brown v. Richmond Symphony, Commission Decision 26044-C, (March 7, 1986), MS 5, it was held that although the employer, The Richmond Symphony, had a music education program, it was not an educational institution within the meaning of the statute because it was not licensed as a school and its staff members were not licensed teachers. Therefore, the claimant, an assistant concert master, would not be prevented from using these wages as the basis for monetary entitlement on a claim filed during two successive program years.

2. Benefits Based on Service in Connection with Sports

Code Section 60.2-616 provides in pertinent part that no benefits based on service consisting of participation in or training for athletic events shall be paid to an individual for any claim week which begins during a period between two successive athletic seasons or similar periods if he has performed services in the first of such seasons and there is a reasonable assurance that he will perform such services in the second of such seasons. Note that as in the case of educational institution workers, an individual claimant in this category may still monetarily qualify for benefits based upon base period wages earned outside of the sports activity.

3. Benefits Denied to Certain Aliens

Code Section 60.2-617 provides in pertinent part that no benefits based on services performed by an alien shall be paid unless at the time such services were performed, such individual was either (1) lawfully admitted for permanent residence or (2) was lawfully present for the purpose of performing such services or (3) was permanently and lawfully residing in the United States under color of law. This includes aliens who were present in the United States in accordance with provisions of Section 1153(a)(7) or Section 1182(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.). Additionally, all requirements specified by federal law as a condition for full tax credit against tax imposed by the Federal Unemployment Tax Act (FUTA) are applicable under this statute. **See** Section 3304 (a) (14), 26 U.S.C. 3301 et seq.

In Rokai v. Lerner's Food, Inc., Commission Decision 24074-C, (January 31, 1985), MS 95.15, it was held that a claimant who was granted a work permit by the Immigration and Naturalization Service which covered the period of his employment had satisfied the eligibility requirements of the statute in that he was lawfully present in the United States for the purpose of performing services.

Note that this section concerns monetary eligibility only, similar to Section 60.2-616 dealing with sports earnings and Section 60.2-615 dealing with earnings from educational institutions. A claimant may have all or only some of his base period earnings invalidated under this section, depending upon what the U.S. Citizenship and Immigration Service reports concerning the documentation which the agency has submitted for verification. An alien claimant whose base period earnings monetarily qualify him for benefits since he had a valid work permit at the time he earned the wages may no longer be entitled to work due to its subsequent expiration. This is no longer an issue under Section 60.2-617, but brings up the issue of the claimant's availability under Section 60.2-612(7) of the Code during any weeks claimed while he possesses no legal authorization to work.

4. Service Required During the Immediate Preceding Benefit Year in Which the Individual Received Benefits

a. Statement of Law

Section 60.2-614 of the Code provides as follows:

Service required during immediately preceding benefit year in which individual received benefits. -- No individual may receive benefits in a benefit year unless, subsequent to the beginning of the immediately preceding benefit year during which he received benefits, he performed service for an employer as defined in Section 60.2-210 for remuneration during thirty days, whether or not such days were consecutive, and subsequently became totally or partially separated from such employment.

b. Agency Interpretation

In order to be eligible for benefits during a second benefit year, a claimant must show that he has performed services for an employer during thirty days after the beginning of the immediate preceding benefit year during which he was paid unemployment compensation. Section 60.2-614 is commonly referred to as the "double-dip" provision. LaMonaco v. National Orthopedic & Rehab. Hospital, Decision UI-74-3166, (December 10, 1974); aff'd by Commission Decision 6574-C, (February 17, 1975), MS 60.05.

The purpose of the statute is to prevent more than one benefit charge from being imposed on an employer for the same separation from employment. The so-called "double-dip" usually occurs when a claimant who has filed for and received benefits remains unemployed through the end of his benefit year, and thereafter, attempts to establish a new claim with the same last 30-day employer. Even if he has sufficient base period wages to qualify, he is not eligible because he has not worked for a single employer for 30 days since he filed his last claim.

c. Typical Issues

Computation of Work Days

This statute has been interpreted to require proof that the claimant actually performed services for remuneration on 30 separate days. See *Simmons v. Oman Construction Company*, Decision UI-73-1243, (July 26, 1973); aff'd by Commission Decision 6070-C, (August 27, 1973), MS 60.05, in which it was held that the claimant's mere contention that he had performed services during 30 or 31 working days, including one Sunday, did not satisfy the statutory requirement in the face of the employer's separation information which showed that he had worked from November 13, 1972 through December 16, 1972 for a total of 24 working days.

A claimant may not satisfy this eligibility requirement by merely being employed for any number of days within a 30-day period. See *Amos v. Appalachian Senior Citizens*, Decision UI-83-5402, (June 16, 1983), MS 60.05.

Any part of a day constitutes a day of work for purposes of this provision.

Caveat: The 30 days of employment need not be consecutive, but must be for a single employer. This provision does not apply to a claimant who is separated from the same employer more than once during his benefit year if he has worked 30 days since he filed his initial claim and after receiving benefits for the benefit year. There is no "double-dip" because he has worked 30 days for a single employer since initiating the last benefit year.

Example: Claimant works for XYZ Corporation two years. He is laid off on January 31, 1986. He files a claim for benefits, effective February 2, 1986, thereby establishing a benefit year which ends January 31, 1987. After receiving benefits for two weeks, he is recalled to work by XYZ Corporation and continues to perform services there until a second layoff on November 21, 1986. He may continue to claim benefits through the end of his benefit year, January 31, 1987, and initiate a new claim effective

February 1, 1987 and establish a second benefit year which ends January 30, 1988, even though he does not have a different last 30-day employer, because he worked 30 days for a single employer since he initiated the prior benefit year in which he received benefits.

5. Reduction of Weekly Benefit Amount Caused by Earnings

Code Section 60.2-603 provides as follows:

Weekly benefit for unemployment. -- A. Each eligible individual who is unemployed in any week shall be paid for such week a benefit equal to his weekly benefit amount less any part of the wages payable to him for such week which is in excess of twenty five dollars. Where such excess is not a multiple of one dollar, it shall be computed to the next highest multiple of one dollar.

B. Wages earned on a shift commencing Saturday and ending Sunday shall be allocated to the week in which the claimant earns the majority of wages for such work.

This provision must be read in conjunction with two others, Section 60.2-226 defining "unemployment," and Section 60.2-229A defining "wages." Note that remuneration for services performed in a week does not have to be paid in that week in order to cause a reduction or elimination of benefit entitlement for it.

6. Reduction of Weekly Amount by Amount of Pension or Other Periodic Payments

Section 60.2-604 of the **Code** provides:

Reduction of benefit amount by amount of pension. -- The weekly benefit amount payable to an individual for any week which begins in a period for which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment under a plan maintained or contributed to by a base period or chargeable employer based on the previous work of such individual, including payments received by such individual in accordance with Section 65.1-54 or Section 65.1-55, shall be reduced, but not below zero, by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week.

In VEC v. Nunery, 24 Va. App. 617 (1997), the Court of Appeals held that a lump sum payment of Social Security disability benefits were in the nature of retirement pay or pension payments encompassed by 60.2-604, since such benefits were based on the

individual's previous employment. In 2005, this section of the Code was amended to exempt 50 percent of Social Security Act or Railroad Retirement Act retirement benefits where the fund balance factor effective the first Sunday in January is below 50 percent, and 100 percent where the fund balance factor is above 100 percent.

This offset was not originally limited to those pension or retirement payments attributable to or affected by employment with a base period employer. Watkins v. Cantrell, et al., 736 F2d 933 (4th Circuit) (1984), TP 460.55. Nevertheless, effective July 1, 1987, the Code was amended to include that limitation.

Note that the weekly benefit amount is not affected by workers' compensation payments payable pursuant to any provision of the Code other than Section 65.1-54 and Section 65.1-55. Harlow v. Wes-Way Sprinkler Company, Commission Decision 24193-C, (July 1, 1985), MS 95.15.

7. Child Support Intercept of Unemployment Benefits

Code Section 60.2-608 provides in pertinent part that any individual who files a new claim for unemployment compensation shall, at the time of filing such claim, disclose whether or not he owes child support obligations (meaning obligations which are being enforced pursuant to a plan prescribed by Section 454 of the Social Security Act which has been approved by the Secretary of Health and Human Services). In the event the individual is determined eligible for unemployment compensation, the Commission shall so notify the state or local child support enforcement agency which enforces such obligation. Further, the Commission shall deduct and withhold from any unemployment compensation payment to such individual in either:

- a. the amount specified by the individual to the Commission to be withheld under the subsection (but only if neither of the provisions of the following paragraphs are applicable);
- b. the amount, if any, determined pursuant to an agreement submitted to the Commission under Section 454(20)(B)(i) of the Social Security Act by the state or local child support enforcement agency, unless the provisions of the following paragraph are applicable; or
- c. any amount otherwise required to be so deducted and withheld from such unemployment compensation pursuant to legal process, as

defined in Section 462(e) of the Social Security Act and which is properly served upon the Commission.

Any amount deducted and withheld shall be paid to the appropriate child support enforcement agency and shall be treated as if it were paid to the individual as unemployment compensation and paid by such individual to the appropriate child support enforcement agency in satisfaction of his child support obligations.

8. Eligibility Limitation When a Claimant Has Given Notice of Resignation and is Terminated Prior to Its Effective Date

Effective July 3, 1988, the General Assembly added Section 60.2-612(8) to the Code of Virginia, which reads as follows:

An unemployed individual shall be eligible to receive benefits for any week only if the Commission finds that:

8. He has given notice of resignation to his employer and the employer subsequently made the termination of employment effective immediately, but in no case to exceed two weeks for which he would have worked had the employee separated from employment on the date of termination as given in the notice; provided, that the claimant could not establish good cause for leaving work pursuant to Section 60.2-618 and was not discharged for misconduct as provided in Section 60.2-618.

This subsection has the effect of limiting a claimant's benefit entitlement to no more than two weeks under certain specified circumstances. It is most important that the adjudicator has read and understands the ruling in Boyd v. Mouldings, Inc., Commission Decision 23871-C (September 6, 1984), MT 135.05, and further interpreted in Actuarial Benefits & Design Corp. v. VEC, 23 Va. App. 640 (1996). These cases are further discussed in the Section on "Discharge As Response to Notice of Resignation" in both the "Voluntary Quit" section and "Misconduct." After doing so, the decision-maker should keep these points in mind.

Boyd does not stand for the premise that every time a claimant leaves work prior to the date specified in a notice of resignation, such separation is a discharge. If Boyd's employer had paid her through the date of her notice or even allocated unused paid vacation to that period of time, then all obligations to her would have been discharged and her separation would have been a voluntary one, even if she was told to leave immediately. Similarly, had the employer representative in Boyd asked her if she would be willing to leave immediately, and had she agreed to do so, then her separation would have remained a voluntary one,

with a compromise of the effective date agreed to by both parties.

In order to apply this subsection of the Code, the adjudicator must first be convinced that the Boyd criteria have been met, namely that there has been a verbal or written resignation given by the claimant to the employer and that, prior to the effective date of that resignation, the employer has subsequently terminated the claimant, without providing full pay for the notice period and without an agreement by the claimant to cut short the notice period.

Once the decision-maker is convinced that there is a Boyd situation, in order to apply the limitation of benefit eligibility, all elements of the following scenario must exist. They are:

- a. A notice of resignation was given to the employer by the claimant.
- b. That notice contains a definite or determinable date (i.e.; "two weeks from today").
- c. There is a termination by the employer "at any time after notice is given and before the end of the notice period." Actuarial Benefits & Design Corp., 23 Va. App. at 649-50. The Court of Appeals in Actuarial Benefits expressly overruled the Commission policy at the time, which was to apply the two-week limitation of benefit eligibility only to claimants who were terminated immediately after submitting their notice of resignation (i.e. during the same conversation).
- d. The termination is not for misconduct (e.g. insubordination in delivering notice, "Here's my notice, now let me tell you what I think of you and the company ...").
- e. The notice was given for reasons which would not be good cause for resigning under Section 60.2-618(1) (such as to accept a better job, to take care of elderly parents out of state, or for health reasons).

Only if all of these elements are present would the claimant be subject to the two-week limit on eligibility. (It could be only one week or even none depending upon the length of the notice given or the pay in lieu of notice received by the claimant.)

It must be noted that this subsection makes no changes in the burdens of proof required. It still remains the employer's burden to show that there was a notice given and what it stated.

Likewise, the employer bears the risk of non-persuasion when it comes to establishing an immediate termination and whether or not it was for misconduct. Once it is established that it was not for misconduct, the burden shifts to the claimant to show good cause for submitting the resignation in order to avoid the imposition of the two-week limit on eligibility.

9. Waiting Period Requirement

Effective January 6, 1991, the Virginia General Assembly reimposed a one-week waiting period which every claimant must serve in each benefit year before benefits may be paid. Note that there is no requirement that this be a week of total unemployment. A partial or part-total week will suffice so long as all other eligibility requirements are met. The adjudicator should also be aware of the "ripple effect" which will result from a determination of disqualification or ineligibility affecting the waiting period week. The next validly claimed week for which the claimant remains eligible would then become the waiting period for that benefit year and an overpayment for that week could result.

10. Incarceration

Effective July 1, 1993, one of the provisions of Section 60.2-618(5) of the Code was moved to Section 60.2-612 where it more naturally belongs. A claimant will not be eligible for benefits in a week he was imprisoned or confined to jail. So long as the confinement is for the major portion of the week no problem should arise. If it is for less time, then the eligibility should be adjudicated under Section 60.2-612(7). Remember that if conviction for the unlawful act resulting in confinement brought about the claimant's separation from work, adjudication is still required under Section 60.2-618(5). There is no requirement that there be a conviction for a crime to make a claimant ineligible under Section 60.2-612(10).

V. Weekly Eligibility Criteria

A. Able and Available

In order to receive benefits, a claimant, on a weekly basis, must satisfy certain other eligibility requirements which are listed in Code Section 60.2-612. The eligibility issues adjudicated most frequently are set forth in Code Section 60.2-612(7) which concerns the claimant's ability to work, availability for work and efforts to seek employment.

1. Statement of Law

Section 60.2-612(7) of the Code provides:

Benefit eligibility conditions. -- An unemployed individual shall be eligible to receive benefits for any week only if the Commission finds that:

- a. He is able to work, is available for work, and is actively seeking and unable to obtain suitable work. Every claimant who is totally unemployed shall report to the Commission the names of employers contacted each week in his effort to obtain work. This information may be subject to employer verification by the Commission through a program designed for that purpose. The Commission may determine that registration by a claimant with the Virginia State Job Service may constitute a valid employer contact and satisfy the search for work requirement of this subsection in labor market areas where job opportunities are limited. The Commission may determine that an individual, whose usual and customary means of soliciting work in his occupation is through contact with a single hiring hall which makes contacts with multiple employers on behalf of the claimant, meets the requirement that he be actively seeking and unable to obtain suitable work by contacting that hiring hall alone. In areas of high unemployment, as determined by the Commission, the Commission has the authority to adjust the requirement that he be actively seeking and unable to obtain suitable work.
- b. An individual who leaves the normal labor market area of the individual for the major portion of any week is presumed to be unavailable for work within the meaning of this section. This presumption may be overcome if the individual establishes to the satisfaction of the Commission that the individual has conducted a bona fide search for work and has been reasonably accessible to suitable work in the labor market area in which the individual spent the major portion of the week.

2. Typical Issues

a. Able to Work

1. Ability to Work Defined

The Supreme Court of Virginia has supplied the following definition:

(R)eason and justice demand that the words "able to work", as used in the statute, should mean no more than that an applicant possess

physical and mental ability to perform some substantial, saleable service. Unemployment Compensation Commission v. Dan River Mills, Inc., 197 Va. 816, 91 S.E.2d 642 (1956), AA 235.05.

2. Burden of Proof

The burden of showing ability to work rests upon the claimant:

A strong presumption is raised against the claimant's ability to work by reason of his application for a pension, the eligibility for which is dependent upon the claimant's inability to follow a substantially gainful occupation. In order to overcome this presumption, the claimant must establish to the satisfaction of the Commission that he is in fact able to work. Nelson v. Dan River Mills, Inc., Commission Decision 3566-C, (September 13, 1960), AA 190.1.

3. Illustrative Cases

(a) An individual who has been retired on full disability has not automatically become unable to work for unemployment insurance purposes. There is raised a strong presumption, however, that he is unable to work which must prevail until such time as he can demonstrate that he is physically capable of performing services in the general labor market. Riley v. U. S. Naval Mine Depot, Commission Decision UCFE-11, (December 10, 1957), AA 235.05.

(b) A claimant with a permanent handicap can be found to be able to work even though the handicap significantly restricts the type of work he is capable of performing. The test for establishing a claimant's ability to work includes a review of his past work history to see if his base period wages were earned under the restrictions imposed by the handicap, as well as a demonstrated willingness on the part of the claimant to continue to work under the same conditions as before. See Decision D-5962; A.E.-4175, (October 16, 1951), AA 235.2. (Note: Although this was termed an availability case, it is just as apparently a case involving the ability to work.)

(c) A claimant with a new disability which may, indeed, have forced a termination of the previous work, may still be found able to work even though he must now seek work in a new occupation. In such cases, it is most important to have statements from a physician or other health care professional concerning the claimant's ability to work and what limitation might apply to it.

One may be unable to pursue his usual occupation because of some physical impairment and yet retain sufficient powers of labor to perform some gainful work in the labor market. Those with physical impairments have, as a general rule, a greater difficulty

in securing suitable employment than those who are physically whole. This, however, does not mean that the physically handicapped are unable to work, or that they are unemployable. In the vast majority of cases, such individuals must simply direct their efforts toward securing a type of work which is compatible with their capabilities. Trent v. Roanoke Telecasting Corporation, Commission Decision 5785-C, (September 28, 1972), AA 235.25.

(d) Temporary health restrictions on employability, as opposed to permanent handicaps, are considered on an individual basis. Close attention should be paid to any medical statements brought in by a claimant in such a situation as well as any statements provided by the claimant on a Record of Facts (Form B-60). A self-imposed health-related restriction which is not confirmed by a doctor's statement should certainly raise grave doubts concerning the claimant's ability to work. See Davis v. Washington Naval District, Commission Decision UCFE-219, (July 23, 1974), AA 235.4.

In the previous cited case, pregnancy was found to be simply a temporary health condition which may or may not make a claimant unable to work. Prior presumptions of the inability of pregnant women to work during some arbitrarily defined period were expressly rejected by the Commission in this case.

(e) Care must be exercised in cases where inability to work is limited to only a portion of a particular week. The Commission has held that the eligibility requirements of this section of the Code do not have to be met during each day of the week in question. Whitt v. National Airlines, Commission Decision 6463-C, (October 15, 1974), AA 5. Thus, it is necessary to focus upon an individual claimant's customary work week and what effect the inability had upon his activities during the week claimed. For instance, a clerk who customarily works Monday through Friday would hardly be considered unable to work if suddenly hospitalized on Saturday of the week. However, a nurse who customarily works weekends and is scheduled to begin a new job on Saturday and cannot do so due to hospitalization might, indeed, be found unable to work during the same week. Similarly, a short-term illness which has no effect upon a claimant's work search during the week, might show an inability to work if a scheduled appointment for a pre-employment test or interview is missed.

4. Other Considerations

Temporary health conditions affecting ability to work are frequently discovered when a claimant reports to a local office to file a claim, reports back, or attends an appeals hearing. A laborer with a broken leg might be found to be unable to work while a clerk with the same condition might be found able to work.

The claimant's prior work history and customary occupation are the primary pertinent facts in making such a decision.

Conversely, temporary health conditions affecting ability to work can be discovered when a claimant fails to report to a Commission local office when directed or scheduled. See Guide concerning Code Section 60.2-612(5). It is important to note that claimants in such situations may indeed have good cause for failing to report as directed so as not to be declared ineligible under Section 60.2-612(5). Instead, the fact that the claimant was unable to report due to health reasons becomes the strongest evidence that the claimant was unable to work during the week in which the failure to report occurred.

It is important to remember that ability to work is only one of the eligibility requirements under the provisions of Code Section 60.2-612 (7). It is relatively rare that a case will turn solely on a claimant's ability to work. Far more probable is the case in which an ability to work question is combined with an availability for work or a work search question. Therefore, it cannot be stressed too highly that all factors concerning eligibility for a week must be considered.

b. Availability for Work

1. Availability Defined

The Supreme Court of Virginia has supplied the following definition:

As used in the statute, the words "available for work" imply that in order that an unemployed individual may be "eligible to receive benefits" he must be willing to accept any suitable work which may be offered to him, without attaching thereto restrictions or conditions not usual and customary in that occupation but which he may desire because of his particular needs or circumstances. Stated conversely, if he is unwilling to accept work in his usual occupation for the usual and customary number of days or hours, or under the usual and customary conditions at or under which the trade works, or if he restricts his offer or willingness to work to periods or conditions to fit his particular needs or circumstances, then he is not available for work within the meaning of the statute. Unemployment Compensation Commission v. Tomko, 192 Va. 463, 65 S.E.2d 524 (1951), AA 5.

2. Burden of Proof

The burden is upon the claimant to show that he has met this eligibility requirement. Tomko, supra, and Virginia Employment Commission v. Meredith, 206 Va. 206, 142 S.E.2d 579 (1965), AA 40.

3. Agency Interpretation

At first glance, it might appear that the aforementioned standard set down by the Virginia Supreme Court would go against those previously discussed in the preceding section on ability to work.

Certainly, a physical handicap represents "a personal circumstance" which might result in a claimant having limitations upon employability which are more restrictive than those generally imposed in the trade or industry. There is actually no paradox here due to the findings in the case of U.C.C. v. Dan River Mills, Inc., 197 Va. 816, 91 S.E.2d 642 (1956). In that case, the claimant worked in a factory which had three shifts. Due to medical restrictions imposed by his physician, he was unwilling to accept third shift work which was all the employer had available for him. In the case, the Court stated:

Under this remedial legislation a claimant is not required to be available for work which has been shown to be unsuitable. The problem of determining when work is suitable and when it is unsuitable, under the facts and circumstances of each particular case, has been delegated to the Commission.

Because the Commission had determined that third shift work was unsuitable for this claimant, his failure to be available for it did not make him ineligible and there is no conflict with the Court's holding in Tomko.

4. Specific Factors Affecting Availability for Work

a) Attendance at School or Training Course -- Cases concerning availability occasioned by a claimant who is attending school or training arise under two distinct sets of circumstances.

(i) Where the Training Has Been Approved by the Commission. See Code Section 60.2-613 and Regulation 16 VAC 5-60-40. In such cases where training has been approved or is properly approvable under the facts as ascertained, the issue of availability simply becomes moot. A claimant in approved training has no obligation to be available for work. Such a claimant's eligibility is only governed under the provisions of Code Section 60.2-613. However, under Code Section 60.2-612(7)(c), the General Assembly allows an individual engaged in work that is performed in two or more shifts per 24-hour period to miss only one shift per 24-hour period for classes for employment education or a certificate or degree program at an institute of higher education. The individual must be available to work all other shifts.

While ability to work is not mentioned in the training subsection of the Code, as a practical matter, that issue should never arise. Certainly, if a claimant is so limited by ill health as to be unable to attend training, he would be ineligible for not regularly attending it. On the other hand, a claimant on crutches who is unable to work but who can make it to a training class will be found eligible as having met the same requirements of the aforementioned subsection.

(ii) Cases Where the School or Training is not Approved. These cases are governed strictly under Code Section 60.2-612(7) relating to availability for work. The main consideration is that found in Mitten v. Newport News Shipbuilding and Dry Dock Company, Commission Decision 6129-C, (November 20, 1973), AA 40, which cites the following quotation from Patronas v. Unemployment Compensation Board, Commonwealth Court of Pennsylvania, (5-17-72), reported in C.C.H. Unemployment Insurance Reports, p. 41 (656):

It should not be assumed that this decision will set a precedent for large numbers of college students to finance their college education by way of unemployment compensation benefits. The factual situations in this case are clear, and they permit the court to draw a line between claimants who are basically students and claimants who are basically committed to the work force but in addition are attempting to better themselves by continuing their education.

The case of McLaughlin v. Eighth Sea, Inc., Commission Decision 6068-C, (August 17, 1993) AA 40, also sets forth a number of important factors relating to the eligibility of claimants who are attending school. Thus, where a claimant enrolls in school on a full-time basis, it is possible to find him available for work. There are a number of factors which must be taken into consideration before such a finding can be reached, however.

First, the claimant must unequivocally express a willingness to rearrange school hours (if such is possible) or give up schooling altogether in order to accept work. Factors which weigh against such a statement include the payment of a non-refundable tuition which would be forfeited upon dropping out of school, the receipt of G.I. Benefits which are payable only on condition that the individual remains in school, or the near approach of final exams or graduation which would mean forfeiting an entire semester of course work if a job opportunity requiring dropping out of school would arise.

Secondly, a claimant in school or training stands a better chance of establishing availability for work by demonstrating that, prior to becoming unemployed, a similar course of study was being carried. By showing a proven ability to work and carry a course load at the same time, a claimant will be establishing reasons for continuing to attend school while unemployed, and thus, be considered primarily in the labor market while only secondarily a student.

Finally, consideration must be given to the claimant's normal and customary hours of work as opposed to the hours of the school or training course. No conflict in these areas would certainly tend to show that attendance poses no substantial restrictions upon employability. Also, the claimant's search for work must be closely examined. Restrictions upon employability are cumulative in nature and any self-imposed limits such as minimum standards of salary, conditions, or location of employment, become more significant if the claimant is in school or training.

A claimant who is considering enrolling in school or training but who continues to actively seek work up until the time of his enrollment will not necessarily be found ineligible for benefits.

See Virginia Employment Commission v. Evelyn R. Meredith, 206 Va. 206, 142 S.E.2d 579 (1965), AA 40. So long as the intention is merely a future expectancy and the claimant has not stated to the Commission that he is not in the labor market full time, no actual restriction exists. Of course, if a claimant who plans to attend school or training to the exclusion of working full-time actually refuses an offer of work or tells prospective employers that his availability is limited, then that claimant has attached additional personal restrictions upon employability. No automatic presumption can be applied to a claimant who is attending school or training to the effect that he was unavailable for work for the weeks just prior to beginning it.

(b) Conscientious Objection -- Cases involving conscientious objection to certain types or conditions of work can arise on occasion. It has been held in the case of a claimant whose religion forbade working on Saturday, that this was not the type of self-imposed restriction as would make him unavailable for work. Decision IS-1232-1251 (August 29, 1955), AA 90. Although not stated in this case, presumably such a claimant would be available for work on Sunday, and therefore, would not be in a position of higher unavailability than one whose religion forbade working on Sunday. Again, eligibility in such cases would still have to be tested by a showing of an active search for work during the week for which benefits are claimed.

(c) Moving from One Locality to Another and Transportation -- A claimant will not be considered unavailable for work just because

he has moved from one locality to another where job opportunities may be less available. The statutory language is broad and comprehensive. It provides that in order that a claimant be eligible for benefits the Commission must find that he is able to work and is available for work. There is no requirement that he be available for work in the locality where he last resided, or was last employed. Dan River Mills, Inc. v. U.C.C. of Virginia, 195 Va. 997 at 1001, 81 S.E.2d 620 (1954), AA 5.

Normally, transportation to and from work which is located within a normal commuting distance is a personal problem which must be solved by every individual. A claimant who could ride with her husband to a first shift factory job but could not accept second shift work because she did not have access to his car, and who could not accept third shift work because she did not want to drive 17 miles alone at night, was found to be unavailable for work. Burton v. Dan River Mills, Inc., Decision S-15-97, (April 16, 1952); aff'd by Commission Decision 703-C (May 27, 1952); aff'd by the Corporation Court of the City of Danville, AA 150.2.

(d) Domestic Circumstances -- Generally, a claimant must be available for full-time work. A claimant who had worked previously only 30 hours per week and who wanted to accept no more hours with respect to prospective jobs due to child care responsibilities, did not show that she was available for work. Cronin v. Prison Fellowship, Commission Decision 24636-C, (February 28, 1985), AA 160.05. A claimant willing to work only first shift in a factory setting because she did not have child care for the second or third shift was also found to be unavailable for work. Holley v. Dan River Mills, Inc., Decision S-53-118; aff'd by Commission Decision 704-C, (May 27, 1952); aff'd by the Corporation Court for the City of Danville, appeal denied.

(e) Restrictions as to Type of Work -- A claimant who was available only for permanent work and whose job contacts were in the District of Columbia and Maryland rather than Virginia, the only jurisdiction in which she had a license to work as a hair stylist, was found to be putting unreasonable restrictions upon her availability. Merrill v. Sophia of Virginia, Inc., Decision UI-73-1804, (October 1, 1973); aff'd by Commission Decision 6115-C, (November 1, 1973), AA 215.1.

(f) Incarceration -- A claimant who is incarcerated for an entire week is automatically ineligible for that week under the provisions of Section 60.2-618(10) of the Code; nevertheless, availability for work could obviously be affected by incarceration during only a portion of a week. See generally, Whitt v. National Airlines, Commission Decision 6463-C (October 15, 1974), AA5. A claimant who has been released on bond pending disposition of

criminal charges cannot be held to be unavailable for work solely due to this fact on the assumption that no one, knowing of the situation, would extend an offer of work. Ratcliff v. Huff-Cook, Commission Decision 6119-C, (November 7, 1973), AA 250.

(g) Civic Obligation -- A claimant who has been notified that he is on-call for jury duty is not thereby rendered unavailable for work. However, payments made to such a claimant for showing up in court or actually serving on a jury would be considered wages under the provisions of Section 60.2-229 (See elsewhere in Guide) of the Code. Decision S-5661-5538 (August 29, 1958), AA 370.1. The length of actual service on a jury would be an additional factor to consider in determining eligibility.

(h) Length of Unemployment-- Non-availability of Employment -- Work search considerations aside, "availability for work" is not dependent upon the availability of employment in a particular labor market. Thus, the Supreme Court of Virginia reversed a lower court's reasoning that certain claimants were unavailable for work due to economic conditions which made work unavailable for them in their usual occupation. U.C.C. v. Tomko.

Similarly, the mere fact that a claimant's unemployment has been unusually long cannot, by itself, render him unavailable for work. The potential duration of an individual claimant's benefits is determined under the Benefits Table found in Section 60.2-602 of the Code and no adjudicator can act to cut short this entitlement on the assumption that long-term unemployment means that the claimant is unavailable for work. Rector, et al. v. Vaughan--Bassett Furniture Company, Commission Decision 380-C, (September 15, 1948). However, the General Assembly requires claimants to participate in reemployment services such as job search assistance if they are determined likely to exhaust regular benefits and who are identified likely to need reemployment services pursuant to a Commission profiling system. Code Section 60.2-612(11). The Commission may excuse participation in reemployment services for good cause or for completion of such services.

c. Actively Seeking and Unable to Find Suitable Work

1. 1982 Amendment

This language, added in 1982 to this section of the Code, has created a third statutory requirement for eligibility. Nevertheless, the Commission and the Courts in numerous decisions had previously made such a requirement a part of being "available for work." See Dan River Mills v. Unemployment Compensation and Virginia Employment Commission v. Meredith. See also Virginia

Employment Commission v. Coleman, 204 Va. 18, AA 190.1.

2. Scope of Job Search

In the **Coleman** case, **supra**, the Supreme Court of Virginia held that the Commission had sufficient evidence to conclude that a claimant who had made seven definite job contacts in eight weeks had not shown his eligibility for benefits. The Court also refused to consider the claimant's contention that calls to employers whose names he could not remember in the number of "six a week" could be used to help demonstrate an active search for work. Absent fraud, the Commission is the weigher of evidence in such cases so as to establish the facts which will be reviewed by the Courts. Therefore, in order to assure a complete and accurate record, it is essential that the adjudicator at each level examine the claimant's job search activity or lack of activity in detail. This requires thorough questioning and specific answers concerning the particulars of the job search rather than general statements regarding availability. The adjudicator should take care not to make strict numerical assumptions concerning job search.

In **Thompson v. Mantech Mathetic Corporation**, Commission Decision 30211-C, (May 20, 1988), AA 160.05, the claimant did not make two personal job contacts each week with prospective employers. Despite this, he was found to have been actively seeking and unable to find suitable work during the period in question. This was due to the professional and highly specialized nature of his work; the fact that reading journals, calling prospective employers, and sending resumes was customary in his field; and the fact that the documentary evidence submitted by the claimant proved his eligibility.

In the case of **Baron v. Commonwealth of Virginia**, Commission Decision 29924-C, (April 19, 1988), AA 160.1, the claimant, a self-employed attorney filed his claim following his separation from his last employer. He subsequently established his own law office and mailed announcements of the opening of his practice to 70 individuals and organizations. The announcements were mailed in an attempt to solicit clients and referrals for his new law practice.

The Commission held that the mailing of announcements to prospective clients did not constitute an active search for work as contemplated by the statute. The vast majority of the announcements were mailed to individuals, and Section 60.2-612.(7)(a) clearly contemplates job contacts with "employers" as defined in Section 60.2-210A of the **Code**. Also, the Commission held that the solicitation of clients did not represent an attempt to find or obtain "employment" since the services rendered by an attorney to his clients does not meet the statutory definition of "employment." See Section 60.2-212C of the **Code of Virginia**.

3. Length of Unemployment

While the length of one's unemployment does not automatically render a claimant unavailable for work (See Rector), it is a factor which may influence how a claimant's work search should be viewed.

The desire to find employment in keeping with one's prior employment experience and utilizing the best of his talents or skills, is both reasonable and desirable. There is a limit, however, beyond which selectivity becomes a restriction. As the length of one's unemployment grows longer and longer he is expected to expand his search and his willingness to include jobs which are entirely new so far as his past experience is concerned.

This does not mean, of course, that the individual is to be expected to extend his availability beyond his physical or mental capabilities. It does mean that the individual must be ready and willing to attempt new work that is within his capacity and must extend his search to include such work. Runion v. Hercules Powder Company, Commission Decision 3259-C, (July 28, 1958), AA 295.

4. Wage Restrictions

In seeking work, a claimant cannot limit himself to considering only jobs which would economically justify working.

This Commission has never required a claimant to seek or accept work where the wages, hours, or other conditions of work are substantially less favorable to the individual than those prevailing for similar work in the locality. But this in no way infers that the claimant can exclude from consideration work for which he is qualified simply because the prevailing wage is not sufficient for him to meet his personal domestic expenses and still clear an amount he deems suitable. Perkins v. C&P Telephone Company, Commission Decision 3028-C, (September 6, 1956), AA 450.152.

An adjudicator would be well advised to secure Job Service evidence in eligibility cases where a claimant places any type of wage restriction upon his work search.

5. Union Relations

(a) Job Search Through Hiring Halls -- Even prior to the addition of language to this section concerning soliciting work through a hiring hall, the Commission has allowed exclusive job search contacts with such hiring halls to demonstrate an active search for work. Such a finding may be made in cases where the

individual is a bona fide member of a labor organization through which work is customarily obtained by most employers in the claimant's occupation in the appropriate labor market. Stuss v. Tri-State Armature & Elec. Co., Commission Decision 5728-C, (July 17, 1972), AA 475.5 and Mangum v. A C & S Inc., Commission Decision 5818-C, (December 1, 1972), AA 475.05.

(b) Restrictions Imposed by Union -- There are, however, cases where restrictions imposed by a union, which when followed by a claimant, might promote a finding that the claimant was not actively seeking work. These include restrictions as to hours not customary in the industry (See U.C.C. v. Tomko), restrictions as to wages which exclude jobs paying the prevailing wage rate for similar work in the locality (See Stophel v. Bradley Brothers Construction Company, Decision UI-69-24; aff'd by Commission Decision 4884-C, (March 17, 1969), AA 475.05), and restrictions as to the type of work predicated upon the existence of union sanctions against members engaging in non-union work where such a restriction clearly eliminates consideration for a large number of jobs in the labor market area. See Racey v. Fishback & Moore, Inc., Commission Decision 545-C, (January 26, 1950).

(c) 1985 Amendments Regarding Union Hiring Halls -- The new language added to this section of the law does not appear to change substantially what has been the previous practice of the Commission except it focuses more closely on the individual claimant's customary method of obtaining work. Unlike the following language concerning areas of high unemployment, there has been no regulation promulgated by which the Commission has defined the class of claimant to which the language applies. Thus, it would appear that the level of unionization of a particular labor market still remains the object of first inquiry. This should be followed by a detailed questioning of the claimant as to how he has found jobs in the past so as to determine his customary pattern of obtaining work.

d. High Unemployment/Limited Job Opportunities Special Requirements

Effective July 1, 1993, this subsection was amended to allow registration with the Virginia State Job Service to constitute a valid employer contact and satisfy the search for work requirement in labor market areas where job opportunities are limited. There has been no regulation promulgated yet which distinguishes such an area from one of "high unemployment" and no cases in this regard have yet arisen.

1. Regulation 16 VAC 5-60-10H provides:

a. Adjustment to Work Search Requirement -- In areas

of high unemployment as determined by the Commission (and) defined in Section 1 of 16 VAC 5-10-10, the Commission has the authority, in the absence of Federal law to the contrary, to adjust the work search requirement of the Virginia Unemployment Compensation Act. (Section 60.2-100 et seq.) Any adjustment will be made quarterly within the designated area of high unemployment as follows:

1. The adjustment will be implemented by requiring claimants filing claims for benefits through the office serving an area experiencing a total unemployment rate of 10% - 14.9% to make one (1) job contact with an employer each week.
2. The adjustment will be implemented by waiving the search for work requirement of all claimants filing claims for benefits through the office serving an area experiencing a total unemployment rate of 15% or more.
3. No adjustment will be made for claimants filing claims for benefits through the office serving an area experiencing a total unemployment rate below 10%.

2. Considerations for Regulation 15 VAC 5-60-10H Cases

The Commission in the past has consistently refused to give a specific number of job contacts which, when made, would automatically show that a claimant has been making an active search for work. The previously cited regulations are a recent exception to this rule.

Although the aforementioned regulation establishes the number of weekly job contacts which a claimant in a high unemployment area must make in order to be considered to be actively seeking work, it does not follow that merely making the required contacts will automatically render the claimant eligible for benefits for the week. It would appear that a claimant with restrictions upon availability (such as attendance at school) who is also within a high unemployment area, might help overcome the presumption against availability by making more than the required minimum number of job contacts each week.

e. Employer Verification

1. Verification Requirement

The 1993 addition to Code Section 60.2-612(7), requiring verification of a claimant's job contacts has become a most useful tool to determine if a claimant is truly attached to the labor market. If a claimant has deliberately falsified an employer contact, then there are two penalties which are applicable. One is that he has failed to show an active search for work, the false contact casting doubt upon his credibility. Such a presumption would apply at least to the week in which the false contact was made and perhaps thereafter. The other penalty is the 52-week disqualification provided for in Section 60.2-618(4) of the Code (See elsewhere in this Guide). In cases involving an administrative penalty for fraud, the burden of proof upon the Agency is higher than that necessary in other cases. The evidence of fraud must be clear and convincing. Therefore, great care should be taken in getting statements from claimants in cases of suspected false employment contacts.

2. Proof of Deliberate Falsification

Merely forgetting a date or the name of an individual contacted does not establish a deliberate attempt to falsify a job search record. It could, however, invalidate that particular contact (by moving it to another week), thus rendering the claimant ineligible for the week in question. The fact that an employer does not recall a claimant asking about work is also not positive proof that the job contact did not occur. Thus, no action should be taken unless the employer representative named by the claimant specifically denies meeting that individual.

3. Effect on Eligibility

The failure of a claimant to provide enough information to verify a job contact means that the Commission cannot exercise its option to do so but does not establish falsification. If the contact in question is needed to show an active search for work, it is apparent that the claimant has not met the burden of establishing his eligibility.

f. Exceptions to Work Search Rule

1. Partial Claimants

Regulatory Interpretation -- Regulation 16 VAC 5-60-20C(7) provides that an employer shall provide the Commission with information with the following certification, or one similar:

During the week or weeks covered by this report, the worker whose name is entered worked less than full-time and earned less than his weekly benefit amount for total unemployment because of lack of work, or otherwise shown. I certify that to the best of my knowledge, this information is true and correct.

Partial claimants did not have to seek work under previous Commission interpretations. The 1982 requirement that a claimant be actively seeking work has not been interpreted as affecting a partial claimant's eligibility in any way. The rationale behind a partial claimant's exemption from the work search requirement is that of concern for an already existing employer/employee relationship. Since that relationship has not been severed and actively continues, this work is sufficient to satisfy the search for work requirement. Regulation 16 VAC 5-60-20F has subsequently confirmed this interpretation.

For a partially unemployed individual to be eligible for benefits, he must work during the hours for which work is available from the employer. The employer, in turn, informs the Commission what time during the week, when work was available, the claimant did not perform it. Partial claimants who fail to work the hours for which work is available are held ineligible for benefits during that week.

Note that it is the employer who has control over what to put down on the partial claim form. If a partial claimant has a pressing need to be off during a scheduled period of work, the employer may exercise its option to lay him off for the time necessary to attend to his business and not show work as being available during that time. If, however, the employer chooses not to excuse the absence, it need only note on the form to that effect; i.e., left four hours early--sick child.

In the case of Shifflett v. Cooper Industries, Commission Decision 31370-C (February 9, 1989), AA 160.35, the claimant failed to volunteer to perform inventory work during a three-day shutdown in the plant where she worked. She was also absent one of the two days she was scheduled to work due to a doctor's appointment. It was held that her failure to volunteer to do inventory would not affect her eligibility since the employer had not specifically assigned her such work which she had then refused. Nevertheless, her failure to work both days when work was available meant that she did not meet the eligibility requirements applicable to partial claimants.

2. Short-Term Layoffs

Commission practice has been to waive the work search requirement

for claimants on a short-term layoff with a fixed or reasonably definite return date (usually four weeks or less). The rationale for this is similar to that in the case of partially unemployed individuals since the primary purpose of requiring claimants to actively seek work is to facilitate their return to work at the earliest possible time. A claimant on a short-term layoff already has a job, so to require him to seek work would be superfluous. Some cases where a fixed return date cannot be established also fall into this category. Examples would be where the layoff was due to weather conditions or where an emergency such as a fire closed a business temporarily. While no fixed return date can be given in such situations, a reasonable estimate can be made. Claimants in such a situation should be informed by their local office representative that if they do not return to work by a set date, they must start seeking work so as to retain their eligibility for benefits.

3. Starting to Work in the Near Future

Once a claimant has found a job with a firm starting date, the primary purpose of his work search has been achieved. There are always situations, however, where such plans can fall through. Thus, a claimant who plans on starting a new job cannot simply stop seeking work as soon as the job is promised if the starting date is far in the future. There is always the possibility of finding a better job in the meantime, or finding temporary work which will last until the new job starts. Commission practice has generally been to allow claimants with start-to-work dates to use their final week of unemployment to prepare for their new job. This is on the assumption that the job-related activities, such as physical exams, orientation classes, moving to a new locality, or finding permanent child care, are all necessary components of obtaining suitable work. Claimants whose start-to-work dates are pushed back or whose new jobs fall through would be expected to immediately renew their work search when such facts are known to them.

4. Claimants Out of Labor Market

This topic was previously mentioned under "Availability for Work."

There is now a statutory presumption that an individual outside of his normal labor market area for the major portion of the week is unavailable for work. The only way to overcome this presumption is for the claimant to conduct a bona fide work search and be reasonably accessible to suitable work in the labor market area where the major portion of the week was spent. There is no exception provided in the statute for individuals on a short-term layoff, such as a maintenance shutdown.

g. Caveats for Adjudicators

The Form VEC-B-60.5, Record of Facts Obtained by Deputy, used to report a claimant's statement concerning availability differs from other VEC-B-60 forms in that no specific questions are asked. This does not mean that such questions cannot be asked. While it is generally best to allow a claimant to explain in his own terms why he was unavailable for work during a particular period of time, frequently the response will not adequately address all aspects of eligibility. For a Deputy to make a determination based upon such an inadequate statement is to invite a reversal, because the claimant would be free to give the Appeals Examiner information which cannot be checked for prior inconsistent statements.

Another caveat applies to Appeals Examiners who might overlook statements from the claimant which, if compared to testimony given at the hearing, would establish inconsistencies. There is no need to introduce the Record of Facts into the record if the testimony given at the hearing is consistent with it. If there are inconsistencies, however, the claimant should be given the opportunity to confront and explain them. The inconsistent statement then should be introduced into the record as an exhibit.

This applies, as well, to Claimant Questionnaire forms and Continued Claim for Benefits forms on which evidence of work search or restrictions upon employability can be found. There is an established rule which may be applied in such cases. A statement against interest freely given without knowledge of its import may be accorded greater weight than a self-serving statement made only after knowledge of how it would affect eligibility. Thus, it can be seen that there is a presumption that a claimant's first statement concerning eligibility is correct so long as there is evidence to indicate that it is accurate, complete and was not obtained by coercion.

Finally, it must be re-emphasized that this Guide is not a substitute for the Precedent Decision Manual. The cases cited herein should all be read in their entirety so as to get the best possible overview of the requirements for weekly eligibility. This Guide has, by necessity, been divided into categories, yet weekly eligibility depends upon a combination of all of these categories. While in some blatant situations it is sufficient to establish that an individual may have failed to meet one of these requirements, in the vast majority of cases a determination or decision will turn upon a combination of the three requirements of Code Section 60.2-612(7).

B. Continued Claims

1. Statement of Law

Section 60.2-612(5) of the Code provides in pertinent part that an unemployed individual shall be eligible for benefits if the Commission finds that he has registered for work and continued to report to an employment office in accordance with Commission regulations.

2. Regulatory Interpretation

Regulation 16 VAC 5-60-10(1) of the Rules and Regulations Affecting Unemployment Compensation further provides in pertinent part that a claimant shall continue to report as directed during a continuous period of unemployment.

Regulation 16 VAC 5-60-10F provides in part that an individual shall be deemed to have reported at the proper time if he claims benefit rights within 28 days of the calendar week ending date of the last claim filed or the calendar date on which the initial claim was filed. In the event the 28th day falls on a day the local unemployment insurance office is closed, the final date for late filing shall be extended to the next day the office is open.

Failure to file within the time limit shall automatically suspend the claim series and the claimant must file an additional or reopened claim in order to begin a new one.

This provision applies to the procedure for filing continued claims within a claim series rather than the procedure of initiating a new claim. See Richardson v. Sapphire Mining Corporation, Commission Decision 24522-C, (February 18, 1985), MS 95.15.

3. Typical Issues

Questions concerning these provisions occur most frequently when a claimant has failed to comply with a reporting requirement.

The Commission is clearly without jurisdiction to honor a continued claim for benefits which is filed more than 28 days after the date of the last claim filed even if a claimant received no warning that his failure to file his claim within 28 days would result in a loss of benefits. See Morton v. Capital Records, Commission Decision 12761-C, (November 20, 1979).

Good cause for late reporting is not shown when a claimant, who is awaiting the outcome of his appeal from a disqualification from benefits, fails to report as instructed or files his continued claims more than 28 days from the date of his last claim filed because a Commission representative told him nothing could be done

about money he had not yet received while his claim was in appeal status. **See Richardson.**

Note that the "28-day rule" eliminates consideration of good cause for late reporting. If the claimant reported within that time, the claim is automatically timely. If not, the matter would be considered under Section 60.2-612(6) (See elsewhere in **Guide**) and a determination is made as to whether the claimant has shown good cause to backdate his reopened or additional claim.

In addition to the routine filing of continued claims, a claimant may be directed to report to a local office for a variety of reasons. These could include possible job referrals, an eligibility review, or to answer questions which may have arisen concerning continued claims previously filed. If a claimant fails to report in accordance with instructions to do so, he may be held ineligible under the provisions of Section 60.2-612(5) of the **Code**. What is important to remember is that this section may not be used retroactively to reach weeks claimed before the week in which the claimant was directed to report. For instance, suppose a claimant turned in a continued claim form covering the weeks ending June 7 and June 14 in which she stated that she had worked part-time, but neglected to show her earnings. This form is returned promptly; and on Friday, June 20, the local office sends her instructions to report by Friday, June 27, to give the amount of her earnings. She receives the instruction, but finds it inconvenient for personal reasons to report by that day. Instead, she comes in the next week and provides the necessary information.

This claimant would not be ineligible for any week prior to the week ending June 28 for failing to report as directed since she was not directed to report in any such week. She could be ineligible for the week ending June 28 if there had been no contact with her which might be construed as a rescheduling of the appointment. However, if she had called in to say she could not make it on Friday, and was told by a local office representative to simply come in the next week, then she could not be held ineligible for failing to report in the week ending June 28, since the original instructions would have been changed. Of course, if her reason for not keeping the original appointment was that she was sick in bed, then the issue of her ability to work in the week ending June 28 would be properly considered under Section 60.2-612(7) of the **Code**.

C. **Bona Fide Paid Vacation**

1. **Statement of Law**

Section 60.2-612(4) of the **Code** provides in pertinent part that an unemployed individual shall be eligible for benefits with respect

to any week only if the Commission finds that he is not on a bona fide paid vacation. If the individual's weekly vacation pay is more than \$25 but less than his weekly benefit amount, his weekly benefit amount shall be reduced by an amount of the vacation pay which is in excess of \$25.

2. Typical Issues

Within the context of this provision, the question raised most frequently is whether the claimant is on a bona fide paid vacation during his claim week. Generally, if the claimant is receiving vacation pay which is attributable to the claim week, he is on a bona fide paid vacation. See Coleman, et al. v. Virginia Employment Commission and Lynchburg Foundry, Circuit Court of the City of Lynchburg (August 31, 1979). In Coleman, the employer had an annual maintenance shutdown which normally occurred during the first week in July. Additionally, the employer was a party to a collective bargaining agreement which permitted each individual employee to choose between taking vacation prior to the shutdown or during the shutdown. The Court held that those claimants who did not take "early vacation" and who received vacation pay during the scheduled maintenance shutdown were on a bona fide vacation, while those who had already had their vacation prior to the shutdown or who had arbitrarily been denied the opportunity to take early vacation, and were not receiving vacation pay were not on a bona fide paid vacation. See also Penn v. Lynchburg Foundry Company, Commission Decision 23487-C, (July 16, 1984), appeal denied in Circuit Court of Campbell County (January 30, 1987). Under similar circumstances, a claimant who exercises his right to take early vacation as opposed to vacation during the scheduled maintenance shutdown, under the terms of a collective bargaining agreement, will not be penalized under this provision. His unemployment does not result from his failure to take vacation during the maintenance shutdown but rather the employer's lack of work. See Zeh v. Hercules, Inc., Commission Decision 24776-C, (February 15, 1985), TP 105.

VI. Other Eligibility Criteria

A. Receipt of Unemployment Benefits from Another State or the United States

1. Statement of Law

Section 60.2-612(3) of the Code provides in pertinent part that an unemployed individual shall be eligible for benefits with respect to any week only if the Commission finds that he is not receiving, has not received, or is not seeking unemployment benefits under an unemployment compensation law in any other state or the United

States. This provision does not apply if it is finally determined by the appropriate state or federal agency that the individual is not entitled to such unemployment benefits.

2. Agency Interpretation

The language in this statute is not intended to preclude a claimant who has a multi-state employer in his base period from filing his claim against more than one state to discover where his wages were reported. Likewise, a claimant who has potential monetary entitlement in two or more states may file his claim against those states to determine which is more advantageous. However, a claimant who has filed more than one claim may not collect benefits from them simultaneously, and he must declare his intentions as to which one he will pursue.

3. Typical Issues

The application of this provision usually arises within the context of an overpayment situation after, through crossmatch or other means, it is learned that the claimant has collected benefits under the unemployment compensation programs of two or more states and/or the federal government simultaneously.

B. Labor Dispute

1. Statement of Law

Section 60.2-612(2) of the Code provides as follows:

Benefit eligibility conditions. -- An unemployed individual shall be eligible to receive benefits for any week only if the Commission finds that:

- a. His total or partial unemployment is not due to a labor dispute in active progress or to shutdown or start-up operations caused by such dispute which exists (i) at the factory, establishment, or other premises, including a vessel, at which he is or was last employed, or (ii) at a factory, establishment or other premises, including a vessel, either within or without this Commonwealth, which (a) is owned or operated by the same employing unit which owns or operates the premises at which he is or was last employed and (b) supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed. This subdivision shall not apply if it is shown to the satisfaction of the Commission that:

(1) He is not participating in or financing or directly interested in the labor dispute; and

(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the labor dispute, there were members employed at the premises, including a vessel, at which the labor dispute occurs, any of whom are participating in or financing or directly interested in the dispute.

- b. If separate branches of work which are commonly conducted as separate businesses at separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subdivision, be deemed to be a separate factory, establishment or other premises. Membership in a union, or the payment of regular dues to a bona fide labor organization, however, shall not alone constitute financing a labor dispute.

2. Typical Issues

a. Existence of a Labor Dispute

Initially, there must be a finding of a labor dispute in active progress. A labor dispute is a controversy between an employer and its employees concerning the terms or conditions of employment and/or the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms and conditions of employment regardless of whether the disputants stand in the proximate relationship of employer and employee. See Petersen v. Roanoke Telecasting Corporation, Commission Decision 6466-C, (October 17, 1974) and Bernard v. M. W. Manufacturing Company, Decision UI-73-1696, (August 14, 1972); aff'd by Commission Decision 5791-C, (October 12, 1972), LD 125.15. For a labor dispute to exist, there is no requirement that a union or specified number of employees be involved. See Bisese, et al. v. National Airlines, Inc., Decision 3184-C, (January 28, 1958), LD 35.15. Because the Code is concerned with the mere existence of a labor dispute rather than the merits of the parties, responsibility for the cause of the dispute is immaterial. See Bisese, supra, and Caudill, et al. v. Blackwood Fuel Company, Inc., Commission Decision 320-C, (November 5, 1947), LD 125.1.

Under Virginia law, the term "labor dispute" contemplates both strikes by employees and lockouts by employers and there is no distinction between them. See Decision S-16299-16308, (November 19, 1964), LD 125.1. In that case, the employer, an A&P store, was a member of a local trade association whose members engaged in

a two-month lockout in order to support another member which was the object of a strike by union employees. The Commission held that the claimants, who had been locked out by A&P but who had not participated in the dispute by picketing, were unemployed as a result of a labor dispute.

The Supreme Court of Virginia has held that when a labor dispute and resultant strike which occurred at the employer's distribution plant caused the shutdown of a dependent assembly plant where there was no dispute and no strike, the assembly plant was a separate establishment within the meaning of the Code, even though the assembly workers were members of the striking union and covered under a master labor agreement between the union and the employer's integrated company. The circumstances of employment, rather than those of management and operation, are key in determining the unity and integration of the several plants within the company, or the lack of unity and integration. See Ford Motor Company v. U.C.C., 191 Va. 812 (1951), LD 35.05.

b. Labor Dispute as the Cause of Unemployment

Although the existence of a labor dispute may be clearly established, there may be a question as to whether it caused the claimant's unemployment. An employee who is laid off due to a lack of work prior to the start of the labor dispute is not unemployed because of the labor dispute in active progress unless work becomes available for him and he refuses it because of the dispute. See Carter, et al. v. T. M. Coal Company, Commission Decision 10493-C, (June 23, 1978), LD 470.2. However, if it is evident that an employee who was laid off prior to a labor dispute would not have returned to work because of the dispute, he is unemployed due to the labor dispute even if the employer has not issued a specific recall to advise him of the availability of the work. See Cannon v. S. J. Groves & Sons Company, Commission Decision 3942-C, (August 21, 1962).

Moreover, if during the course of a labor dispute an employer fills a claimant's job with a permanent replacement and refuses the claimant's offer to return to work, the claimant who initiates a claim for benefits after the strike has ended is not unemployed as a result of a labor dispute since there is no job for him. See Bernard, and Bryan v. Dean Foods Company, Decision UI-71-2347, (November 18, 1971); aff'd by Commission Decision 5538-C, (November 20, 1971), LD 445.2.

Start-up operations include those operations necessary to ready the employer to resume business, such as maintenance or repairs to damage which occurred during the labor dispute. Therefore, where an employer has resumed regular operations following a labor dispute, but is unable to recall the claimants because of

significant loss of business which occurred during the dispute, such claimants are not unemployed as a result of start-up operations. See Hedrick, et al. v. R. P. Thomas Trucking Company, Inc., Decision UI-82-9357, (September 23, 1982), LD 350.55.

c. Abandonment of Labor Dispute

Claimants may contend that although a labor dispute did exist, it was not in active progress during the claim period in question because they abandoned it. The Commission has held that in order to establish the abandonment of a labor dispute, it must be shown that the claimants have notified the employer of their abandonment and that they have made an unconditional offer to return to work.

See Bryan.

Where the employer refuses to rehire employees who have abandoned their strike and made an unconditional offer to return to work because it has no vacancies, such employees are not unemployed due to the labor dispute. Rather, their unemployment is a result of the employer's inability to return them to work. See Adams, et al. v. Heritage Hall Health Care, Commission Decision 24380-C, (March 7, 1986), LD 465.3.

d. Statutory Exception

The burden is on the claimant to show that he comes within the exception set forth in the statute. See Employees of Craddock Terry Shoe Company, Commission Decision 158-C, (October 18, 1945), LD 220.15. In determining whether a claimant comes within the exception, it is necessary to recognize that participation and interest in a labor dispute are not synonymous. Participation connotes personal activity. A direct interest may exist whether or not the individual is among those actively involved in the dispute, or even when he is not in sympathy with those actively involved in the dispute. A person is directly interested in a dispute when his wages, hours, or conditions of work will be affected favorably or adversely by the outcome. See Bisese. When there is a mere possibility that a claimant's wages, hours or other conditions of employment will be affected by the outcome, he is not directly interested in the labor dispute. See Branch v. Old Dominion Transit Management Company, Commission Decision 9069-C, (March 23, 1977), LD 130.

A claimant may be directly interested in the outcome of a dispute even if he is not a member of the union engaged in the dispute and he has been locked out of his job by his employer. See Wornom v. Newport News Shipbuilding and Dry Dock Company, Commission Decision 9939-C, (December 12, 1977), LD 130.

The term "grade" denotes level, rank, or relative portion of employees in common service. A "class" may include several grades

of workers. Thus, a trainee may be unemployed due to a labor dispute in active progress if he is of a grade within a general class of workers, any of whom are participating in, financing, or directly interested in such dispute. See Dorish, et al. v. Virginia Air National Guard, Commission Decision 9162-C, (April 13, 1977), LD 220.1.

VII. Training (See also Availability for Work in this Guide)

A. Statement of Law

Section 60.2-613 of the Code provides as follows:

Benefits not denied to individuals in training with approval of Commission. -- A. No otherwise eligible individual shall be denied benefits for any week because he is in training with the approval of the Commission, including training under Section 134 of the Workforce Investment Act, nor shall such individual be denied benefits for any week in which he is in training with the approval of the Commission, including training under Section 134 of the Workforce Investment Act, by reason of the application of the provisions in subdivision 7 of Section 60.2-612 relating to availability for work, or the provisions of subdivision 3 of Section 60.2-618 relating to failure to apply for, or a refusal to accept, suitable work.

B. Notwithstanding any other provisions of this chapter, no otherwise eligible individual shall be denied benefits for any week because he is in training approved under Section 2296 of the Trade Act (19 U.S.C. Section 2101 et seq.), nor shall such individual be denied benefits by reason of leaving work to enter such training, provided the work left is not suitable employment, or because of the application to any such week in training of provisions in this law (or any applicable federal unemployment compensation law), relating to availability for work, active search for work, or refusal to accept work.

C. For purposes of this section, "suitable employment" means, with respect to an individual, work of a substantially equal or higher skill level than the individual's past adversely affected employment, as defined for purposes of the Trade Act, and wages for such work at not less than eighty percent of the individual's average weekly wage as determined for the purposes of the Trade Act.

B. Regulatory Interpretation

16 VAC 5-60-40 of the Rules and Regulations Affecting Unemployment Compensation further provides in pertinent part that:

- A. Training shall be approved for an eligible claimant under the provisions of Section 60.2-613 of the Code of Virginia only if the Commission finds that:
1. Prospects for continuing employment for which the claimant is qualified by training and experience are minimal and are not likely to improve in the foreseeable future in the locality in which he resides or is claiming benefits;
 2. The proposed training course of instruction is vocational or technical training or retraining in schools or classes that are conducted as programs designed to prepare an individual for gainful employment in the occupation for which training is applicable. The training course shall require a minimum of 30 hours attendance each week;
 3. The proposed training course has been approved by an appropriate accrediting agency or, if none exists in the state, the training complies with quality and supervision standards established by the Commission, or is licensed by an agency of the state in which it is being given;
 4. The claimant has the required qualifications and aptitude to complete the course successfully;
 5. The training does not include programs of instruction which are primarily intended to lead toward a baccalaureate or higher degree from institutions of higher education.
- B. Benefits may be paid to an otherwise eligible claimant while he is attending training only if the Commission finds that the claimant is enrolled in and regularly attending the course of instruction approved for him by the Commission.

Each of the criteria under Regulation 16 VAC 5-60-40 must be met to qualify for approved training. See Bellamy v. Giant Food, Inc., Commission Decision 23725-C, (August 2, 1984); aff'd by Circuit Court of the City of Alexandria, Law No. 9161, (January 23, 1985), AA 40.

A claimant who is in training approved under the Trade Readjustment Act of 1974 is not subject to the requirements of Regulation 16 VAC 5-60-40. Where the claimant is certified to receive a trade readjustment allowance, and is enrolled in training approved pursuant to either of these two laws, he

satisfies the eligibility requirements of the Code so long as he regularly attends classes in his approved course of study. See **Jenkins v. General Electric**, Decision UI-85-8067, (November 7, 1985), AA 40.

Introduction to Disqualification

Section 60.2-618 of the Code differs from Section 60.2-612 in that it deals with disqualifications for benefits rather than periods of ineligibility. While there has been some blurring of the distinction between these two terms (principally in the language of Section 60.2-618(4) and Section 60.2-618(5)), the difference remains important. In contrast to a period of ineligibility which is determined on a week-to-week basis, a disqualification for voluntarily leaving work or a discharge for misconduct begins upon the effective date of claim and lasts for an indefinite period of time, even extending beyond an individual's benefit year into a subsequent one. Similarly, a disqualification for failure to apply for available, suitable work or a failure to accept an offer of suitable work becomes effective in the week such incident occurred and continues for an indefinite time. Whereas an ineligibility period is definite and requires another determination or decision if it is to be extended to later weeks, a disqualification under this section of the Code is only imposed once. It is then up to the claimant to show that he has met the re-qualification requirements. If the requirements have not been met, the original disqualification continues in effect. If those requirements are met, the disqualification has been purged and can no longer affect the claimant's benefits rights.

Purging a disqualification under this section of the Code requires several distinct findings. First, the claimant must show that he performed services for an employer during 30 separate calendar days or 240 hours. See Amos v. Appalachian Senior Citizens, Decision UI-835402, (September 16, 1983), MS 60.05.

The services must be performed for a single employer ("an employer"); so a combination of jobs totaling 30 days does not meet the requirement. The Commission's interpretation of the phrase "an employer" as meaning a single employer was adopted by the Circuit Court of Fairfax County in the case of Godor v. Equitable Construction Company, Inc., Decision UI-81-12297, aff'd by Commission Decision 17837-C (February 3, 1982); aff'd by Fairfax County Circuit Court, Law No. 56053, (July 6, 1982), MS 60.05. Furthermore, all 30 days or 240 hours must occur after the effective date of the claim ("for any week or weeks benefits are claimed"). Thus, a claimant who quit his last 30-day employer on January 1 and who then worked another job for 20 days through Friday, January 28, before being laid off and filing a claim cannot purge a disqualification for a voluntary leaving by returning to work for the same subsequent employer and working another 15 days before being laid off again. Although he would have 35 total days with that employer, 15 of them occurred prior to the effective date of his claim, and do not count. The five

(5) days worked Monday through Friday, before filing would count since the effective date of the claim would be the prior Sunday, January 23. In this case, the claimant would be 10 days short of purging the disqualification. See *Seven v. Jack B. Nimble*, UI-73-1954, (October 22, 1973); aff'd by Commission Decision 6141-C, (November 29, 1973), MS 60.2.

The services must have been performed in "employment" for an employer. This means that working 30 or more days as a taxicab driver, a real estate agent, or as a cosmetologist under circumstances which would meet one of the exceptions contained in Section 60.2-219 of the Code would not act to purge a prior disqualification (See also the section on determining the last 30-day employing unit).

Finally, the claimant must show that he has become totally or partially separated from the subsequent employment before a disqualification is purged. A claimant who monetarily qualifies for \$150 a week might take a part-time job paying \$100 per week after the effective date of a disqualification for quitting his job. He cannot file an additional claim after working this job for 30 days and collect a partial or total benefit unless there has been a reduction or elimination of his working hours. Even if this is shown and the prior disqualification is purged, the fact that the claimant now has a new 30-day employer means that the separation from it must be examined. If he quit this subsequent job, or was discharged from it, another disqualification could then be imposed.

I. Voluntary Leaving

A. Statement of Law

Section 60.2-618 of the Code provides that:

Disqualification for benefits. -- An individual shall be disqualified for benefits upon separation from the last employing unit for whom he has worked thirty days or from any subsequent employing unit:

1. For any week benefits are claimed until he has performed services for an employer during thirty days, whether or not such days are consecutive, and subsequently becomes totally or partially separated from such employment if the Commission finds such individual is unemployed because he left work voluntarily without good cause. As used in this chapter "good cause" shall not include (i) voluntarily leaving work with an employer to become self-employed, or (ii) voluntarily leaving work with an employer to accompany or to join his or her spouse in a new locality. An individual shall not be deemed to have voluntarily left work solely because the separation was in accordance with a seniority-based policy.

B. Typical Issues

1. Voluntary

a. Burden of Proof

The first factor which must be established before ruling under this section of the Code is that the claimant's separation occurred as the result of a voluntary leaving of work. Towards this end, the language of Kerns v. Atlantic American, Inc., Commission Decision 5450-C, (September 20, 1971), VL 190.1, is most instructive:

It is established that the burden is upon the employer to produce evidence which establishes a prima facie case that the claimant left his employment voluntarily. The employer assumes the risk of non-persuasion in showing a voluntary leaving. Once a voluntary leaving is shown, the burden of coming forward with evidence sufficient to show that there are circumstances which compel the claimant to leave his employment and that such circumstances amount to good cause as set out in the Unemployment Compensation Act, devolves upon the claimant.

It should be understood that this language does not mean that an employer must affirmatively show that a claimant left work voluntarily. Thus, a voluntary leaving can be found in cases

where an employer has never responded to a separation report and never appeared at a predetermination proceeding or an appeal hearing. The risk of non-persuasion which the employer bears can be overcome by evidence from the claimant alone. An admission by the claimant that he left work voluntarily would be an obvious example; however, it is by no means the only one. The adjudicator always retains the ability and the obligation to affirmatively find the facts surrounding a particular separation.

The standard to apply with respect to the weight of evidence in cases involving separation issues is that which is normally found in administrative hearings; namely, a preponderance of the evidence. In the case of Wright v. Russell County CETA Program and Virginia Employment Commission, Circuit Court of Russell County, Action 5304, (January 19, 1983), VL 190.15, an attempt by the Commission to require that a claimant show by "clear and convincing" evidence that her reason for voluntarily leaving work was for good cause was expressly rejected by the Court. (But note the applicability of the "clear and convincing" standard in cases involving administrative fraud under Code Section 60.2-618(4) and see elsewhere in this Guide.)

b. Quit or Discharge

The first thing which an adjudicator must address in a case arising under this section is whether there was a voluntary leaving of work or a discharge. In fact, controversies arise so frequently that it is now customary to place both issues, Section 60.2-618(1) and Section 60.2-618(2) on all notices of appeal hearings so as to avoid the necessity of waiving notice of one of the issues if the adjudicator realizes that it is more applicable than the one placed on the notice.

The language used by the parties is obviously important in deciding whether the separation was a voluntary one; nevertheless, the language itself is not dispositive of the issue. Rather, it is the underlying facts of the individual case which must be examined to find and classify the separation as voluntary or involuntary. Recurring issues in this area are as follows:

(1) Constructive Voluntary Quit

"Constructive voluntary quit" is a doctrine which has been expressly rejected by the Commission on at least two occasions, nearly 10 years apart. In the case of Branch v. Brown & Williamson Tobacco Corporation, Commission Decision 6971-C, (July 29, 1975), VL 135.05, the claimant lost his job after being arrested, convicted and incarcerated for a crime unrelated to his work. In overturning a disqualification imposed by an Appeals Examiner, the Commission held:

It is apparent that the claimant did not voluntarily leave his work. Only through the legal fiction of constructive voluntary leaving can it be said that the claimant in the present case left his work voluntarily. That fiction states that when one commits an act voluntarily which ultimately leads to incarceration, then it is tantamount to voluntarily leaving his employment. In the opinion of the Commission that legal fiction is not a plausible interpretation of the legislative intent in enacting Section 60.1-58(a) (now 60.2-618(1)) of the Virginia Unemployment Compensation Act.

Although this case dealt with incarceration, it is apparent that the same type of reasoning could arise in other cases where it might be argued that a claimant voluntarily placed himself in a situation in which he knew he would be terminated, and by so doing, caused his own separation. This analysis again surfaced in the companion cases of Brock v. USAFACEUR, Commission Decision UCFE-998, and Gibson v. United States Army, Commission Decision UCFE-1013, (February 21, 1985), VL 155.2. There, the claimants were employed overseas at military installations under the Military Dependent Hire Program where they were the dependents of their husbands on military assignments. When their sponsor husbands were ordered to return to assignments in the United States, the claimants' dependent status was automatically revoked and they were no longer legally able to work at their jobs. In these cases, the Commission held:

To conclude that these claimants knew at the time they accepted this employment that their dependency status would end upon the transfer of their spouses and result in the loss of their jobs and that such a separation was tantamount to a voluntary quit would be an application of the constructive quit theory that the Commission has expressly rejected.

Contrast these cases to that of Randall v. American Systems Corporation, Commission Decision 28029-C, (January 23, 1987), VL 495, where the claimant left her job in Virginia in order to accompany her military spouse to his new duty station in Hawaii. This separation was found to be a voluntary one since, although the claimant felt compelled to leave, she still initiated the separation and at the time she left, the employer still had work available for her. Unlike the situations in Brock and Gibson, U. S. citizens working in this country do not lose the legal ability to work if their spouses are transferred. Note that in 2009 the General Assembly amended Section 60.2-618(1) of the Code to allow that individuals who quit their job to relocate with a military spouse do so with "good cause," with the proviso that the amended section shall only take effect when the federal government appropriates adequate funds specifically for the purpose of paying

benefits to employees who would be made eligible for unemployment benefits pursuant to this section.

The Brock and Gibson cases are cited here for the purpose of emphasizing how the constructive voluntary quit doctrine has been rejected, but can still haunt the adjudicator. When an employer argues that a claimant should not be qualified because he knew when hired that the job was only temporary, the spectre has risen again! Remember, though, that a term employee does not leave work "voluntarily" when his term of employment expires; rather, "work left claimant." Hutter v. VEC, 50 Va. App. 590 (2007).

(2) Quit in Lieu of Discharge

Where a claimant quits in lieu of a discharge, the threat of a discharge, with its concomitant implications upon an individual's work record is frequently used to induce a resignation. In the stressful circumstances of a separation from work, it is frequently more convenient for both parties to call it a resignation when it actually is not.

In the case of Wright v. Allied Bendix Aerospace, Commission Decision 26281-C, (January 14, 1986), this situation was expressly ruled upon:

Cases where an individual submits a resignation in lieu of an immediate and impending discharge are not new to this Commission. The actual language used in expressing a separation from work is not as important as the actions and intentions of the parties involved. Here, although the claimant agreed to submit her resignation, there is no way that she could have refused to do so and continued to work. Since her only alternative to submitting the resignation was to be immediately discharged, it is apparent that the employer had already decided that she would no longer be working there any more. Her only choice was to decide how the termination would be reflected on the official records and her decision to make it look like a resignation cannot change the fact that her separation was purely the result of a decision on the part of the employer.

See also Howard v. Woodward and Lothrop, Commission Decision 5669-C, (May 26, 1972), MT 135.35, and "Discharge" under Code Section 60.2-618(2) of this Guide.

(3) Quit Prior to the Effective Date of Discharge

In the case of Wilson v. Bartlett Tree Expert Company, Commission Decision 28940-C, (September 28, 1987), VL 135.25, the claimant was informed on Monday morning that he was to be discharged for poor performance at the close of the work week on Thursday.

Instead, he left the job at lunch time and did not return. This was found to be a voluntary leaving of work since the claimant could have continued to work but for his decision to leave early. Additionally, good cause for quitting was not found since the reason given by the claimant for leaving early (confusion over whether insurance coverage would continue during the notice period) could have been resolved had he asked about it. A far closer case might have resulted if the claimant had made the contention and backed it with evidence that he left early due to embarrassment or humiliation caused by changed circumstances due to the impending separation.

The doctrine enunciated in Wilson received judicial endorsement in the case of Shifflett v. VEC, 14 Va. App. 96, 414 S.E.2d 865 (1992) VL 135.25. There, the claimant was given a two-week notice that she was to be terminated, yet she chose to leave immediately. In finding that she had voluntarily left work without good cause, the Virginia Court of Appeals noted that the "intervening cause rule" had been applied to employers in the case of Boyd v. Mouldings, Inc., Commission Decision 23871-C (September 13, 1984) MT 135.25. Boyd is more fully discussed in the "Discharge" section of this Guide.

(4) Quit in Anticipation of Discharge

Cases where an individual resigns in lieu of an immediate and impending discharge are thus removed from the provisions of this section of the Code because the act of resigning was not voluntary. On the other hand, when an individual resigns in anticipation of a discharge at some future date, this is a voluntary act. In the case of Hutchinson v. Hill Refrigeration Corporation, Commission Decision 3251-C, (July 10, 1958), VL 135.2, the claimant was told that the next time he had to be absent from work to visit the doctor he had been seeing periodically "he might as well stay." The claimant knew that his next appointment was scheduled a week later and figured that he might as well leave immediately since he was destined for certain discharge. In finding that this was a voluntary leaving, it was held:

Cases where an individual leaves his work in anticipation of being discharged at some future date are not new to this Commission. In such cases the holdings have established the principle that an anticipated discharge is not a discharge in fact, and if the claimant elects to leave before the discharge actually occurs he does so voluntarily. The threat of discharge is sometimes used to warn or exhort an employee, but the threat is not tantamount to actual discharge.

This same type of situation reoccurred in Grantham v. Mounds View

ISD #621 and Asphalt Driveway Company, Commission Decision 24159-C, (October 29, 1984), VL 135.35. There the claimant was in sales under a three-week training program. He knew that he would be placed on a commission only basis thereafter. Because he had made only three sales in 2 1/2 weeks, he left as it was his understanding that if he could not make two sales per day after the training period, he would be discharged. Since he was never specifically told a date on which he would be terminated, it was held that this was a voluntary leaving of work. (The good cause aspect of this case will be discussed later in this section).

It is most important that an adjudicator closely examine the evidence surrounding any situation where a resignation in lieu of discharge appears to exist. Factors to consider include whether a discharge has been mentioned by an employer representative and, if so, whether that individual possessed the actual or apparent authority to fire the claimant. Also important is the immediateness of a threatened termination -- such being established through a specific or determinable date as opposed to mere conditions subsequent. Finally, the existence of alternatives such as a known and established grievance procedure would tend to show that a discharge might not be certain in a particular case. For example, an individual who receives a "notice of intended removal" may not face an immediate and impending discharge if that notice itself documents what steps can be taken to prevent it, and the filing of a grievance can act to suspend the termination.

(5) Factual Disputes Regarding Voluntariness

The third category of situations involving the voluntary aspect of separation is that of the factual dispute where one party's version of events is pitted against the other's. Keeping in mind the burden and risk of non-persuasion cited from the Kerns case, the adjudicator must decide which party has presented the best evidence to support its position. In the case of Hodges v. Cooper Wood Products, Inc., Commission Decision 6718-C, (April 16, 1975), VL 190.15, it was found that the claimant had done so based upon two factors.

First, she presented direct testimony that pulling a worker's time card was a customary method of notification of a discharge by the employer. This formed the basis for her reasonable belief that such action had been taken against her when she arrived at work to find hers missing. After going home, she called her foreman who would not tell her why her timecard had been pulled and who later hung up on her. This scenario was found to be tantamount to a discharge. Secondly, the employer's allegations that the supervisor had told the claimant that he only wished to discuss her attendance with her and did not act to discharge her were presented in the form of hearsay testimony which could not stand

in face of the claimant's direct testimony on the point in this case.

The Hodges case illustrates the importance of weighing the evidence both as to its type (hearsay v. direct testimony) and its content (is the presented story logical, credible and reasonable).

Cases can arise in which hearsay testimony might be taken over direct testimony due to logical inconsistencies in the latter, or there might be prior inconsistent statements which weaken it. The important thing to remember is that each case where there is a dispute as to the type of separation must be studied in depth. Just because the employer carries the initial risk of non-persuasion in establishing a voluntary leaving does not mean that the claimant's version must be taken at face value and assumed to be correct. Likewise, just because an employer is able to produce three people who say they heard the claimant quit, it cannot be automatically held that this overcomes the testimony of the claimant and one witness who are arguing a discharge. All witnesses must have their testimony tested for completeness, accuracy of recollection, the presence or absence of bias, reasonableness and internal consistency. If this is not done, an adjudicator may find himself ruling under the incorrect section of the Code.

In the case of Lightfoot v. County of Henrico Department of Public Utilities, Commission Decision 8327-C, (August 24, 1976), VL 135.1, the claimant was sick and had initially reported this fact to his employer. Over the next two months, he remained sick and unable to work. Because he had no telephone, he relied upon a friend and a co-worker to notify the employer. Although they told him they did so, the employer was not notified and the assumption was made that the claimant had abandoned his job. He was then sent a letter in which this assumption was expressed and he was informed of the procedures for converting his group insurance policy and withdrawing his retirement contributions. In response to this letter, the claimant filed for unemployment compensation, contending that he had been discharged. The employer's position was that he quit.

The Commission found that the separation was a voluntary quit due to job abandonment. First, it was pointed out that the claimant was not free of culpability inasmuch as he had chosen to let others notify the employer and had not done so directly. Thus, the employer's assumption that he had quit was a reasonable one inasmuch as a notice from the claimant had not been received. Secondly, the claimant was made aware of the employer's assumption that he had quit and he did nothing to try to retain his job thereafter. This was found to be a failure on his part to take those reasonable steps to retain his job upon realizing it was in jeopardy. This, in turn, was found to amount to a condonation of

the employer's assumption that he had quit. It was held:

By failing to act to inform his employer of his desire to maintain the employment relationship, when he had a positive duty to do so, the claimant was, in effect, responsible for abandoning his employment, and as such, should be disqualified from receipt of unemployment benefits.

This job abandonment theory has also been followed by the Commission in the case of Snider v. Pounding Mill Quarry Corporation, Commission Decision 23975-C, (February 15, 1985), VL 135.05.

In that case, the claimant's actions in absenting himself from work for a week without notice were held to have created a reasonable belief that he had abandoned his job. His failure to follow instructions to contact his supervisor after attempting to return to work amounted to acquiescence in that belief. This case actually reaffirms the reasoning of Lightfoot inasmuch as the employer in Snider had returned separation information which stated "voluntary quit due to excessive absenteeism." The Commission acknowledged that this language could be construed as supporting the claimant's contention that he was discharged; however, the "totality of the circumstances" showed a voluntary separation. From this, it again must be emphasized that the language used by the parties in describing a separation does not absolutely determine the factual issue.

In the case of Shuler v. VEC, 9 Va. App. 147, 384 S.E.2d 122 (1989) VL 135.1, it was held that a claimant who had been absent from work for three days on what she thought was an approved vacation, had not voluntarily abandoned her job. Instead, the most the record supported was a finding that there had been a misunderstanding between the claimant and the employer concerning whether she had the authority to take vacation. Inasmuch as she did not leave work with the knowledge that if she did so, she would be terminated, and inasmuch as she had not been gone for an unreasonable length of time before returning, her three-day absence was not sufficient to constitute a voluntarily leaving.

(6) Discharge as Response to Notice of Resignation

Yet another area for the determination of a voluntary separation involves the situation where an individual has expressed a desire to resign, and in response, the employer has acted upon this expression with the result that a claim for benefits has been filed. The situation where the claimant gives two weeks' notice and leaves at the expiration of that time period is too obvious in its simplicity to be anything other than a voluntary separation. This section of the Guide will cover less obvious variations on the theme.

The first fact an adjudicator must find in cases involving notice to quit is whether such notice was actually given. If an employee expresses to her employer the desire to look for a job elsewhere, this is not the expression of an intention to resign at some fixed or determinable time in the future. Thus, if an employer replaces a claimant who made such a statement, this is not a voluntary leaving. See Sager v. Bethel Manor Dairy Queen, Commission Decision 5858-C, (January 23, 1973); aff'd by the Circuit Court of York County (October 9, 1973), VL 135.2.

Likewise, when a claimant makes an "offer" to resign which is predicated upon the employer's conclusion that he is not performing satisfactorily and his offer is accepted, such separation is not a voluntary resignation. See Close v. Guardian Care of Great Bridge, Commission Decision 11278-C, (November 30, 1978), VL 135.2. Contrast this case with those in which an offer to resign is used as an ultimatum.

When an individual states the intention to resign to his employer, this is an offer which is capable of being accepted by the employer. It does not matter that this offer to resign was merely an ultimatum issued in an attempt to secure concessions from the employer. See Schwab v. Greencroft Club, Commission Decision 23653-C, (August 31, 1984), VL 135.2. Indeed, if a claimant has an irreconcilable difference with a co-worker and states that "either this individual goes, or I go," there may be every expectation that the employer will get rid of the co-worker. If instead, the employer chooses to let the claimant go and keep the co-worker, this is a voluntary leaving of work. See Cohane v. Progress Index, Decision UI-72-1783, (December 7, 1972); aff'd by Commission Decision 5850-C, (January 9, 1973), VL 135.05.

In the case of Hurd v. 3M, Inc., Commission Decision 35329-C, (April 26, 1991); aff'd by the Wise County Circuit Court, Chancery No. C91-244 (March 3, 1992) VL 135.2, the claimant was working in a fast-food restaurant and was spoken to by a customer in a manner which upset him greatly. His response was to walk out of the building in the middle of his shift, and he returned carrying his street clothes under his arm. He then changed out of his uniform, left it on the desk, and waited in the public portion of the restaurant for the manager to come in so that he could discuss various grievances. In the meantime, the shift supervisor had punched out the claimant's timecard. After his discussion with the manager in which he expressed the desire to return to work, the claimant was told several days later that he was considered to have resigned due to the actions on his last day of work, and he would not be rehired. He then filed his claim for benefits, contending that he had been discharged. Both the Commission and the Circuit Court found that the claimant had, in fact, quit his job by walking out in the middle of the shift and turning in his

uniform. Even though he may have later attempted to rescind his resignation, the employer was under no obligation to accept it. The actions of the shift supervisor in clocking the claimant out did not amount to a discharge, because the claimant had left the premises and was no longer performing services for which he was entitled to be paid.

If a claimant gives an unqualified notice to resign, the employer can accept that offer immediately. This is what happened in the case of Tatum v. American Furniture Company, Commission Decision 19749-C (June 8, 1983) VL 135.2. The claimant's request for a transfer to another department was turned down and he then gave a three-day notice that he would be quitting his job. During that period of time he found out that another job prospect would not come through. He returned the next day to attempt to retract his resignation but was not allowed to do so. The Commission held that once a resignation has been given and accepted, the employer is under no obligation to allow the claimant to retract it. A request to rescind a resignation even when made within the notice period originally given is essentially a request for reemployment. The refusal of the employer to allow the rescission does not change the character of the separation into a discharge. Although, the claimant in Tatum had given a three-day notice, the claimant in the Hurd case, cited previously, gave no notice; nevertheless, the analysis would remain the same.

This case stands in contrast to that of Lester v. Kelly-Crawford Transfer Company, Commission Decision 6121-C, (November 7, 1973), VL 135.05. There, as in Tatum, the claimant was upset over working conditions and quit. Later in the day, he notified the employer that he would return to work the next day. However, unknown to him, the employer made arrangements to replace him after two weeks, but allowed him to continue working in the meantime as if nothing had happened. When the replacement arrived at the end of two weeks, the claimant was let go. In holding that this was not a voluntary leaving, but rather a discharge, the Commission found that the claimant had expressed his willingness to continue working and the employer "at the very least implied condonation of the incident."

Between these two cases, the only significant difference is the finding that the claimant in Tatum had not rescinded his offer to resign before the employer had accepted it. From the holding in Lester, it is apparent that the employer had allowed the claimant to think that his resignation had been rescinded and was thus estopped from asserting the quit as representing the proximate cause for the claimant's separation.

When an individual gives a notice of resignation with a future effective date and the employer, in turn, tells that person to

either forget about leaving or to leave immediately, the offer to resign has not been accepted. Instead, the employer has given an ultimatum to the employee which, if accepted, means that the leaving was not voluntary. In the case of Goedtel v. Virginia Business Institute, Commission Decision 6640-C (March 24, 1975), VL. 135.4, it was held:

This notice of resignation was courtesy to the employer which would give the employer ample opportunity to look around for a replacement for the claimant. By the same token, it would allow the claimant to search for other work prior to the actual termination of her employment. Had her employment continued until September 30, 1974, and then terminated without the claimant having obtained other employment, then the issue of voluntary quit would have arisen. However, the employer terminated the claimant August 26, 1974, and therefore, at most there was only speculation as to the issue of voluntary quit.

Similarly, if an employee gives notice to quit at a future specific date and the employer tells that individual to leave immediately and then pays the employee the wages which would have been earned during the notice period, the separation would be voluntary.

In Bowers v. Thompson, Commission Decision 34068-C, (August 22, 1990); aff'd by the Wise County Circuit Court (July 15, 1991), VL 135.05, it was specifically noted that an employer could use accumulated vacation pay to round out a notice period. This is due to the well-established principle that employers generally have the right to approve and schedule vacations for their employees.

Having initiated the break in the employer-employee relationship, an individual who has been paid full salary for a period of time and who is not required to work it cannot be said to be placed at any disadvantage. In the case of Boyd v. Mouldings, Inc., Commission Decision 23821-C, (September 6, 1984), MT 135.05 & MT 135.25, it was stated:

In the present case, it is apparent that had the claimant been allowed to work out her notice, or had she been paid wages in lieu of notice, then the employer would have discharged all obligations to her and her separation would have been a voluntary one. By accepting her resignation immediately, the employer, was in effect, severing the employer-employee relationship, and the claimant's separation must be considered as a discharge.

The offer to resign which an employee makes upon giving definite notice of such intentions does not have to be accepted in its entirety in order for the separation to be found a voluntary one.

If the employee gives two weeks' notice and the employer responds by stating that one week would be sufficient, this represents a counteroffer on the employer's part. A claimant who responds by accepting the one week's notice (or one week's pay) is then accepting this counteroffer. When that individual leaves, it is a voluntary separation since the employer's action in suggesting, as opposed to imposing, a shorter notice period did not amount to a termination. **See Schwab v. Greencroft Club.**

A formal offer and counteroffer may not exist in every case where notice to quit has been tendered. Where an employer tells an employee who has given two weeks' notice to "clear out right now," there is no room for negotiation. Clearly, such a separation is a discharge. However, pursuant to Section 60.2-612(8) of the **Code**, the claimant's eligibility may be capped at two weeks.

In **Actuarial Benefits & Design Corp. v. VEC, 23 Va. App. 640 (1996)**, the claimant helped with child care for her employer. The employer became very upset with the claimant when the claimant dressed up one of the children in a snowsuit meant as a gift for someone else. When the employer did not apologize for making what the claimant viewed as offensive remarks, the claimant gave two-weeks notice of her resignation. Two days later, the employer called the claimant and terminated her, withholding pay for the remaining notice period.

The Court of Appeals overruled prior Commission policy and held that Section 60.2-612(8) of the **Code** was intended to limit the benefits available to all employees who are discharged at any time after their notice of resignation and before the notice period is complete (provided the claimant was not discharged for misconduct, and voluntarily quit for reasons that do not amount to good cause). The Court remanded the case for a determination of whether the claimant left work voluntarily for good cause, but held that if she did not, her eligibility would be capped at the remaining twelve days of her notice period pursuant to Section 60.2-618(8). Please see the section on "Other Factors Which Might Affect Monetary Entitlement" in this Guide.

However, when an employer proposes to shorten a notice period, thereby suggesting that the employee's job will end sooner than he intended, such employee may be in a **Lightfoot** type situation. Unless he protests the shortening of his notice or otherwise takes reasonable steps to protect his job until the effective date of resignation as tendered, the separation from employment is voluntary because he has accepted the employer's "counteroffer."

(7) End of Employment Contract

Another category of cases involving the voluntariness of separations arises when a claimant is employed under a contract for a specific term and when that contract ends, no new contract is offered to him. Such cases do not clearly fall in the categories of voluntary leaving or discharge. The illustrative case is that of Bowles v. Cities Service Oil Co., Decision S-10559-10306, (April 4, 1961), VL 440, concerning employer-union job rotation agreements. In holding the claimant to be qualified for benefits, the Commission stated:

The claimant was hired for a definite period and, after working the period called for, was replaced by another crew member. He did not leave his job, nor did he quit. The terms of the contract were at an end, and the work he had agreed to do was done.

The reasoning of the Bowles decision was followed in the case of Siugzda v. Vinnell Corporation, Commission Decision 26258-C, (January 17, 1986), VL 440. There the claimant worked under contract at a job site in Saudi Arabia for a Virginia corporation. His contract provided that, at the end of its term, the claimant had the option of extending it for another term or being returned to the United States at the employer's expense. After three terms, the claimant decided to return home. In the absence of a showing that the employer expressly requested that he stay on longer, it was held that his employment ceased at the expiration of the contract term and no disqualification was imposed.

The Court of Appeals has recently recognized the holdings of Bowles and Siugzda as correct. In Hutter v. VEC, 50 Va. App. 590 (2007), the claimant was on notice when she accepted employment in January for a tax-preparation service that her employment would end on April 15, 2005. The court held that "when an individual leaves work solely because that individual entered into a contract of employment for a defined term, that individual does not leave work "voluntarily," as that word is used in Code § 60.2-618(1); rather, work left claimant." Noting that §§ 60.2-615 and 616 deny unemployment benefits for specific classes of term employees, the court found that General Assembly did not intend for term employees to be generally disqualified from benefits.

These claimants did not quit during the term of their employment, nor were they discharged. Thus, in these illustrative cases, the claimants were unemployed by operation of the contract.

(8) Suspensions and Leaves of Absence

A voluntary leaving can be found in certain situations where a final separation has not occurred -- specifically, cases involving

leaves of absence. A leave of absence, like a disciplinary suspension and a labor dispute, represents a period where an individual may meet the definition of "unemployment" found in Section 60.2-226, of the Code, yet, still remains attached to a regular employer. Nevertheless, if such an individual files a claim for unemployment compensation, he is deemed "separated" for the purpose of Section 60.2-618(1), of the Code.

Leaves of absences are generally granted at the request of the individual employee. Only if the request was made to avoid an immediate and impending discharge would a person on a leave of absence be found to be involuntarily unemployed. The adjudicator should clearly define the circumstances which caused the claimant to request a leave.

(9) Shareholder or Owner as Claimant

Cases where a claimant filing for unemployment insurance was also a part owner, major stockholder or corporate officer for the employer can cause problems for the adjudicator. When such a claimant's unemployment is alleged to be caused by a change in ownership, it frequently is portrayed as an involuntary separation.

The Commission has consistently held that the sale of one's interest in a business is a voluntary act as part of the free enterprise system. All of the illustrative cases spanning over a quarter of a century have so held. See Decision IS-1618-1603, (October 19, 1956), VL 440; Hull v. Merrimack Marine, Inc., Decision UI-73-1930, (October 26, 1973); aff'd by Commission Decision 6140-C (November 29, 1973), VL 440; and Compton v. Color Clean Corporation, Commission Decision 18749-C, (July 16, 1982), VL 440. While the good cause aspect of these cases will be discussed later, it is important to note they are confined to situations where the loss of employment is tied to the sale of the interest owned by the employee. Thus, a claimant who lost her job because a new owner took over the business and replaced her would not be deemed to have voluntarily left work if she was not a party to the sale.

c. Statutory Exception to Term "Voluntary"

There is one statutory exception to finding a voluntary leaving. The 1983 amendments to Section 60.2-618(1) provides as follows:

An individual shall not be deemed to have voluntarily left work solely because the separation was in accordance with a seniority-based policy.

In Eason v. Nacirema Operating Company, Inc., Commission Decision 19784-C, (September 23, 1983); aff'd by the Circuit Court of the City of Portsmouth, Chancery C-83-583, (August 20, 1984), VL 475.05 and Rasnake v. Nacirema Operating Company, Inc., Commission Decision 19439-C, (September 23, 1983); aff'd by the Circuit Court of the City of Portsmouth, Chancery C-83-583, (August 20, 1984), VL 475.05, each claimant filed his claim prior to July 1, 1983, the effective date of the amendment. However, in its analysis, the Commission noted that the amendment reflected the legislature's intent to prevent a disqualification from benefits merely because an individual is unemployed due to the operation of a seniority based system. Further, in each of these cases, the Commission found that the claimant was unemployed solely because of a lack of work at his customary work location rather than by operation of the seniority-based system.

d. Inducements to Volunteer for Layoff

The situation in which a claimant has been found to have "volunteered" for a layoff deserves special mention here. Although at first glance this might appear to be a voluntary separation, factors may be found which remove it from this category. Specific reference is made to the case of Gannaway v. Brown & Williamson Tobacco Corp., Commission Decision 22411-C, (November 16, 1983), VL 495. In this case, the employer found it necessary to cut its operations considerably which meant that many workers would lose their jobs. In order to accomplish the cutbacks as smoothly as possible, a settlement agreement was negotiated between the employer and the union representing the affected workers. Under that agreement, cash payments of at least 26 weeks pay would be made to employees with at least 6 years of service if they elected to leave the company service. The employer retained the exclusive right to determine the number of people to be allowed to participate and when the separations would take place. The claimant chose to take the option and was paid in excess of \$15,000 for doing so.

In holding that the claimant had not voluntarily quit his job, the Commission stated:

(T)his situation bears some similarity to those cases where a claimant left his or her job in anticipation of being discharged. However, this is not a case of an employee quitting work in anticipation of a discharge. In those cases, the direct and immediate cause of the claimant's unemployment was his decision to quit work, and there was no act by the employer which was the direct and immediate cause of the claimant's separation from work. Accordingly, it would be incorrect for this decision to be interpreted as a departure from the Commission's long-standing series of precedent decisions regarding claimants who leave work

voluntarily in anticipation of being discharged.

In order to find a Gannaway type of separation to exist, the adjudicator must carefully examine the facts of the particular case. When an employer has determined the necessity to eliminate employees and allows the affected workers an option to volunteer to accept the layoff at an earlier date than mandatory and when the employer retains the exclusive right to determine the employees to be laid off and the date of the layoff, the exercising of such an option by a claimant shall not be deemed a voluntary leaving but a layoff due to lack of work.

In the case of Lewis v. Lynchburg Foundry Company, Commission Decision 27864-C, (January 13, 1987), VL 495, the employer offered certain employees a "special severance arrangement" by which they could receive salary continuation payments for 24 months as well as continued insurance coverage if they agreed to leave by a certain date. Although the company was to undergo restructuring which might necessitate layoffs in the future, the claimant was not told that his job would be affected, and his attempts to secure this information was rebuffed. He then resigned. Despite the factual difference from that in Gannaway, the Commission found good cause for the claimant's decision to leave based upon the totality of the circumstances and the financial attractiveness of the employer's offer.

2. Good Cause

a. Definition of Good Cause

Once a voluntary leaving has been found, the adjudicator must then see if the claimant has established good cause for that action. See Kerns v. Atlantic American, Inc., VL 190.1. In order to establish good cause, it must be shown that the reason for leaving employment was so necessitous and compelling as to leave no alternative but to quit and that prior to leaving, the claimant made every effort that a reasonable person desirous of maintaining employment would pursue in order to protect his job. See Manning v. Tidewater Regional Transit, Commission Decision 13598-C, (May 6, 1980), VL 235.25 and Lee v. Virginia Employment Commission and General Service Administration, 1 Va. App. 82, 335 S.E.2d 104 (1985), VL 515.05. In Lee, the Court of Appeals cited the following construction of the phrase good cause:

The Commission has adopted and held firmly to the premise that an employee, who for some reason, becomes dissatisfied with his work, must first pursue every available avenue open to him whereby he might alleviate or correct the condition of which he complains before relinquishing his employment. Stated in other terms, the

claimant must have made every effort to eliminate or adjust with his employer the differences of which he complains. He must take those steps that could be reasonably expected of a person desirous of retaining his employment before hazarding the risks of unemployment.

The Virginia Court of Appeals limited the application of the Lee holding in the case of Umbarger v. VEC, 12 Va. App. 431, 404 S.E.2d 380 (1991) VL 210. There, the claimant resigned her job after she discovered that a male co-worker who had been recently hired was receiving more remuneration than she was. After being told by her supervisor that nothing could be done about this, she resigned her job. The court specifically noted that the Lee holding did not require employees to go outside of their employer to undesignated agencies such as the EEOC in order to resolve their complaints prior to quitting. Inasmuch as the claimant in Umbarger did not have access to an established grievance procedure, and inasmuch as there was no evidence that the out-of-state company which owned the employer took an active role in managing it, her choice to resign the job after being told by her supervisor that nothing could be done about the situation was made with good cause based upon her reasonable perception that she had been a victim of unlawful discrimination.

In Whitt v. Race Fork Coal, 18 Va. App. 71 (1994), the claimant was injured on his job as a loader operator. The court found that the claimant left work voluntarily when he accepted a lump sum Worker's Compensation settlement on the condition that he resign his job and release his employer from any future liability resulting from his injury. The claimant argued that had he rejected the settlement, he would have faced litigation, he did not know when he could return to work, and he needed the money. The Court of Appeals applied the two-part Umbarger test to find that the Worker's Compensation dispute was "susceptible of orderly resolution," yet the claimant did not make a reasonable effort to resolve it prior to ending his employment. Further, the claimant's injury was temporary, and his doctor gave him a return-to-work date. Finally, the court found that needing the settlement money was insufficient to demonstrate good cause to quit work.

It is not necessary that the reason for leaving work be attributable to or connected with the employment in order for a finding of good cause to be made. Although the Code once did have such a provision, it was removed many years ago. The case of Phillips v. Dan River Mills, Inc., Commission Decision 2002-C, (June 15, 1955), VL 50 and VL 155.35, pointed this out in awarding benefits to a claimant who left work to care for her elderly and infirm parents on the recommendation of their physician. In doing so, it was stated:

(W)here the pressure of real, not imaginary, substantial, not trifling, reasonable, not whimsical, circumstances compel the decision to leave employment, the worker leaves voluntarily but with good cause. The pressures of necessity, of legal duty, or family obligations or other compelling circumstances, and the worker's capitulation to them, will not penalize his right to benefits if he once again re-enters the labor market.

The distinction between work-connected and personal factors is frequently blurred in individual cases as a combination of reasons for leaving may exist. It is important to keep in mind that the language of the Lee and Phillips cases should always be applied in combination when testing a claimant's reason for quitting work to determine if good cause exists. Thus, just because Lee involved job-related complaints while Phillips dealt with external pressures, does not mean that the respective holdings cannot be applied in opposite situations. For example, a claimant who quits work for purely personal reasons must still show that he took all reasonable steps to protect his employment before leaving it in accordance with the Lee analysis. Similarly, a claimant who left work due to a job-related condition needs to show that his reasons were substantial, reasonable, and compelling in accordance with the Phillips language. With this preliminary point in mind, typical issues involving good cause will be discussed in the general order in which they occur in the Precedent Decision Manual.

b. Attendance at School or Training Course

With one exception, a claimant who leaves work to attend school or training cannot establish good cause for having voluntarily quit. See McLaughlin v. Eighth Sea, Inc., Commission Decision 6068-C (August 17, 1993) AA 40. Numerous past decisions on this subject have spoken of the commendable personal desires of such individuals to further their education which do not meet the "good cause" requirements for avoiding a disqualification.

The exception is a statutory one, found in Section 60.2-613 of the Code. (See "Approved Training" elsewhere in this Guide.) If a claimant leaves work which is deemed to be "unsuitable" (not substantially equal or higher in terms of skill level or paying less than 80% of average weekly wages earned in adversely affected employment under the Trade Act of 1974) in order to enroll in training approved under Section 236(a)(1) of the Trade Act of 1974, then he cannot be disqualified for that separation for having left work voluntarily without good cause.

It should be further noted that the Court of Appeals has read

60.2-613(B) to only apply to claimants who leave work after "submission and approval of [an] application to enter [a] program." Good cause shall not be found for a claimant who voluntarily quits work because of "plans, intentions, or acts merely antecedent or preparatory to admission." **VEC v. Fitzgerald**, 19 Va. App. 491, 496 (1995).

c. Conscientious Objection

A claimant who leaves work due to conscientious objection to some required aspect of the job may have good cause for doing so. If the evidence shows that an employer, who is made aware of a conflict between the job requirement and the claimant's genuine religious beliefs, cannot or will not make a reasonable accommodation, the work is not suitable for the claimant and he has good cause for leaving such work. In the case of **Rohrer v. Buchanan County Sheriff Department**, Commission Decision 22174-C, (March 2, 1984), VL 90 and SW 90, the claimant was a deputy engaged in serving court papers, warrants and subpoenas. At the time he was hired he informed the employer that his religious beliefs forbade carrying a gun, and for several years he performed his duties without having to do so. He quit his job after being told that, in the future, wearing a gun would be a requirement of his job. In awarding benefits, the Commission held:

(T)he new regulation in question, while facially neutral, does have a substantial impact on the claimant's First Amendment guarantee to the free exercise of religion. Despite the reasonableness of the particular rule, the First Amendment freedom guaranteed by the U.S. Constitution must take precedence.

Similar cases have arisen where claimants have quit rather than work on warships due to religious beliefs and where they quit rather than to perform work on Sabbath or holy days in violation of religious precepts. **See** Decision S-5040-4957, (March 20, 1957), VL 90. If a claimant alleging conscientious objection for voluntary leaving cannot show that he took reasonable steps to seek an accommodation with his employer before quitting, he should be disqualified. **See Lester v. White Front Automotive Parts Company**, Commission Decision 24865-C, (April 12, 1985), VL 90. Inquiry into an individual's religious beliefs should be cautiously made and should only go so far as to define those beliefs which caused a conflict with a condition of work. The length of time an individual has held those beliefs is not important. In Decision S-5040-4957, in which the claimant had just joined his church which observed the Sabbath on Saturday "shortly prior to his separation," the Commission held that because the employer could not arrange for the claimant's schedule to preclude Saturday work, the claimant's reason for leaving the job con-

stituted good cause. However, this does not mean that an adjudicator cannot find that a claim for conscientious objection is unfounded based upon the particular facts of a case. Also, situations might arise in which an individual cites religious reasons totally unrelated to work as prompting a voluntary leaving.

d. Distance to Work and Transportation

Where a claimant bases a decision to quit work upon a lack of transportation or the distance to the job, it is necessary to determine what distance is involved and whether the work is located within the individual's normal labor market area. Generally, if the work is located beyond the normal labor market area and the claimant has no alternative means of transportation, his leaving is for good cause. In the case of Campbell v. Shenandoah Sand and Gravel, Inc., Commission Decision 13080-C, (April 8, 1980), VL 150.2, the claimant worked for four months at a job located 60 miles from his home. He had no car and was able to commute with his supervisor and co-workers to the job site. When they quit, the claimant had no way to get to work since no public transportation was available. In awarding benefits, the Commission held that he should not be penalized for having accepted work located at such a distance.

However, the mere fact that the job is some distance from the claimant's residence does not necessarily lead to a finding of good cause. See Hylton v. Frith Construction Company, Commission Decision 12846-C, (January 28, 1980), VL 150.2. There, the claimant was working 50 miles from home as a construction laborer. As bad weather came on, he chose to leave because of the difficult driving coupled with the fact that his hours would be cut back. In denying benefits, the Commission held:

While it is unfortunate that the commuting distance to the job was an obstacle for the claimant to overcome during the winter months, he agreed to the distance to work as a condition of employment by continuing in it for so long a period of time.

The claimant in Campbell had no transportation, while the claimant in Hylton did. Thus, despite the similar distance which each claimant had to face, their situations were different. Arguably, had Hylton lost his transportation without there being any alternatives, he would also have shown good cause for leaving. Such a result was actually reached in the case of Marchinke v. Neff, Commission Decision 30027-C (May 12, 1988); aff'd Frederick County Circuit Court, Case No. L-88-64 (June 27, 1989), VL 210. When an individual is faced with an increased distance to work due to the actions of the employer in either transferring the individual to a more distant location or moving the permanent work

place elsewhere, good cause for quitting may be shown. In Myers v. Bramwell Manufacturing Company, Commission Decision 6216-C, (March 11, 1974), VL 150.2, the claimant was faced with an additional 20-mile commuting distance due to the employer relocating its plant. Since she had no way to travel this distance, her subsequent leaving was found to be with good cause.

If, in this case, the claimant had transportation but was only objecting to the increased cost, a different result might have been reached if it could be shown that the work was still within her labor market area and the increased costs of transportation were not so great as to make continued work unsuitable.

In Barnes v. Prospect Enterprises and Uniroof Company, Commission Decision 26759-C, (March 31, 1986), VL 150.1, the claimant, whose car was temporarily inoperable, moved his residence to an area 25 miles from the employer's premises. Because there was no public transportation available, he quit his job. It was held that the claimant had not shown good cause for leaving work because his relocation caused transportation problems and he failed to exhaust reasonable alternatives to quitting.

It is not unusual to encounter situations where an individual agrees to accept a transfer as a condition of employment or makes a transfer at the employer's request. If later that person refuses to transfer or leaves work to return home, good cause will generally not be found for such actions. In French v. Ryan Homes, Commission Decision 22406-C, (March 25, 1984), VL 150.15, the claimant accepted a transfer to Maryland in lieu of a layoff in December 1982. He also accepted a \$900 relocation allowance and rented an apartment near the new job site where he worked until September 1983. After being unable to sell his home in this time, he quit work to return to Virginia contending that his agreement to move had only been a conditional one. In denying benefits, the Commission stated:

(T)he claimant, having accepted the transfer to Maryland and having worked in the job for approximately nine months, would be estopped from raising the objection that the work was not suitable as it was not accessible to him.

Generally, an individual is not obliged to accept work which requires that he move his residence. If, however, he has agreed to move as a condition of employment, he will then be estopped from asserting such a requirement as good cause for quitting, unless he can show that the employer placed such an undue burden upon him as to render the work unsuitable for a reasonable person desirous of retaining employment. Frequently, employers invest a considerable amount of time and money to train employees in one location so that they can work elsewhere.

The case of Hendrickson v. Commonwealth of Virginia, Commission Decision 31692-C (May 26, 1989), VL 425 provides another situation which may be encountered. There the claimant was demoted and involuntarily transferred to a location between 75 and 80 miles from his home. He filed grievances to protest that action and continued to work for three more months before resigning. It was held that he had established good cause for quitting due to a combination of circumstances. These included the 16 percent reduction in pay, the vastly extended commuting distance and time, and the fact that he had never accepted the situation since he reserved the right to pursue his grievances notwithstanding his resignation. Therefore, his working the three months did not act to estop him from establishing that the work had become unsuitable for him.

Additionally, the adjudicator will occasionally face instances where individuals are in jail and on "work-release" far from their homes. When they finish their sentence, they have no reason to continue living where the jail is located, so they quit to move back home. The adjudicator should decide whether the claimant had good cause to quit according to normal principles unless the claimant was working in the Diversion Center Incarceration Program ("DCIP") pursuant to Code Section 19.2-316.3. Code Section 60.2-618(6). If the claimant was working in DCIP, then he or she does not have good cause to quit employment because of release on parole or release from a penal or custodial institution. Id.; see also Code Section 60.2-219(27) (work in DCIP is not employment for purposes of the Virginia Unemployment Compensation act).

Adjudicators should thoroughly explore all aspects of cases in which transportation or distance to work are offered as justification for a voluntary quit. The existence of alternate means of transportation would tend to remove good cause from a decision to quit based upon the lack of a personal automobile or driver's license. Similarly, the normal commuting habits of persons engaged in a particular trade might explain the difference between not disqualifying a factory worker whose job site has been moved 20 miles while disqualifying a bricklayer who decides not to commute a distance of 30 miles.

e. Domestic Circumstances

Domestic circumstances account for a high percentage of cases contested under this section of the Code. The general rule to follow is that stated in the Phillips case found earlier in this Guide. In Phillips, the claimant left work to care for her aged and infirm parents after acting upon a physician's advise and demonstrating that she was the only person available to provide such care.

(1) Care of Parents -- While the legal obligation of an adult child to care for his parents exists, it is a shared obligation among all siblings. Section 20-88 Code of Virginia. Thus, a claimant who has brothers and/or sisters who live near their parents cannot establish good cause within the meaning of the statute simply because he has no family and it is convenient for him to take on the responsibility of caring for the parents. Similarly, the desire of a claimant to move closer to his elderly parents who are capable of caring for themselves would not be sufficient to establish good cause for leaving work.

Certain circumstances may present themselves where an adult child may have good cause to stay with a sick parent. In AAA v. George & VEC, No. 2344-94-4 (Va. Ct. App. Jul. 5, 1995) the claimant was approved for three weeks of leave to attend to her sick mother in England. When the mother's condition worsened, the social worker at the hospital recommended the claimant stay in England for a period that extended beyond the pre-approved leave. Although the claimant contacted the employer through her husband and daughter to explain and document the situation, the employer sent the claimant a certified letter to the claimant that a failure to return to work on a specified day would be considered a voluntary resignation. The court found that the claimant took every step a reasonable person desiring to retain her employment would take and did not willfully disregard her obligations to the employer. Thus, the court held the claimant did not quit her job without good cause, and she was qualified for benefits.

(2) Unemancipated Infants -- Children under the age of 18 are unemancipated infants and, thus, legally under the authority of their parents. If such a child leaves work to accompany his parents to a new locality beyond a normal commuting distance, then such leaving is with good cause in response to a legal duty. However, when the child is 18 and moves with his parents because his job is only paying minimum wage and would not support him in an independent living situation, such a leaving has been held not to constitute good cause. See Kinard v. Pine Trees Inn, Decision UCX-139, (July 20, 1979), VL 155.05. Note, however, that other factors may show up in this type of case. A child might be legally an adult but have a medical condition which requires parental care. Evidence of this may well be enough to invoke the "necessitous and compelling with no reasonable alternatives" doctrine discussed earlier.

(3) Child Care -- Of course, parents are legally obligated to provide for their children, including making such arrangements for child care as will allow them to work. Sometimes such arrangements require individuals to work less, creating possible weeks of unemployment. Other times, when child care arrangements

fall through, an individual may feel compelled to quit work and later file a claim.

When a claimant asks an employer to rearrange her schedule to allow her to work only the ten months during the year when her children are in school, and the employer complies, the claimant has voluntarily quit without good cause for the remaining two months. The claimant is disqualified from benefits for those two months, even if she requests part time work from the employer and the employer refuses. **Physical Therapy Works, Inc. v. VEC, No. 2777-00-1 (Va. Ct. App. Oct. 16, 2001), overturned on rehearing en banc (Va. Ct. App. May 28, 2002).**

In the case of **Mincey v. The Hertz Corporation**, Commission Decision 13571-C, (May 16, 1980), VL 155.1, the claimant lost her babysitter shortly after returning to work from maternity leave. Although she requested additional leave or part-time work so as to locate another babysitter, this request could not be granted due to the heavy workload of the employer. In awarding benefits after the claimant's resignation, the Commission considered the fact that the children needed specialized attention due to a medical condition they shared, as well as the fact that the claimant had no one else available for their care. This, in turn, became a "necessitous and compelling" case under the reasoning of **Phillips**. **See also Goodwyn v. National Health Labs, Inc.**, Commission Decision 30177-C, (July 8, 1988), VL 155.1.

Contrast this case with that of **Bowman v. Big Tract Coal Company**, Commission Decision 13493-C, (March 7, 1980), VL 155.1. There, the claimant's babysitter quit without notice and he was unable to secure a replacement that same day. He then quit his job and filed a claim for benefits after his wife returned to care for their child. The Commission denied benefits on the grounds that reasonable alternatives to quitting, specifically a leave of absence, had not been requested prior to the separation.

From these cases, it is apparent that the decision to award or deny benefits rests upon a thorough investigation by the adjudicator into the facts of each case. This investigation should not focus exclusively on what the claimant did to alleviate the situation. The willingness or lack of willingness of the employer to accommodate a worker with a child care dilemma ought to be considered. Obviously, a claimant who is told that she must come in to work the next day whether or not she has child care or lose her job need not show that she requested a leave of absence before resigning. Common sense dictates that a party does not have to perform a useless act just to show that alternatives were exhausted.

(4) Health of Children -- Care of children can also be good cause for leaving even if babysitting is not an issue. In Dix v. Dan River Mills, Inc., Commission Decision 22450-C, (January 9, 1984), VL 155.1, the claimant left Virginia to move to Arizona for the sake of his children's health. Particularly notable in this case is the fact that good cause for leaving was found even though the written doctor's statement recommending the move was not obtained until after the separation. Presumably, this made no difference since presentation of such a doctor's statement to the employer could not have changed the ultimate fact that the claimant had to leave and there was nothing the employer could have done to accommodate the situation.

(5) Spouses -- If a claimant quit to care for a spouse and did not move, the situation is similar to those previously discussed with respect to parents and children. Medical documentation of the spouse's condition (and presumably that of a child or parent) need not be required if there is no dispute on this issue between the parties or the Commission. See Wright v. Russell County CETA Program and Virginia Employment Commission, Circuit Court of Russell County, Action No. 5304, (January 19, 1983), VL 155.35 and VL 190.15.

When deciding cases in which there is more than one reason proffered for a claimant's leaving work, adjudicators must make a finding, based on the evidence, of the primary reason for the voluntary quit. If that reason is to provide personal care for an ill spouse, whether or not that spouse is in a new locality, the "compelling and necessitous" standard for determining good cause should be applied. See Phillips.

If, however, the primary reason for quitting employment is to accompany or join his or her spouse in a new locality, the disqualification provided in Section 60.2-618.1(ii) should be applied. See Hutchinson v. Clyde Stacy and John Matney, Commission Decision 28322-C, (March 31, 1987), VL 155.2. The General Assembly has passed a revised Section 60.2-618(1) that recognizes "good cause" for claimants who quit their job to relocate with a military spouse. However, there is specific enabling language that the revised Section 60.2-618(1) only becomes effective when the federal government allocates funds specifically for paying benefits to spouses made eligible under the revised section.

Section 60.2-618(1)(ii) has survived a federal court challenge to its constitutionality. Austin v. Berryman, 878 F.2d 786 (4th Cir. 1989), cert denied (October 30, 1989).

(6) Living Expenses -- Other domestic circumstances which might prompt a resignation center around housing and living expenses.

Just because a claimant feels that it is financially expedient to leave work to move in with relatives or to an area with a lower standard of living does not mean that good cause exists for the separation. In the case of Durst v. United Masonry Inc. of Va., Commission Decision 24702-C, (March 7, 1985), VL 155.3, it was held:

In this regard, the Commission has consistently refrained from considering the matter of an individual's finances. At best, such an analysis would be highly subjective since it involves questions of personal taste, habit, and ability to manage money, all of which may vary from one person to the next.

The word "refrain" does not mean "refuse". Therefore, Durst does not stand for the proposition that the Commission will never consider personal finances as constituting good cause for voluntarily leaving work. It does, however, mean that the burden is upon the claimant to show the existence of such necessitous or compelling circumstances as would have left a reasonable person desirous of retaining his employment, no reasonable alternative to quitting at the time that action was taken. For instance, if a claimant could show that she was actually evicted from her home and that she had searched ineffectively to find other affordable housing in the area, this might amount to good cause for leaving under the "necessitous and compelling" doctrine of the Phillips case. Nevertheless, if she resigned only because she knew that eviction proceedings were going to be instituted against her when in fact there was some period of time before she would actually be forced out of her home, this might not amount to good cause for leaving.

Care must be taken to distinguish between a claimant's personal financial situation and those factors (although ostensibly personal and financial) which are actually more related to establishing prevailing conditions of work. Thus, while a claimant who states that he could not afford the commuting expenses to work because he did not have enough money left over in his paycheck after paying rent might be disqualified under the Durst analysis, a claimant who can show that his high commuting costs actually exceeded his income because his hours were cut back to less than those prevailing for similar work in the locality could be relieved of disqualification since the work was no longer suitable. See Byrnes v. Banker's Life & Casualty Co., Decision UCFE-216, (June 19, 1974) and Hewitt v. Hope Chemical Company, Decision UI-75-44, (January 15, 1975), aff'd by Commission Decision 6597-C (February 28, 1975), VL 500.25.

f. Health or Physical Condition

A claimant may have left work voluntarily because of his own health, physical condition or concern. Even if there is no change in his job duties, the work can be found to be unsuitable giving rise to good cause for leaving it. See Weakley v. Sperry Marine Systems, Commission Decision 6680-C, (April 7, 1975), VL 235.05. This case involved an award of benefits to a claimant who left work due to health conditions after informing her employer of the problem and trying unsuccessfully to perform alternate work.

The Commission has been affirmed in its interpretation of "good cause" for leaving work due to health conditions. In the case of Parker v. Convenience, Inc., Commission Decision 24617-C, (February 5, 1985); aff'd by the Circuit Court for the County of Roanoke, Chancery 85-0445, (July 23, 1985), the claimant had missed two months of work due to a broken foot and later had a recurrence of foot troubles. She then quit upon the advice of her doctor who said she could not stand up for full-time hours. Prior to leaving, she did not inform the employer of her doctor's advice and she had not requested a reduction in hours, a transfer or an accommodation for her physical condition. In denying benefits, the Commission cited two factors on which an individual alleging health reasons for leaving work needs to bear the burden of proof to demonstrate good cause. They are:

1. The claimant must produce competent medical evidence to show he was precluded from working because of a medical condition and/or that a physician directed or advised the claimant to permanently leave employment due to a health problem; and
2. The claimant took such steps which a reasonable person would take who is desirous of retaining employment (i.e., exhaust all reasonable alternatives to unemployment), including informing the employer of the health problem and requesting a transfer or a leave of absence.

"Competent medical evidence" is not limited to documents. There are additional things for the adjudicator to remember (aside from the Wright and Parker holdings) when examining a claimant's separation for health reasons. One is that a medical statement can be tested. For example, the weight to be accorded to a doctor's statement is diminished if it is based upon inaccurate or misleading information provided by either of the parties. Similarly, a statement that a claimant was advised that he "should seek other employment" is not equivalent to finding that he was instructed to leave work due to health problems so as to excuse a failure to find other work first. A statement from a doctor (or

other appropriate medical professional) showing that the claimant was advised to quit cannot be persuasive if evidence shows that she ignored that advice for a long time before quitting so as to cause doubts concerning the seriousness of her medical condition.

Pinkard v. City of Roanoke, Commission Decision 31737-C (May 5, 1989), VL 235. Finally, the adjudicator could be justified in finding that medical advice was not the proximate cause of the separation or that the claimant was estopped from asserting those health reasons as good cause for leaving work. **See Moran v. Virginia Employment Commission**, Circuit Court of the County of Chesterfield, Chancery 409-84 (July 6, 1984), **appeal denied**, Supreme Court of Virginia, Record No. 84153, (June 4, 1985).

When a claimant does not return short term disability forms within the reasonable time period provided by an employer, that claimant should be found to have voluntarily quit. Unless good cause can be shown, the claimant should be found disqualified for benefits.

Snyder v. VEC, 23 Va. App. 484 (1996). Although the court found that there was sufficient non-hearsay evidence to support the Commission's decision, **Snyder** also reaffirms that hearsay is admissible in administrative proceedings before the Commission. **Snyder**, 23 Va. App. at 489-90.

Pregnancy is simply one type of health condition which may be asserted as a reason to leave work. The failure of a claimant to request maternity leave which is available from the employer would demonstrate that she had not taken reasonable steps to protect her job before leaving it. On the other hand, a claimant whose employer's rules do not cover maternity leave does not have to ask for it before leaving at her doctor's recommendation in order to establish good cause. In the case of **Dudding v. Mountain National Bank**, Commission Decision 5510-C, (November 18, 1971), VL 235.4, it was held:

To require the claimant to make a verbal request for a leave of absence when she was clearly aware that such leaves were not granted would be asking the claimant to perform a useless task which would not alter the fact that the bank did not grant leaves of absence. Therefore, the claimant cannot be deemed to have not taken every precaution to protect her employment rights, and her quitting as aforesaid was clearly for good cause.

It should be noted, however, that even if the employer does not have a defined leave policy, a claimant with a medical condition must at a minimum advise the employer of the problem he is facing that is causing him to quit work, in order to allow the employer the opportunity to offer some reasonable accommodation. Otherwise, he has not exhausted all reasonable avenues to resolving his problem prior to quitting as required pursuant to 60.2-618(1) of

the Code.

g. Retirement or Pension

An individual who retires from work may or may not have left voluntarily. Mandatory retirement due to age or health would not represent a voluntary act on the claimant's part although it would raise questions of availability for work under Section 60.2-612(7) of the Code, as well as a reduction of benefits because of the receipt of a pension under Section 60.2-604. What appears to be a voluntary retirement may actually be the result of a lack of work situation under the rationale of the Gannaway case.

Frequently, an employer faced with a layoff situation will offer inducements to older workers to exercise their retirement options. If those inducements are in lieu of a layoff, then a claimant who takes it may well be found to have good cause for doing so. Examples of such inducements include the crediting of extra service, the waiver of minimum age for retirement, or a cash benefit payment.

On the other hand, a claimant, who is not required or induced to retire by his employer but who does so anyway, has voluntarily left work just as an individual who has turned in a resignation. If that person's retirement benefits are less than his weekly benefit amount, he may well apply for unemployment insurance, thereby prompting a determination or decision by an adjudicator. However, since the passage of Section 60.2-604 of the Code which counts all retirement benefits against a claimant's unemployment insurance weekly benefit amount, the number of adjudications which involve retirement as the cause of separation has dropped considerably. With the subsequent amendment of Section 60.2-604, the adjudicator must determine whether the source of any retirement pension was a base period or chargeable employer. If so, the offset provision applies; if not, it doesn't.

An individual may be found to have voluntarily left work because, as a recipient of social security benefits, she cannot earn more than a certain amount without having the benefits reduced or eliminated. Presently, such limits apply to recipients between the ages of 62 and 70. A claimant who quits work so as to avoid having her earnings exceed the allowable social security limit has voluntarily left work without good cause. See Jackson v. George R. Robson & Company, Decision S-5013-4929, (March 12, 1957); aff'd by Commission Decision 3084-C, (April 2, 1957), VL 345.

h. Leaving for Another Job

Frequently, an adjudicator will be faced with the situation in which a claimant quits work in order to go to another job which

either did not materialize or which came to an end prior to becoming the claimant's last 30-day employer. Such a voluntary separation is for good cause if it is shown that (1) the new job represented an improvement in the claimant's circumstances; (2) the claimant had a reasonable expectation that it was for a non-temporary, indefinite duration; and (3) the claimant had actually secured the new job prior to quitting.

In **Taylor v. Tazewell County School Board**, Decision SUA-196, (May 27, 1977), VL 365.05, the claimant had been a custodian and bus driver at \$2.75 per hour. He quit this job upon being promised employment as a machinist trainee with a salary of \$3.55 per hour and a definite starting day. After resigning his job with the school board, he reported to the new job only to be told that economic conditions prevented the company from hiring him at that time. The decision which held no disqualification should be imposed stated:

The Commission has held in limited circumstances that an individual may have good cause for leaving employment to accept new work which he reasonably believes to be in his own best interest. It has held that if the work to which the claimant transfers is of a non-temporary duration and he has actually obtained it, in contrast to mere anticipation of securing it, such leaving is with good cause.

This is one statement of the so-called "tripartite test" which is applied in these cases. In **Taylor**, the claimant had secured a job prior to leaving his old one. He reasonably believed it to be in his own best interests due to the higher pay and the chance for advancement. He also had no reason to believe that it would be temporary or "of a non-permanent nature." The fact that he could not start work when promised was unforeseeable to him.

The following cases illustrates further the requirements of the "tripartite test."

In **Day v. WENZ Drum Communications**, Commission Decision 12892-C, (May 9, 1980), VL 365.05, the claimant was a radio announcer who quit work to go to another station. He had obtained the new work before leaving the old job and he thought that it represented an advancement for him. Unfortunately, he had overlooked a clause in his contract of employment with his old employer by which he agreed that for a period of six months following his separation, he would not work at a competing radio station within the local listening area, including the one he went to. When his new employer was threatened with legal action, he was terminated prior to working as many as 30 days. Even though the claimant argued that this clause in his contract was not enforceable, the Commission found that this was unimportant. The very existence of

the clause in his contract had placed him on notice that his employer would object to his quitting to accept work with a competitor. His failure to clarify this position prior to leaving meant that he did not have reasonable belief that his new job was a permanent one.

Similarly, the claimant in Ashton v. F&K Lumber Corporation, Commission Decision 11655-C, (February 28, 1979), VL 365.1, quit a full-time permanent job to take a short-term job which ended after two weeks. This was also found to be quitting without good cause.

It is important for adjudicators to remember that the new job does not have to be permanent (what job is?), merely of a permanent nature. What this means is that a claimant on a construction job due to end in a month who quits to accept another job which is supposed to last two months will have met this part of the "tripartite test" since the new job was of a more permanent nature than the old one. See Townsend v. Prince William Decorating Service, Commission Decision 26475-C, (February 13, 1986), VL 365.1.

In Kiser v. Rochester Manufacturing Company, Commission Decision 11218-C, (November 13, 1978), VL 365.15, the claimant quit work to take a better paying job for a coal mining company. He had taken a physical examination for the new job prior to quitting and assumed he would have no trouble passing it. After quitting, he was told that his application was rejected due to the results of the physical exam. In denying benefits, the Commission held:

Although the claimant in this case had reason to believe that he would pass the new employer's physical examination, he had not done so, and therefore did not have a valid employment contract at the time of leaving his last thirty-day employer.

Likewise in Helms v. City of Norfolk School Board, Commission Decision 12075-C, (May 23, 1979), VL 365.25, the claimant quit a teaching job in the public school system to take an offered college position which was contingent upon funding from a federal grant. The funding did not materialize and it was held:

(S)ince the position had not been funded at the time of her leaving, it cannot be maintained that she actually obtained new employment prior to leaving. Accordingly, the claimant must bear the risk of whether or not the position would be funded by the federal government.

From these cases, it is apparent that a job offer, in order to be definite, cannot be contingent upon events which take place after the separation. There also should be a definite date to start work as opposed to a general statement to the effect that the individual can get on at any time. Furthermore, the individual

offering the new work must have actual authority or be cloaked with the apparent authority to hire for the new employer. A statement to the effect that a neighbor or friend promised to get the claimant on the payroll is certainly not sufficient to show this.

In Wilson v. K-Mart Apparel Corporation, Commission Decision 11424-C, (January 8, 1979), VL 365.25, the claimant left a job which offered paid vacation, sick leave, hospitalization and life insurance to take another job paying 10 cents more per hour and located closer to home. The Commission held that she had failed to show that she had reason to believe that this was in her best interest. Thus, it is not enough to find that the new job paid more; rather, all factors concerning the respective positions must be considered. Such considerations as working hours, ease of access, fringe benefits and relative difficulty of the job all go towards determining whether a new job is in a particular claimant's best interest. Finally, it is important to remember that the "tripartite test" contains factors which are not independent of one another. A claimant who has been told his job is ending in two weeks and who finds another one that is supposed to last six months, but which pays less and is further away, should not be disqualified on the grounds that the new work (absent the imminent demise of his old job) was not an improvement over the old or in his best interest. Obviously, from his point of view, the new work was an improvement since the old job was not going to last and he should hardly be penalized for being enterprising enough to find new work rather than waiting two weeks to be laid off.

If the "new job" which the claimant cites as the primary reason for leaving, is self-employment, then the "tripartite test" would not be applied and the claimant would be disqualified under the statutory exclusion of self-employment from the term "good cause."

Care must be exercised by the adjudicator to insure that such work was actually self-employment, and not merely a statutorily excluded form of employment such as those found in Sections 60.2-212.1, 213, 214, 215 and 219. See McConnell v. Wisco Foods, Inc., Commission Decision 27869-C, (December 20, 1986), VL 5.

i. Termination of Employment Due to Change in Ownership

Although previously discussed under the heading of "Voluntary," cases where an individual claimant was also an official partner, corporate officer or major shareholder in the employer's business also need to be mentioned here. While the sale of a claimant's personal interest in the business resulting directly in his unemployment may represent a voluntary leaving of work, the question of good cause for that action is still open.

In Compton v. Color Clean Corporation, Commission Decision 18749-C, (July 16, 1982), VL 440, the claimant and his wife each had a one-third interest in the corporation. The other one-third owner had put up the capital for the business, obtaining promissory notes from them. Because of a business slowdown, the claimant and his wife were unable to make payments on their notes.

The other stockholder demanded full payment so the claimant and his wife exchanged their stock for the cancellation of the notes and left the business. In finding good cause for this action, the Commission held:

Had he failed to do so, he would have been subject to civil litigation and given the current circumstances of the business, there was no reasonable prospect that he would receive any profits, dividends or potentially even his salary. Furthermore, there was no reasonable opportunity to continue working for this employer after the exchange of stock had taken place.

In Decision IS-1618-1603, (October 19, 1956), VL 440, the claimant had been president and 20% stockholder in the business before selling out. He had a disagreement with the other stockholders over management of the family company and was unable to buy them out. The problems were so severe that his health was adversely affected. The Commission found good cause for his leaving since it was "impossible for them to continue under the same arrangements."

Contrast these cases with that of Hull v. Merrimack Marine, Inc., Decision UI-73-1930, (October 26, 1973), VL 400. There, the claimant agreed to sell his 20% interest in the company with the condition that he resign as president and general manager because of the corporate debts and the necessity of seeking additional capital. In denying benefits, it was held:

The claimant may have felt that he was faced with a situation where it was necessary to obtain additional capital so that the corporation could continue in operation; however, it had never reached that point where the company had been forced into bankruptcy or involved in other litigation. Undoubtedly, the claimant may have felt it was to his best interest to sell his stock in the corporation; nevertheless, he was not forced or compelled to do it.

A more recent case involved a claimant who sold his business, citing health reasons. In Groves v. Groves Plumbing and Heating, Commission Decision 32377-C (September 6, 1989), VL 440, it was held that this did not constitute good cause since the claimant had not acted upon medical advice, he had not sought to lessen his responsibilities by delegating them to subordinates, and he had

not negotiated with the new owners to stay on in a lesser capacity.

From the examples cited, it is apparent that the key point for an adjudicator to focus upon in such cases involves what alternatives existed at the time the interest was sold. If the company is shown to be on the verge of bankruptcy, and the sale represented a way out for the claimant, then he may show good cause for leaving.

Similarly, good cause can be found when the claimant stands to lose a substantial financial investment or becomes liable for corporate debts. Mere disagreement with other shareholders over management, however, would not constitute good cause for leaving, nor would fears or concerns about financial troubles which might arise in the future. Remember, too, that the position of shareholder or corporate officer is separate from that of a working company official. Merely selling stock or resigning from the board of directors does not automatically mean that the claimant is forced to leave his salaried management or hourly paid employment. The analysis in such cases must focus on the claimant's decision to do the latter.

j. Full-time Versus Part-time Work

Situations arise in which a claimant leaves work because it is only part-time, it having been a secondary job before the loss of the primary one. (Situations where hours have been reduced will be discussed later under "Working Conditions.") In the case of McLamb v. Larasan Realty Corp., Commission Decision 7691-C, (April 23, 1976), VL 450.4, the claimant had been notified that he was to be laid off from his full-time job at the end of the month. Then he gave notice that he was quitting his part-time job because that income alone would not support him. In denying benefits, the Commission stated:

Although the claimant had been released from his employment that was the primary source of his income, it was not mandatory he give up his part-time employment at the time he did. If he had not resigned, he could have possibly negotiated with the company for work that would remunerate him to the extent so he could have remained with the employer. ...

It is apparent that the claimant could have retained his part-time employment and used his spare time in seeking the type of work he desired.

The Commission has previously articulated the doctrine that the purpose of the Virginia Unemployment Compensation Act is to facilitate employment, rather than unemployment, that is, some employment is better than no employment. A claimant who has lost his full-time job, but who continues to work a part-time one, is

not prevented from filing his claim while continuing to work. If the wages from the part-time job are less than his weekly benefit amount, they will be treated as casual earnings. So long as he is willing to seek and accept full-time work, the claimant can then draw a reduced benefit. Thus, the claimant has at least three alternatives to quitting a part-time job: (1) negotiating for more work with the same employer; (2) keeping the same hours and seeking work elsewhere; and (3) keeping the same hours while claiming benefits and seeking work elsewhere.

k. Union Relations

The situation may arise in which a claimant has left work voluntarily for reasons attributable to a union agreement with the employer or to internal union by-laws. Note that these situations assume a voluntary leaving and are distinct from those discussed previously. For instance, the employer and employees may have abandoned the union contract. There is no labor dispute involved since the master contract remains in force and the employer offers all workers the chance to stay on at the same rate of pay and under the same conditions of work. If the claimant quits only because he may be subject to sanctions for doing non-union work, this would be a purely personal reason not amounting to good cause. He would still have the reasonable alternative of continuing to work as he had done before because under Virginia law, his right to work is protected. See Code Section 40.1-58.

l. Working Conditions

The final category to be discussed in this subsection is also one of the broadest. Previously, good cause for leaving has been viewed from the perspective of external factors affecting the claimant's decision. As noted before, the Code applies no limitation of good cause findings to work-related reasons. Working conditions can constitute good cause for leaving and the more recurrent situations will be covered here. This coverage is not exhaustive.

(1) Hours of Work -- It has long been recognized that an employer retains the fundamental right to schedule the work of an employee, including the imposition of reasonable amounts of overtime work. Furthermore, it is understood that some jobs involve seasonal fluctuations such as the "Christmas rush" in the retail trade and at the post office, planting and harvest in agriculture, Mother's Day for florists, and the summer boom in tourism and construction trades. During these peak times, it is not unusual for persons in such lines of work to be expected to work extra long hours.

There are, however, limits beyond which an individual may have good cause to quit work in which the hours are excessive. In

Hodges v. Best Products, Inc., Commission Decision 7848-C, (May 27, 1976), VL 450.1, the employer was starting its Christmas rush and the claimant ended up working between 70 to 80 hours per week while getting only one day off in a month. His attempts to get a transfer or have his hours reduced met with no success and he began to suffer a severe weight loss. He was further prevented from seeking other employment because he was working from 8:00 a.m. to 9:00 p.m. virtually every day. In awarding benefits, the Commission took note of Section 40.1-28.1 of the **Code** which provides that, except in an emergency, every employer shall allow each employee to have at least 24 consecutive hours of rest in each calendar week, in addition to the regular periods of rest normally allowed or legally required in each working day.

The adjudicator should be aware of the extensive exceptions to the above section of the **Code** which are mentioned in Section 40.1-28.5 with reference to Section 18.2-341. This substantially limits use of the statutory day of rest provision in finding good cause for voluntarily leaving work.

The converse to the **Hodges** case is that of **Hylton v. Frith Construction Company**, Commission Decision 12846-C, (January 28, 1980), VL 150.2, where winter weather cut back the hours the claimant was able to work at his construction job. Consideration of the length of his employment, as well as his acceptance of the working conditions, prompted a denial of benefits. Whether a claimant quits because of too many or too few hours, the adjudicator must carefully consider the totality of the circumstances. Working 10 hours a day, seven days a week is obviously a pace which no one can keep up for long. Likewise, having to drive long distances to find no work or hardly any work available might make a reasonable person decide to quit. Factors to consider include those found in Section 60.2-618(3) of the **Code** relating to suitability of work. If the work is unsuitable so that the claimant would not be disqualified for refusing it, then good cause for quitting has automatically been established.

(2) **Wages** -- Frequently, a determination of "good cause" will be required in cases where a claimant has left work due to complaints over wages. If there is a detrimental change in the wages which is so substantial as to render continued work unsuitable, then good cause will be found for the separation. In **Decker v. Hereth, Orr, & Jones**, Commission Decision 13641-C, (May 2, 1980), VL 500.1, the claimant was hired to sell bonds and promised a draw against commissions generated by his sales. After a few months, the employer took away the draw and wanted him to continue on commission only. When he quit, it was found to be with good cause. **See also Hewitt v. Hope Chemical Company**, Decision UI-75-44, (January 15, 1975); **aff'd** by Commission Decision 6597-C (February 28, 1975), VL 500.25. In both of these cases, the

claimant was being placed in an untenable financial position by the employer's action.

Similarly, in Loving v. Provident Mutual Life Insurance, Decision UI-76-5014, (August 19, 1976); aff'd by Commission Decision 8477-C, (September 28, 1976), VL 500.1, it was held:

(T)his claimant's written contract provided that it would be automatically terminated at the end of any month in which he had not made his quota. Since the employer informed the claimant that he would not be receiving any more paychecks in accordance with the contract until he had made his quota, it is apparent that the contract was being terminated and a new contract being offered. Since the claimant had never agreed to work for nothing, it is the opinion of the Appeals Examiner that he did have good cause in resigning his employment, rather than face the uncertainty of whether he would be paid for the work he did in the future.

The cited cases all involved claimants whose wages were being effectively eliminated and who were new to the job. A salesperson on commission who has experience in the field might not so easily demonstrate good cause for leaving if his lack of income could be attributed to a seasonal "dry spell" which could be considered an accepted condition of the work. Additionally, note that in the case of Grantham v. Mounds View, et al., VL 135.35, the claimant was facing the elimination of his guaranteed salary after his training period ended. Since this had not actually occurred at the time he resigned, good cause could not be shown for the leaving. Consider, too, the case of an individual whose wages were merely cut back rather than eliminated. If the cut was not so severe as to render the work unsuitable, then good cause would not be shown. If, however, the cut in pay is accompanied by a demotion in terms or duties so as to significantly change the terms and conditions of work, then good cause for leaving can be found under the theory that an individual should have a chance to explore the local labor market for a job more in line with his previous training and experience before having to accept work at a substantially lesser pay or skill level.

In Cobbs v. Luv-N Oven, Commission Decision 12784-C, (December 7, 1979), VL 500.35, the claimant was demoted from the position of manager with a net reduction from \$200 to \$120 a week. The hourly rate had changed significantly and she had also a net reduction in hours. It was held that the claimant had accepted the new conditions of work by staying on for four months and that she had taken the reasonable steps of seeking an increase in her hours so as to increase her pay. Moreover, her wages still exceeded the wage for similar work in the locality. Therefore, benefits were denied.

However, simply changing a salaried employee's compensation structure to an hourly rate, keeping yearly compensation, fringe benefits, and position in the company's management structure all virtually the same, does not constitute a "good cause" for a voluntary quit. Stasko v. VEC, No. 2835-00-2 (Va. Ct. App. Apr. 24, 2001).

A failure to pay wages when due can constitute good cause for leaving work voluntarily. The adjudicator must make the distinction, however, between infrequent incidents of paychecks being late or failing to clear the bank and situations where the failure to pay is persistent to the point that a reasonable person, desirous of retaining employment, would have doubts that he would ever get paid. See Decision S-3765-3716, (October 17, 1955), VL 500.3, where three weeks without wages was found to be sufficient to show good cause for quitting.

Compare the claimant in Decision S-3765-3716 with a claimant who leaves due to a dispute over the amount of pay due, either because of the number of hours worked or the existence of overtime which was not compensated. Unlike the person who is not being paid at all, a person who merely has a pay dispute with his employer is receiving a paycheck. Such individuals are not presented with the same compelling reason to quit, rather, they have the option of continuing to work while attempting to resolve the dispute with the employer or searching for and finding other work.

The refusal of an employer to grant a wage increase is generally not good cause to leave work voluntarily. See Booth v. C. W. Poff & Son, Company, Commission Decision 3634-C, (January 25, 1961). Frequently, a promise of a raise in pay is not definite but contingent upon external factors such as performance or increased sales. However, when the refusal of an increase in pay is coupled with an increase in working hours, this actually amounts to a reduction of the pay rate and may constitute good cause for leaving. See Decision S-5074-4971, (March 25, 1957), VL 500.4.

Sometimes, a claimant's contention that he had to leave work because his wages were reduced below an acceptable level are shown to be due to his own actions. In Rapp v. Dick Harris & Son Trucking Company and Carolina Western Express, Inc., Commission Decision 24838-C, (April 5, 1985), VL 500.45, it was held:

The claimant, who in this case was an over-the-road truck driver, felt that he was unable to sustain himself and his family during the early stages of his employment without receiving advances on his wages and that these advances, which were subsequently deducted, were diminishing his take home pay to an amount which prohibited him from continuing in this employment. Since the wages received by the claimant for services he performed while in this

employment have not been shown to have been less than prevailing, it would appear that the job was suitable and that his only reason for leaving was caused by his inability to adjust his personal financial needs to the payment policies of his employer. Although the accuracy of the reasons the claimant has given for relinquishing his employment is not in doubt, these reasons, as can be seen from the above, cannot be held to be good cause within the meaning of that term as used in the Virginia Act.

A claimant who contends that low wages prompted a voluntary leaving of work is questioning the suitability of that work. Even though the issue does not arise under the provision of Section 60.1-618(3), of the Code, the suitability criteria are the same. Thus, a Commission representative should be available to give testimony in such cases. In the case of Baker v. Clinch Valley Lanes, Commission Decision 7863-C, (June 2, 1976), VL 500.5, such testimony established that the wages for the job the claimant quit were 13% below the prevailing wage rate for similar work in the locality. This was considered to be "substantially" below that rate so as to make the work unsuitable and establish good cause for leaving it.

(3) Conditions at the Job Site -- If a claimant cites the conditions at work (meaning, here, those general physical conditions under which the work was customarily performed as opposed to specific complaints about harassment, supervisors, pay or the like which will be discussed hereafter) as prompting a voluntarily leaving, he must show that the work was unsuitable, and, again, the adjudicator is reminded that Commission expert testimony on this point is most helpful.

Once a claimant is faced with a problem concerning working conditions, he must act to resolve those problems with the employer. See Lee v. VEC, 1 Va. App. 82, 335 S.E.2d 104 (1985), VL 515.05. Thus, a claimant who was medically restricted from performing her duties and who chose not to take the employer's offer of light duty work, was found not to have established good cause for leaving under this section of the Code. See New v. Danville Industries, Inc., Decision UI-73-1062, (June 18, 1972); aff'd by Commission Decision 6044-C, (July 24, 1973), VL 510.05.

In the Lee case, the claimant left work because he was not satisfied with a job assignment to a position with little or no potential for advancement. Even though the employer did have an available grievance procedure, the claimant did not choose to follow it since he felt that the employer was ignoring a settlement reached as a result of a prior grievance he had filed. This was found to be the failure to exercise a reasonable alternative to leaving so as to preclude a finding of good cause. Remember that under the Umbarger doctrine, a claimant who works

for an employer which has no internal grievance procedure, may not be obligated to go to an undesignated outside agency in an attempt to resolve any grievances prior to quitting work.

Occasionally, a claimant will cite reasons for quitting work which involve a change in "philosophy" on the part of the employer. This frequently comes about as the result of a change in management or ownership with the result being that the claimant is asked to change emphasis, priorities or style with respect to work performance. The classic case in this regard is that of Butler v. WLVA, Inc., Decision UI-71-2612, (February 28, 1972); aff'd by Commission Decision 5619-C (April 26, 1972), VL 515.05.

There the claimant was a radio program director and show host on a station which was emphasizing an appeal to a younger audience. New management decided to change the "format" of the station to appeal to an older audience and also chose to deal directly with the claimant's subordinates on occasion. In denying benefits due to a lack of good cause, it was held:

The fact that the new management would deal directly with announcers did not compel his resignation. The new management clearly had the right to establish program objectives and to expect employees' cooperation in carrying out these objectives. Although the claimant felt that under the circumstances he could not continue with his job he apparently could have done so until he found other work more acceptable to him, providing he could not resolve his differences with the employer.

(4) Relations with Supervisor -- Contrast the previous case to that in which the claimant leaves work due to specific complaints concerning his supervisor (as opposed to mere philosophical differences). In Decision UI-71-2859, (January 18, 1972), VL 515.05, the claimant was faced with a supervisor who not only usurped her authority, but who also insulted and demeaned her personally even after she had tried to conform to her wishes that she take on additional duties. In awarding benefits the Commission stated:

The claimant could not reasonably be expected to have continued in her capacity as store manager in the face of the continuing insults from and degradation of her position by the one individual to whom she must look for guidance and help in the proper performance of her duties.

See also Cox v. White Park Coal Company, Decision S-10272-10029, (February 3, 1961); aff'd by Commission Decision 3659-C, (March 6, 1961), VL 515.05, where the claimant quit due to abusive and profane language directed towards him by his supervisor. In finding good cause for leaving, it was held:

In every employer-employee relationship, each individual has the right to expect to be treated fairly, and to be spoken to in a normal and customary manner. When either party departs from this practice and uses either abusive, or profane language, he creates a condition which would cause continued association to become extremely unpleasant.

See also Meadows v. EGA, Inc., Commission Decision 8091-C, (July 19, 1976), VL 515.8 and Blevins v. Musser Lumber Company, Commission Decision 25091-C, (July 5, 1985); aff'd by the Circuit Court of the County of Smyth (November 8, 1985), VL 515.8.

These cases should be contrasted with that of Mason v. Seven Eleven, Commission Decision 13417-C, (July 3, 1980); aff'd by the Circuit Court of the City of Richmond, Division 1, (January 22, 1982), VL 515.8. There, the claimant quit due to her supervisor's "overbearing and abrasive manner." Benefits were denied as it was held:

Conditions of work are seldom, if ever, ideal in every respect. Where differences with supervision cannot be resolved to a worker's satisfaction but are not so severe that she is compelled without alternative to leave immediately, a worker should seek the security of other employment before hazarding the economic risk of unemployment.

Additionally, employees need to take reasonable steps to resolve problems with supervisors before quitting work. In Smith v. S.W. Rodgers Co., Inc., No. 0003-99-4 (Va. Ct. App. Jul. 20, 1999), the claimant was sexually harassed by two of her supervisors. When she finally met with the personnel director, as was company policy regarding all complaints, the personnel director assured the claimant that he would speak with the supervisors and assign the claimant to a comparable job where she would not have contact with the two men. However, the claimant had already decided to quit work based on the harassment, and she never showed up for her new job. In finding the claimant voluntarily quit without good cause, the court recognized that when the claimant used the established grievance procedure, the employer responded promptly and reasonably.

The adjudicator will note from the cited cases that the test for establishing good cause for leaving work due to the conduct of one's supervisor comes back to the "necessitous and compelling" rule articulated in the Phillips case. The terms and conditions of the work essentially must be found to be unsuitable before good cause is shown.

(5) Relations with Fellow Employees -- People frequently leave work due to complaints concerning co-workers. These can range from simple personality conflicts to acts of physical violence. If the employer is not informed of the problem, generally good cause cannot be shown since the chance to resolve the differences has not been allowed to occur by the claimant. A change of work areas, shifts or disciplinary action on the part of the employer could all act to eliminate the problem of which the claimant complains. See Bolden v. City of Alexandria, Commission Decision 30472-C, (July 15, 1988), VL 515.4.

In the case of Otey v. Camac Corporation, Commission Decision 24598-C, (February 18, 1985), VL 515.4, the claimant quit due to teasing by co-workers concerning psychiatric help he had received at the employer's request to avoid being terminated at some time in the past. Apparently, someone in higher management had allowed confidential medical information to become known and the wife of the plant superintendent was one of the people who taunted him. In finding good cause for leaving, the Commission held that he had exhausted all reasonable alternatives before escaping from the situation. Obviously, the involvement of management in causing the situation was a key factor in that decision. Given the circumstances, it would have been virtually useless for the claimant to do anything else.

Compare Otey with Allen v. Diversified Mailing, Commission Decision 26610-C, (February 27, 1986), VL 515.4, in which the employer had responded to the claimant's complaint regarding adverse rumors by transferring him to another shift. It was held that the claimant's subsequent voluntary resignation was without good cause because of the absence of necessitous and compelling circumstances.

(6) Working Conditions--Morals -- In the case of Spencer v. A. N. Clanton, D.O., Decision UI-74-3319, (December 26, 1974); aff'd by Commission Decision 6581-C, (February 20, 1975), VL 515.5, the claimant was working as a receptionist for a doctor with an alcohol problem. The doctor's wife wanted her to tell patients who were scheduled for times when the doctor was incapacitated due to his problem that he had been called away on an emergency. Benefits were awarded as it was held:

Conditions of work are seldom, if ever, ideal in every respect; and at times a worker is expected to accept the conditions provided they have not reached such a degree of unreasonableness that would impel an ordinarily prudent person to leave her employment. It is apparent from this claimant's testimony that her working conditions had become so intolerable that she could not reasonably be expected to continue. This is especially true where she was expected to cover-up for the employer by making

false statements to the employer's patients.

In Caprino v. Jerry's Ford Sales, Inc., Commission Decision 6534-C, (January 2, 1975), VL 515.5, the claimant quit working as an automobile salesman because, among other things, he was asked by management to "bump" the price of new cars already ordered by customers, which meant he was to demand an additional payment above that which had been agreed upon. In its decision that no disqualification should be imposed, the Commission took note of the employer's failure to deny the claimant's allegations, as well as its comments to the effect that the automobile business was "brutal" and stated:

While such practices might be "normal" or "usual" business practices in that trade, it does not necessarily follow that they will pass muster as honest or moral practices.

In Miller v. Historic Michie Tavern Museum, Decision UI-76-2083 (April 1, 1976); appeal withdrawn by employer and dismissed by Commission Order 8173-C (July 28, 1976), VL 515.5, the claimant was propositioned by her employer. In awarding benefits, it was held:

(T)he employer made a proposal to her which violated her moral standards and greatly upset her. When she attempted to resolve the matter, he responded with rage and threats. Therefore, the claimant's job became unsuitable for her and she did have good cause for leaving.

All of these cases are illustrative of situations in which moral objections to working conditions can amount to good cause. Frequently, however, the objections stated by the claimant fail to rise that far. For instance, an individual complaining about profane language used by a supervisor is not going to prevail if it is shown that such language was customary in the work place, was not directed towards the claimant, and was nothing more than language the claimant had used on occasion. Similarly, a truck driver who contends that he was "forced" to drive in excess of the allowable hours under FCC regulations will not prevail if it is shown that he was the one who kept his log book and it was his responsibility to pull off the road when he reached the limit of allowable driving hours. Finally, higher management must be shown to be aware of the offending practice before such a leaving is with good cause.

(7) Working Conditions--Safety -- Safety considerations have prompted many people to quit their jobs. In Terrell v. Mecklenburg Correctional Center, Commission Decision 24036-C, (November 21, 1984), VL 515.65, the claimant was a prison guard who had been previously assaulted on the job and became so fearful

of the working environment that he quit. In denying benefits, the Commission quoted 76 Am.Jur. 2d, Unemployment Compensation, 68 which states:

While a claimant's honest fear of the work itself may constitute good cause for refusing proffered employment, neither a groundless, an unreasonable, a pathological, or a phantasmal fear, nor a fear due to hazards different or greater than those to which the employee was previously accustomed, even though he is oppressed by such fear or anxiety, answers the requirements of good cause. (Emphasis added)

See McConnell v. Wisco Foods, Inc., Commission Decision 27869-C, (December 20, 1986), VL 5, for a factual situation in which good cause for leaving due to safety violations was found.

Two coal mining cases serve to further illustrate the point at hand. In Caldwell v. Fountain Bay Mining Company, Commission Decision 22419-C, (March 2, 1984), VL 515.65, the claimant quit rather than work in a situation where he felt safety regulations were being violated and where an underground explosion could result. He had taken the matter to higher management and he filed a formal complaint which ultimately resulted in the employer being cited for a safety violation. Good cause for leaving was found by the Commission stating:

(T)he claimant was confronted with a serious, potentially life-threatening situation which rendered his job unsuitable. When an employee is confronted with such a situation, has advised proper supervisory personnel of the condition and no meaningful action is taken to remedy the problem, the employee would have good cause for leaving his job.

Contrast this case with that of Bush v. Moses Coal Co., Decision UI-82-11512, (November 9, 1982); aff'd by Commission Decision 20209-C, (January 28, 1983); aff'd by the Circuit Court of Lee County, #83-13, (August 30, 1984), VL 515.65. There, the claimant quit his job driving trucks because he was asked to drive one which he felt was unsafe, even though it was a type customarily used at the mines. In denying benefits, it was held:

(T)he dangers existing in the proposed change of equipment were inherent to the nature of the work and would be logically expected by a person engaged in this type work. While any employee has an inalienable right to take counsel of his fears and leave a job, when he does, he is out of work through his own choosing. Thereby, the receipt of unemployment compensation would be dependent upon him producing evidence to the effect that the dangers involved were greater than would be expected by a person involved in that line of work.

The adjudicator in deciding such cases must focus upon the nature of the work, the degree of any risk involved to the claimant, and what efforts were made to resolve the situation. What may be an unacceptable risk in one field might well be a normal job condition in another. And even when working conditions are not as safe as they should be, employees are required to take all objectively reasonable steps to resolve the problem before resigning.

In Lindeman v. VEC, 1842-03-3 (Va. Ct. App. Feb. 24, 2004), the claimant was hurt on the job and inquired about workers' compensation insurance. When the employer told the claimant that he did not carry workers' compensation insurance, the claimant became upset and quit. Even though the claimant correctly believed that the employer was required by law to carry workers' compensation insurance, the court upheld the Commission's decision that claimant's resignation was without good cause. The court noted that the claimant had not taken any objectively reasonable steps to resolve the situation before quitting, including contacting the Workers' Compensation Commission or the Virginia Employment Commission to inquire into his legal rights to compensation for workplace injuries, as well as waiting a reasonable time for the employer to comply with the law.

The cases discussed in this subsection by no means represent an exhaustive view of situations arising concerning a voluntary leaving of work. They do, however, stand for the principles which the adjudicator needs to keep in mind when analyzing a case at hand. Just as few cases are strictly one-issue ones, the cited cases themselves frequently involved issues for which they were not cited in this section. Reading those cases is the only way that one can gain a total understanding of the complex combination of issues which will be confronted in a typical situation.

II. Misconduct

A. Statement of Law

Section 60.2-618 of the Code provides as follows:

Disqualification for benefits. -- An individual shall be disqualified for benefits upon separation from the last employing unit for whom he has worked thirty days or 240 hours or from any subsequent employing unit:

2. For any week benefits are claimed until he has performed services for an employer during thirty days, whether or not such days are consecutive, and subsequently becomes totally or partially separated from such employment, if the Commission finds such individual is unemployed because he has been discharged for misconduct connected with his work.

B. Typical Issues

In order to impose a disqualification under this statute, it is necessary to find (1) a discharge, (2) caused by misconduct, and (3) that the misconduct was in connection with the claimant's work. However, no disqualification may be imposed if the claimant's misconduct is excused by mitigating circumstances. See "Misconduct" and "Mitigating Circumstances" below.

1. Discharge

A discharge is a separation from employment which is involuntary on the part of the claimant. Note that the separation need not be final. A claimant may be separated from employment as a result of a disciplinary suspension which may have been imposed by his employer for an indefinite period. For example, the claimant may have been suspended pending the disposition of criminal charges for possession of marijuana found in a company vehicle. The employer's decision to continue the claimant's employment will depend on whether the claimant is convicted of the violation of law. Even though he has not been removed from the payroll, the claimant (assuming that he is not incarcerated) is nonetheless involuntarily separated from work if he is not permitted to return to his job and is not being paid during his forced absence. See Barkley v. Peninsula Transportation District Commission, 11 Va.App. 317, 398 S.E.2d 94 (1990) MT 485.45.

A termination is obvious when it is expressed in categorical language such as "you're fired." However, it may be couched in more ambiguous terms. In such instances, the key to finding a discharge is determining whether the claimant had a choice to continue in his employment. Bear in mind that the risk of

non-persuasion in establishing a voluntary leaving rests with the employer. Kerns v. Atlantic American Inc., Commission Decision 5450-C, (September 20, 1971), VL 190.1. Therefore, unless a preponderance of the evidence established that the claimant was separated from employment as a result of his own volition, the separation must be deemed involuntary. Three typical situations in which this question may be presented are as follows:

a. Resignation in Lieu of Termination

When a claimant is given the option of submitting a resignation in lieu of immediate termination, such separation is involuntary, and the issue becomes whether the separation was for reasons which constitute misconduct. See Howard v. Woodward & Lothrop, Commission Decision 5669-C, (May 26, 1972), MT 135.35, in which the claimant who was unable to perform satisfactorily was given the option of either resigning or being fired. The claimant resigned in order to protect her employment record. It was noted in this case that the words "discharged" or "fired" need not be expressly used by the employer, but may be inferred from such language as "it would be best if you resigned."

b. Resignation in Anticipation of Discharge

A claimant who leaves his employment before a discharge actually occurs does so voluntarily. See companion section in the Voluntary Quit Section. In Grantham v. Mounds View ISD #621 and Asphalt Driveway Company, Commission Decision 24159-C, (October 31, 1984), VL 135.35, a claimant resigned his employment in anticipation of being discharged for failure to meet the employer's minimum requirements. The claimant had not been informed by the employer that he was being terminated, nor was he advised of any specific last day of work. The Commission held that no discharge had occurred and that his separation was voluntary.

c. Discharge Prior to Effective Date of Resignation

When a claimant provides an employer with notice of intent to resign at some specified future date and the employer elects to sever the employee-employer relationship immediately, the separation must be deemed a discharge. See Boyd v. Mouldings, Inc., Commission Decision 23871-C, (September 13, 1984), MT 135.05 & MT 135.25, in which the claimant was terminated the day after she provided the employer with a 30-day notice of resignation. The Commission held that had the claimant been allowed to work her notice period or if she had been paid wages in lieu of the notice, then the employer would have discharged its obligations to her and her separation would have been voluntary.

An adjudicator should not forget the application of the provisions of Section 60.2-612(8) of the Code, which has the effect of limiting the benefit entitlement of claimants whose cases fall under the Boyd analysis to a maximum of two weeks. A detailed explanation of the application of this provision of the Code is to be found at the end of the Section on "Other Factors Which Might Affect Monetary Entitlement" in the "Monetary Entitlement" section.

For a more detailed discussion concerning the distinctions between a voluntary separation and a discharge, see the section on "Voluntary Leaving" under Section 60.2-618.1 of this Guide.

d. Termination by Operation of Contract

When the claimant is unemployed as a result of the expiration of the employment period as specified in his contract, rather than as a result of any action on his part, his separation from work is involuntary. See Siugzda v. Vinnell Corporation, Commission Decision 26258-C, (January 17, 1986), MT 135.3.

2. Misconduct

In the absence of a statutory definition of misconduct, the Commission relies upon the interpretation provided by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609, 249 S.E.2d. 180 (1978), MT 485.6. In that case, the Court held as follows:

In our view, an employee is guilty of "misconduct connected with his work" when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer. ... Absent circumstances in mitigation of such conduct, the employee is "disqualified for benefits", and the burden of proving mitigating circumstances rests upon the employee.

This definition was reaffirmed in Brady v. Human Resource Institute, 231 Va. 28, Supreme Court of Virginia, (1986), MT 485.05.

Ordinarily, the term misconduct connotes an element of dishonesty or maliciousness. However, within the context of unemployment law, misconduct may include a broader range of behavior. For

example, problems involving absenteeism or tardiness do not necessarily conjure images of wickedness. But depending on the circumstances, such problems may be regarded as job-related misconduct. For purposes of analysis, there are three categories of misconduct. They are (1) the deliberate rule violation; (2) the act or omission of such a nature as to manifest a willful disregard of the employer's legitimate business interests and the duties owed to the employer; and (3) the recurrent acts or omissions which manifest a willful disregard of those interests and duties.

a. Rule Violations

Pursuant to Section 60.2-618(2) (b) (3) of the Code, "a willful and deliberate violation" of a state regulation or standard by an employee that would subject a licensed or certified employer to be sanctioned or to have its license or certification suspended constitutes misconduct. In such cases, it is helpful to think of all state licensing and certification regulations and standards as "rules" that implicitly bind all employees of licensed or certified employers. This amendment largely codified the Commission's previous interpretation of the statute.

Otherwise, obviously, the finding of a rule violation requires evidence as to the existence of a rule. The rule should be sufficiently clear and definite to ensure that the employees are aware of it and understand its significance. See Granger v. Wornom's Drug Store, Commission Decision 4750-C, (June 13, 1968), MT 485.6 in which it was found that a sales clerk who was discharged for violating a company policy of which she had no notice was not discharged for misconduct. The Commission held that given the circumstances, there could be no finding of a deliberate violation.

The Commission distinguished its decision in Granger, supra, in the case of Prince v. General Offshore Corporation, et al., Commission Decision 29576-C, (February 12, 1988), MT 485.06. In the Prince case, the claimant was a full-time tractor trailer driver and he was fired because he consumed alcoholic beverages with his lunch on the day prior to his dismissal. The claimant contended that he had never been informed of any company rule prohibiting such conduct. The Commission held that the lack of actual knowledge of a company rule will not necessarily afford a claimant an absolute defense from the disqualification for misconduct. If he knew or reasonably should have known that his conduct was inconsistent with his job responsibilities, the employer's policies, or the legitimate business interests of the employer, he could be subjected to the disqualification for misconduct even if he did not have actual knowledge of the company rule in question.

Additionally, the rule in question must be reasonable. In looking at rules which regulate the conduct of employees, the adjudicator should consider the nature of the rule, the potential serious consequences of the rule, the frequency of the rule violation, and the general adherence to the rule. See Saenger v. Continental Manufacturing Co., Commission Decision 5652-C (May 10, 1972), MT 485.05 & MT 485.7. In Saenger, the employer had a rule which prohibited employees from entering the restrooms between 5:00 p.m. and 5:28 p.m. On her last day of work, the claimant got paint in her eye at approximately 5:10 p.m. and entered the restroom to wash it out. She was discharged for violating the rule. The Commission held that her separation was not based upon misconduct because the unqualified prohibition against employees using the restroom was unreasonable and because the rule violation could not result in harm or injury to the employer.

Employer rules must be most strictly construed against the author and most liberally in favor of the employee. See Branch, in which the Virginia Supreme Court found that the claimant had not violated the employer's rule prohibiting three garnishments "within twelve months of each other" because the third garnishment occurred nearly 17 months after the first. Thus, any ambiguity in the interpretation of the company policy must be resolved in favor of the claimant. However, compare this result with the holding in Huffman v. Blue Bird East, Commission Decision 23534-C, (October 17, 1984), MT 485.6. The claimant had received 14 separate garnishments during his 11 years of employment. Six of the last seven occurred in the calendar year 1983, and the final one was issued in March 1984. Although the employer had a rule which permitted an employee to have two garnishments per calendar year, the claimant's discharge was the result of his excessive number of garnishments throughout his employment rather than the violation of the rule. The Commission held that the claimant's actions were so recurrent as to manifest a willful disregard of the duties owed the employer, and that his separation was for misconduct within the meaning of the Code. Therefore, the adjudicator must pay close attention to the reason for the discharge as articulated by the employer in order to determine whether the rule violation caused the separation.

Under the Branch decision, misconduct is defined in the disjunctive so that either a deliberate violation of a rule or an act or omission showing willful disregard of the employer's interest disqualifies a claimant for benefits. When an employer adopts a rule, that rule defines the employer's interests. By definition, a violation of that rule disregards those interests. The rule violation prong, then, allows an employer to establish a prima facie case of misconduct simply by showing a deliberate act which contravenes a rule reasonably designed to protect business

interests. Once the employer has borne the burden of showing misconduct connected with the work, either by violation of a rule or by an act manifesting a willful disregard of the employer's interest, the burden shifts to the employee to prove circumstances in mitigation of his or her conduct. (citation omitted) If the employee's evidence or the entire evidence fails to show mitigating circumstances, the Commission must find that benefits are barred because a rule reasonably designed to protect a legitimate business interest was violated. If, however, the record contains evidence which mitigates the rule violation, the trier-of-fact must balance this against the legitimate business interest being protected to determine whether the employee demonstrated a willful disregard of the employer's interest.

This language is from the case of Virginia Employment Commission, et al. v. Gantt, 7 Va. App. 631, 376 S.E.2d 808 (1989), aff'd en banc 9 Va. App. 225, 383 S.E.2d 271 (1989), MT 255.05. This decision reversed a circuit court decision to find that Commission Decision 26865-C was correct in holding the claimant to be disqualified for misconduct.

The claimant had been assistant manager of a bridal shop which had a rule prohibiting eating in the store except in designated areas. Although this rule had been unenforced in the past, the store manager held a meeting to announce that it would be strictly enforced in the future. Shortly thereafter, when the manager was away, the claimant and other workers ordered breakfast and ate it in the store. Upon learning of this, the manager discharged the claimant, but not the others who ate breakfast with her.

Citing Branch, the court held that the employer had shown the existence of a reasonable rule designed to protect a legitimate business interest which the claimant deliberately violated. Even though the claimant had been discharged for a single violation, her position as assistant manager justified the more severe penalty she received. Managers are expected to not only obey rules, but enforce them as well; yet, this claimant chose to lead her subordinates in the violation. Finally, the court rejected the idea that a rule has to be strictly enforced in order for a violation to constitute misconduct in connection with work. A workers' compensation case cited by the dissent was distinguished due to the differences in the laws involved. Workers' compensation is payable without regard to whether the worker injured was at fault, while unemployment compensation is designed to provide temporary financial assistance to those who become unemployed through no fault of their own. (See also the section on "Mitigation")

The cases which follow involve employer rules designed to regulate employee conduct:

(1) Attendance

The employer has the right to expect regular attendance from an employee and to be promptly notified whenever, for any reason, the employee is unable to report for work as scheduled. Many employers elect to adopt specific rules governing attendance. The Examiner should be aware, however, that it is not enough to show that the claimant's absence merely exceeded the number of unexcused absences allowed by the employer's rule. Rather, in attendance cases, it is necessary to establish that the claimant's absenteeism was inexcusable, that is, without adequate justification and without proper notice.

a. Absences due to medical reasons:

Absences due to medical reasons are considered legitimate and may not constitute misconduct. In Epps v. Burlington Worsteds, Commission Decision 6523-C, (December 10, 1974), MT 15.2, the employer presented evidence which merely established chronic absenteeism. However, evidence was submitted to establish that the absenteeism was due to medical reasons. The Commission held:

Because illness was the proximate cause of this absence, it cannot be said that there is any showing of a wanton disregard of the employer's interest on the part of the claimant. Therefore, there has been no showing of misconduct.

Similarly, when an employee is willfully and deliberately late in reporting for work, especially after being warned, such behavior is regarded as misconduct in connection with work. However, tardiness does not constitute misconduct when the claimant has a legitimate excuse such as sudden illness or emergency. Moehring v. Bendall Motor Sales, Inc., Commission Decision 386-C, (September 28, 1948), MT 435.

Failure to properly notify an employer of absences may render a claimant's absence due to illness misconduct, especially when the employer has established reasonable terms which define excused absences, and the claimant fails to report for reasons which are not excused. The examiner should review the reasons for the absence and the lack of notification. Sudden illness, however, or other exigent circumstances, may render notification infeasible. In Hunter v. VEC, No. 0947-97-3 (Va. Ct. App. Dec. 23, 1997), the claimant's employment was terminated for missing work due to illness and not calling in until noon. All of the employees, including claimant, were aware of the employer's policy of prompt notification "first thing in the morning" if an employee could not report to work as scheduled. Without any mitigating evidence, the court affirmed the Commission's finding that the claimant's

tardiness in notifying his employer of his illness constituted a deliberate violation of a company rule designed to protect the employer's legitimate business interests.

Failing to comply with reasonable requests regarding attendance, such as bringing in a doctor's note, may also result in disqualification. In Henderson v. VEC, No. 1056-99-2 (Va. Ct. App. Sept. 14, 1999), a doctor recommended that the claimant take off several weeks from work due to an injury. Two days later, when the claimant notified the employer of his impending absence, the employer asked the claimant to bring in a doctor's note to verify the time that claimant would be out. When several weeks elapsed and the claimant never brought in a doctor's note, the employer terminated the claimant's employment. The court found that the claimant's refusal to comply with a reasonable demand to verify absences demonstrated a deliberate and willful disregard of his duties and obligations, and amounted to misconduct connected with work.

b. No-Fault Attendance Policy

Frequently, an employer will adopt a "no-fault" attendance policy which provides for progressive discipline for the number of occasions or occurrences of tardiness or absenteeism, rather than the reasons for them. Such was the situation in the case of Jones v. Perdue, Incorporated, Commission Decision 29878-C (April 26, 1988); aff'd by the Accomack County Circuit Court, Case No. 88CL085 (February 28, 1991) MT 485.1. In that case, the employer's rules excused only absences due to deaths in the family, jury duty, military leave, maternity leave and hospital admissions. Any absence for other reason was considered unexcused and resulted in one point per "occurrence." An occurrence could include consecutive absences if for the same reason. A certain number of occurrence points resulted in different levels of disciplinary action including: oral conference, written warnings and ultimately a three-day suspension. Upon reaching the maximum number of occurrences allowed, the employee was discharged. If an employee accumulated no occurrence points for eight consecutive weeks, the last occurrence point would be dropped from their record. The employer's policy did not carry penalties for failing to call in to report the reasons for an occurrence of absence or tardiness.

The claimant in Perdue progressed through every stage in the policy to the point of being assessed with a three-day suspension.

She was then discharged for reaching the maximum number of points under the policy, when she was absent because her baby was sick and had to be taken to the doctor. The Appeals Examiner, the Commission and the Circuit Court all found that the claimant's ultimate discharge had not been due to misconduct despite the

employer's strenuous argument that it was incorrect to focus upon the last occurrence of absenteeism as being for a legitimate family emergency. It was noted that the employer's own rule virtually mandated emphasis on the last incident once it was determined that the claimant had progressed through all the preliminary steps. This is because, but for that incident, the claimant would not have been discharged. Presumably, had the situation been reversed and had the last occurrence of absenteeism not been for a reason which could be considered necessitous or compelling, the claimant would have been disqualified since she had progressed through all steps of the procedure so as to be placed on notice that the next incident of absenteeism would bring about her termination.

In adjudicating "no-fault" attendance policy cases, therefore, the Examiner must first determine whether the claimant has properly progressed through all steps prior to his discharge. If so, then the Examiner should focus on the final incident, determining whether that incident, standing alone or in conjunction with all prior incidents, would amount to a deliberate or willful violation of the rules and standards of behavior expected of an employee. Only then may a disqualification be imposed, if the claimant does not provide evidence sufficient to mitigate his conduct.

In cases where the employer has a progressive disciplinary policy governing attendance that is not considered "no fault," the Examiner should consider whether the final absence constitutes a deliberate rule violation. If so, a claimant's discharge may be found to be misconduct. In Garland v. VEC, No. 0433-00-3 (Va. Ct. App. Aug. 8, 2000), the employer's progressive discipline system began with written warnings regarding attendance, following by a three-day suspension and, in the event of further problems, termination. The claimant was issued a number of written warnings after he had problems with tardiness and leaving work early. Later, he was suspended for three days, and, when he missed a day of work shortly following his suspension, the claimant was discharged. The court found that since there was no evidence in mitigation of the final absence, the claimant's "recurrent attendance problems, coupled with his intentional absence following so closely after a suspension, constituted misconduct connected with work."

Finally, it should be noted that a claimant's reason for absence may be completely justified, and his notice proper to the employer; however, if he fails to adhere to the employer's policies regarding returning to work, he may be considered to be discharged for misconduct. An employee who is clearly aware of a company policy which requires his immediate return to work upon being released by his physician and who deliberately delays his

return for several days, commits an act of misconduct. **Cantrell v. Koch Raven Coal Company**, Commission Decision 14754-C, (December 9, 1980); **aff'd** by the Circuit Court of Buchanan County (September 22, 1983), MT 485.1.

In 2005, the General Assembly amended the definition of misconduct to include:

Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

This amendment largely codified the Commission's previous interpretation of the statute. **See Davis v. VEC**, No. 1192-94-4 (Va. Ct. App. Feb. 14, 1995) (finding that continued absences and tardiness in the face of warnings represents a willful and substantial disregard of duties and interests the employee owes the employer).

(2) **Fighting** -- Generally, fighting or otherwise engaging in an altercation on the employer's premises and/or while on duty is regarded as misconduct in connection with work. **Hawkins v. P. W. Plumly Lumber Corporation**, Commission Decision 3707-C, (May 25, 1961), MT 485.15. However, the Commission has held that no disqualification should be imposed for violation of a company rule against fighting if it is shown that the claimant acted only in justifiable self-defense. In **Bryant v. United Parcel Service**, Commission Decision 18879-C, (October 13, 1982), MT 390.2, the evidence established that the claimant, who had been assaulted and struck without provocation, applied reasonable force to repel the attack by striking his assailant with a flashlight. In its opinion, the Commission included the following citation from **Jackson v. Commonwealth**, 96 Va. 107, 30 S.E. 452 (1898).

A person assaulted while in the discharge of a lawful act, and reasonably apprehending that his assailant will do him bodily harm, has the right to repel the assault by all the force he deems necessary and is not compelled to retreat from his assailant, but may, in turn, become the assailant, inflicting bodily wounds until his person is out of danger.

See also 2A **Michie's Jurisprudence**, "Assault and Battery," Section 7, p. 166.

In **Hargove v. AMF, Incorporated**, Commission Decision 6709-C, (April 15, 1975), MT 485.15, it was held that a claimant who was discharged for violating company policy which prohibits acts of

violence, fighting, and brawling, should be disqualified for misconduct because his throwing a brass hammer to repel his attacker was not justifiable self-defense under the facts of the case.

(3) Intoxication -- Rules which concern the possession and use of intoxicants such as alcohol or illegal drugs can be especially difficult. Obviously, a claimant who is caught at his work station with a liquor bottle in his hand or hip pocket has violated the employer's rule against possession on the premises. However, the question of possession is not so clear in the absence of corroborating evidence regarding use, when the contraband is found at a location which is accessible to others; i.e., a locker, a desk drawer or a company vehicle. Even more troublesome are the problems of determining whether a claimant has used an intoxicant in violation of established rules and whether a claimant was "under the influence" of a forbidden intoxicant. For a discussion of these issues, See "Burden of Proof."

The Commission has held that violation of a work agreement prohibiting alcohol-related absences was not misconduct where the claimant was medically diagnosed as being a chronic alcoholic because he did not have the requisite willful intent to be held responsible for such a violation in becoming intoxicated. Cox v. Dunham & Bush, Inc., Commission Decision 7248-C, (December 5, 1975), MT 270.

NOTE: The holding in Cox should not be interpreted to mean that an alcoholic will automatically avoid disqualification for misconduct.

In the case of Rook v. Postal Data Center, Commission Decision UCFE-443, (October 19, 1978), the claimant was fired by the employer for being intoxicated while on duty and being absent without notice. Although the claimant's absence was due to his being in the hospital because of his alcoholism, the Commission found that the Cox case was distinguishable. The Commission held that the claimant's alcoholism neither justified his being intoxicated on the job nor his failure to properly notify the employer of his absence.

In Kirkland v. GNB Incorporated, Commission Decision 26138-C, (December 31, 1985), MT 270 & MT 485.05, the claimant was discharged because she had been insubordinate to her supervisor and had been intoxicated on the job. The claimant was reinstated on certain terms and conditions, which included a requirement that she participate in a particular alcoholism program. That program's after-care contract was made a part of the agreement between the employer and claimant and any violations of that agreement could subject the claimant to termination. The claimant

was subsequently discharged because she was terminated from the alcoholism program for failing to attend AA meetings and not maintaining contact with her AA sponsor. In disqualifying the claimant, the Commission again distinguished the Cox case. The claimant's dismissal was predicated upon her willful violation of the agreement by failing to participate in the aftercare program as she had agreed. Unlike Cox, she was not discharged for having a recurrence of alcoholism. Therefore, her dismissal was found to be for misconduct connected with her work.

See also, Goodman v. J. W. Ferguson and Son, MT 270, Commission Decision 25210-C, (July 5, 1985), where the Commission held that the claimant was not disqualified for misconduct where his absence was due to his hospitalization for drug addiction and the employer had been put on notice of the circumstances.

(4) Substance Abuse and Drug Testing -- Drug testing in the work place is one of the most controversial, hotly contested issues in our society. Drug usage at work has an immediate impact on employers and the cost of doing business. Consequently, employers feel compelled to take action to combat the rising tide of drug abuse. The main weapon in their arsenal is drug testing. The General Assembly has decided that a positive drug test in certain instances may amount to misconduct per se, although evidence in mitigation should still be considered. Section 60.2-618(2)(b)(1) of the Code. Further, a positive drug test now disqualifies a claimant from benefits even if a non-liable employer administered the drug test (i.e. employer #1 is the potentially liable employer, but the claimant tests positive for drugs during the application process to a subsequent employer, employer #2). Section 60.2-618(3)(d) of the Code. These amendments largely codified the Commission's previous interpretation of the statute.

A preliminary issue in a drug testing case is whether the employer can demonstrate that an employee violated the employer's drug policy.

If an employee admits to drug use in violation of an employer's policy, the employee may be terminated for misconduct and disqualified from benefits without reaching the issue of the drug test. In the case of Barkley v. Peninsula Transportation District Commission, 11 Va. App. 317, 398 S.E.2d 94 (1990) MT 485.45, the claimant was a bus driver who filed her claim during a suspension imposed by the employer for testing positive for the presence of marijuana in her system. Although the drug test lacked authenticated test results or a completed chain of custody document, the employee's admission of drug use made the issue moot. Because the employer had a drug policy, the confession demonstrated a rule violation sufficient to constitute misconduct.

(This case also illustrates how the Commission has held that a disciplinary suspension imposed by an employer is equivalent to a discharge when a claimant files for benefits during the suspension and meets the definition of being "unemployed.")

Employee admissions of guilt are rare, though, and the employer will likely have to produce a failed drug test as evidence of misconduct. A prima facie case of misconduct based on drug use requires an employer to prove both that it has a reasonable and known drug policy that justifies the administering of a legitimate drug test and that the results of that drug test, along with the chain of custody, were properly kept. In Otey v. Hercules, Inc., Commission Decision 28352-C, (July 2, 1987), the claimant was discharged under an employer policy which prohibited ". . . reporting to work with detectable levels of drugs or under the influence of alcohol." Under the policy, all tests which were positive would be confirmed by another test and all future annual physicals of company employees would include a drug screening test. The claimant was given a drug test with his annual physical which came back positive and was confirmed by other tests. By showing both a reasonable policy and a legitimate drug test, the employer successfully made out a prima facie case of work-connected misconduct.

It should be noted that the Commission placed substantial emphasis on the safety factor which was an underlying reason for the employer's rule. In cases where an employee's occupation or duties give rise to such safety factors, the Commission has been consistent in holding that drug testing would be warranted in conjunction with annual physicals, or after accidents or job-related injuries. Therefore, even if an employer did not have a reasonable suspicion that a particular employee may be using drugs, these safety factors could justify an employer requiring that an employee submit to a drug screening test.

A claimant may mitigate an employer's prima facie case by showing that the employer's policy is somehow deficient or that there were deficiencies in the drug testing procedure. The claimant in Virginia Employment Commission v. Sutphin, 8 Va. App. 325, 380 S.E.2d 667 (1989) successfully argued the first type of mitigation. The employer had promulgated a rule that employees with illegal substances in their possession or detected in their body would be discharged. The claimant was discharged when he tested positive for marijuana during his annual physical. The claimant argued that while at a birthday party a few days earlier, he had smoked a cigarette that, unbeknownst to him, had been laced with marijuana, and, in addition, other people at the party were smoking marijuana cigarettes. The court found the claimant's failed drug test could not amount to misconduct because his violation of the company's rule was "involuntary or non-

intentional."

As far as the second type of mitigation, problems with the drug test itself mitigated findings of misconduct in two earlier cases.

Harris v. Tidewater Regional Transit Authority, Commission Decision 24516-C, (January 24, 1985), MT 485.45, represented the first drug test case to come before the Commission. In that case, a bus driver was discharged under an employer's rule that prohibited employees from using intoxicants within twelve hours of reporting for work. A single, unconfirmed drug test was positive; however, the claimant denied drug usage. The employer's evidence consisted only of the test result itself, which was unsigned, uncertified, and unconfirmed. It could not show when the intoxicants were consumed. The Commission held that the employer's evidence was insufficient to prove misconduct. **Harris** is noteworthy because it sets out the Commission's expectation and quality of the evidence necessary to prove misconduct connected with work.

Blake v. Hercules, Inc., 4 Va App. 270, 356 S.E.2d 453 (1987), MT 485.45, was the next case that the Commission confronted concerning drug testing, and it involved both types of mitigation. The employee in this case was discharged as a result of a positive drug test that indicated the presence of a marijuana derivative in his urine. The employer's evidence only amounted to a showing that, at the time of the drug test, the claimant had cannibinoid in his system. The claimant was able to produce persuasive, uncontradicted evidence that he did not deliberately violate the employer's rule. Thus, on appeal, the Virginia Court of Appeals reversed the circuit court and reinstated the Commission's award of benefits.

Physical evidence of impairment does not appear to be necessary to terminate an employee for failing a drug test; that is, failing a drug test is sufficient evidence that the employee was not fully capable of performing his or her duties at work. As the court in **Otey** held:

. . . science has not progressed to the point where specific levels of drugs in an individual's system can be taken as evidence of impairment. . . . Furthermore, given the nature of the production operations involved, the employer cannot afford to wait until an individual is so impaired through the use of drugs that physical symptoms of this fact are made obvious. Lesser amounts of drugs could cause mental impairment which could lead to destruction of property, injury or even death."

Harris also implies evidence of impairment is not necessary to a finding of misconduct. In dictum, the Commission stated that if the chain of custody problems had been solved and there had been

proof of a rule violation, a finding of work-connected misconduct would have been proper. This clearly implies that the lack of objective evidence of impairment will not be a factor that an employee can rely upon and expect to prevail.

However, from the language of the opinion, it would appear that the Blake court would have been interested in and influenced by evidence of impairment and the timing and manner of ingestion. In light of this, it is arguable that the Court of Appeals may, given the right case, adopt a standard in drug testing cases that would involve a more critical analysis of the issue of impairment than the Commission has given in the past.

(5) Money Matters -- In Branch v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609, 249 S.E.2d 180 (1978), MT 485.6, the Supreme Court of Virginia stated the following:

Ordinarily, the way an employee manages his debts is a personal and private matter unconnected with his work. It is a different matter, however, when he mismanages his debts in a manner that impairs the status or function of the employer-employee relationship to the employer's detriment. When an employee forces his creditors to garnish his earnings, he exposes his employer to continuing service of judicial process, complicates his administrative burden and increases the cost of conducting his business. Moreover, when an employer, withholds a portion of a paycheck, the depressing effect on employee morale tends to erode the quality of the work product.

In Branch, supra, the employer's personnel policy provided for the termination of employees who were subjected to three garnishments "within twelve months of each other." The employer was required to garnish the claimant's wages on August 27, 1974, July 24, 1975 and January 6, 1976. In accordance with the principle of construing a rule most strictly against the maker, the court held that the employer's rule had not been violated because the third garnishment occurred nearly 17 months after the first.

In Taliaferro v. Smithfield Packing Co., Inc., Commission Decision 4310-C, (May 28, 1965), MT 485.6, the Commission held that no disqualification should be imposed in connection with the claimant's separation from employment even though the claimant had violated the employer's policy by failing to have his garnishment released within two working days of the time it was served.

The claimant had done everything that could reasonably be expected of him under the circumstances in that he advised the employer that he did not actually owe the money claimed, received personal assurances from the alleged creditor that the garnishment would be

released and had the creditor give the employer similar assurances within the two-day time period.

Where the claimant had deliberately violated a company rule by cashing his personal check for \$500 when he had not submitted a check cashing application and did not have sufficient funds in his bank account, no disqualification was imposed because the employer acquiesced and retained the claimant for an indefinite period of employment, only to fire him six months later for filing for bankruptcy without repaying the debt. The Commission held that although the claimant's violation of the company rule constituted misconduct, the act of declaring bankruptcy did not. See Johnson v. Service Gas Company, Commission Decision 25997-C, (December 19, 1985), MT 485.3.

(6) Polygraphs -- Most pre-employment and mandatory polygraph tests during employment have been outlawed by the Employee Polygraph Protection Act 29 USC 2001 et seq. Exceptions have been retained for government jobs, jobs involving national defense and national security, certain private security functions, and jobs involving controlled substances. There is also a provision allowing the use of tests in connection with specific ongoing investigations so long as certain conditions are met. Although polygraph examinations have not been proven to be sufficiently reliable to be used in court proceedings, a condition of employment that requires employees to submit to such testing in order to protect an employer's legitimate business interests in maintaining security is reasonable. If a claimant works at an occupation where polygraph tests may be legally required, there must be a rule in place which gives notice that employees are expected to submit to such tests as a condition of continuing employment. Without such a rule, the refusal to take a polygraph test will not amount to misconduct. Ivey v. Medical Center Hospital, Commission Decision 15718-C (December 22, 1981) MT 485.05.

The mere fact that polygraphic examination results are inadmissible in a court proceeding does not render such evidence inadmissible in an administrative hearing. Polygraph results are admissible in VEC proceedings, providing that the test was legally required or that the claimant specifically requested it. However, evidence of such results, alone, would be insufficient to substantiate a finding of misconduct. The results of a polygraph test are dependent upon the actual questions given and the skill of the operator. A certified transcript of such a proceeding that includes admissions of wrongdoing on the part of the claimant may be competent evidence.

Where the employer attempts to meet the burden of proof by the presentation of polygraph examination results, together with other

corroborating evidence, such corroborating evidence must be (a) admissible under the rules of evidence followed by administrative tribunals; (b) relevant and material to the inquiry which the agency must resolve; and (c) the corroborating evidence must be credible.

(7) Store Purchases -- Although the employer may have a legitimate business interest in promulgating a policy which prohibits employees from making purchases during their working hours, and further requires such purchases to be removed from the store immediately, if the employer fails to enforce it, a disqualification for misconduct will not necessarily follow a discharge based upon the violation of such policy. See Fisher v. Siegel's Supermarket, Commission Decision 22643-C, (February 24, 1984), MT 485.85, in which the Commission found that the employer had condoned deviations from the policy.

In Brady v. Human Resource Institute, 231 Va. 28, 340 S.E.2d 797 (1986), MT 485.05, the claimant held two jobs, one with the employer and the other with a doctor who was treating her for a thyroid condition. When the claimant attempted to have her prescription filled at the employer's pharmacy without having such prescription on file, she was discharged for violating professional ethics and the employer's personnel policy by ordering a controlled substance for her personal use. However, the evidence established that the claimant as an employee of the doctor had authority to call in prescriptions on his behalf and that the doctor had specifically issued a "continuing prescription" to the claimant to avoid writing a new prescription each time she needed a refill. The Appeals Examiner found that the claimant's action was in keeping with her duties as a nurse for the doctor and did not constitute misconduct. This decision was affirmed by the Commission, but later reversed by the Circuit Court for the City of Norfolk. The Supreme Court of Virginia held that the Commission decision was supported by the evidence and that the employer had failed to carry his burden to show misconduct.

(8) Union Activity -- Where the employer-employee bargaining agreement contained a no strike clause and a claimant was discharged for his participation in a wildcat strike, it was held that his separation resulted from misconduct since his violation of the aforementioned provision showed a substantial disregard for the duties and obligations he owed to his employer. Sifford v. Celanese Fibers Company, Decision UI-74-96, (February 15, 1974); aff'd by Commission Decision 6257-C, (April 16, 1974), MT 475.35.

b. Acts or Omissions Which Show a Willful Disregard

An employer has the right to expect its employees to conform to certain generally accepted standards of behavior such as: honesty, regular attendance and punctuality, as well as civility and courtesy. Even though it does not violate a specifically stated policy or rule, a claimant's conduct may be so careless, negligent, reckless or malevolent that it reflects or manifests a willful indifference to the employer's legitimate business interests. Of course, regardless of the existence of a rule or policy, some types of behavior constitute misconduct per se; e.g., lying and stealing. Depending on the circumstances, however, the determination concerning a willful disregard is not easily ascertained, especially in cases that concern unsatisfactory performance, inefficiency, or errors in judgment.

In determining whether a separation was for misconduct, one consideration is the claimant's ability to alter his behavior; that is, the extent to which he could control the circumstances, his actions and the efforts, if any, he made or could have made to alleviate the problem that resulted in his discharge. Another factor is warnings. Was the claimant on notice that his acts or omissions would be unacceptable to his employer? Was his behavior condoned on prior occasions? Or did a singular occurrence result in the discharge? Had the claimant demonstrated competence in his job performance?

The decisions in the following cases turn on the findings of acts or omissions of such a nature as to manifest a willful disregard for the duties and obligations owed to the employer:

(1) Attendance - Where the claimant, who was absent or late 62 times without warning during the last five months of his employment was discharged for excessive absenteeism after he was called home because of his daughter's illness, the Commission held that there was no misconduct since the employer had condoned his erratic attendance and there was no willful disregard of the duties owed to the employer. Welcher v. General Electric, Commission Decision 8470-C, (September 20, 1976).

In Rebibo v. Saidman Imperial Cleaners, Commission Decision 15737-C, (January 12, 1982), MT 15.1, the claimant obtained permission to be absent from work in order to attend to a sick child in France. She made no effort to notify the employer of her expected date of return and after four weeks, the employer hired a replacement. It was held that the claimant's failure to contact her employer was a deliberate disregard for the standards of behavior that the employer had a right to expect, and did amount to misconduct in connection with employment.

Absenteeism, attributable to illness or injury, does not reflect a willful disregard of the employer's interests and does not amount to misconduct. See Dye v. Newport News Shipbuilding & Dry Dock Company, Commission Decision 8252-C, (August 9, 1976), MT 15.2, in which the claimant was discharged, but not for misconduct, after a series of absences which were due to either her personal illness or the illness of her child. See also Cox v. Dunham & Bush, Inc., Commission Decision 7248-C, (December 5, 1975), MT 270, in which it was held that a claimant's absence caused by his hospitalization due to alcoholism was not misconduct in connection with work since the employer had been notified of the reason for the absence. Similarly, when a claimant's absenteeism was the result of hospitalization for drug addiction and the employer had been made aware of the circumstances, there could be no finding of misconduct in connection with employment. Goodman v. J. W. Ferguson and Son, Inc., Commission Decision 25210-C, (July 5, 1985), MT 15.2.

When an employer sent a claimant a certified letter that "clearly and expressly stated" that the employer would consider the claimant's failure to report for work on a specified day as a voluntary resignation, the claimant did not have any duty to investigate whether she still had her job when she returned six days after the specified date. The claimant's failure to investigate was held not to constitute willful misconduct, and, as the employee otherwise had good cause for not reporting to work on the employer's deadline (her mother was hospitalized in a critical care unit), the claimant was qualified for benefits. AAA v. George & VEC, No. 2344-94-4 (Va. Ct. App. Jul. 5, 1995).

(2) Attitude/Loyalty

(a) Competition with Employer or Aiding Competitor -- An employee, by virtue of his relationship to his employer, is obligated to deal with him in good faith. A material breach of this obligation constitutes misconduct if it is prejudicial to the employer's interests. See Hudnall v. Jets Services, Inc., Decision UI-73-43, (February 28, 1973); aff'd by Commission Decision 5920-C, (March 27, 1973), MT 45.15, in which the claimant was discharged because he submitted a contract bid in competition with his employer but was not awarded the contract. It was held that he committed an act of disloyalty which was a substantial disregard of the employer's interests.

In Colton v. Greyhound Airport Service, Decision UI-74-603, (April 1, 1974); aff'd by Commission Decision 6282-C, (May 14, 1974), MT 45.15, the employer and a competitor were bidding on a contract to provide services which at the time were rendered by the employer. The claimant and his co-workers were advised to file applications

with the competitor while the award was pending. The claimant went one step further by secretly furnishing the competitor with certain employer records in an attempt to arrange for all employees to continue in their jobs. The Commission found that even if the claimant believed that his employer would lose the bid, he knew or should have known that showing a competitor the company's records without permission would be detrimental to the employer and held that his action represented a willful disregard for the employer's interests.

(b) Dishonesty -- Clearly, the act of giving false or misleading information to one's employer is misconduct. In Powell v. Sims Wholesale Company, Commission Decision 13448-C, (June 10, 1980), MT 140.25, the claimant had been hired to do bookkeeping and typing. In her application for employment, the claimant stated she had worked as a bookkeeper and typed 45-50 words per minute. The employer discharged her after discovering that she did not know the difference between a credit and a debit and could not type more than 10-12 words per minute. It was held that the claimant's misrepresentation of her skills on her employment application in order to obtain work constituted misconduct.

In Madison v. Newport News Shipbuilding & Dry Dock Company, Decision UI-78-7966, (December 26, 1978); aff'd by Commission Decision 12128-C, (May 24, 1979), and the Circuit Court of the City of Newport News, (June 9, 1980). MT 140.2, the claimant, who failed to report for work, gave the employer a receipt from a doctor in which the dates were altered to coincide with the absences. The claimant admitted he had not been to a doctor as the receipt indicated and that he had changed the dates to protect his job. It was held that his attempt to mislead his superiors constituted a willful disregard of the employer's interests, as well as a violation of the employer's regulation prohibiting falsification of company records.

Also, "an employee's intentionally false or misleading statement of a material nature concerning past criminal convictions made in a written job application" is misconduct connected with work when the employer terminates the employee because of the lie and promptly upon learning of the lie. Section 60.2-618(2)(b)(2) of the Code. This amendment largely codified the Commission's previous interpretation of the statute.

(c) Indifference -- In Hupp v. Worth Higgins & Associates, Inc., Commission Decision 25019-C, (August 7, 1985), MT 255.1, the claimant's indifference towards her job was demonstrated by her failure to complete certain readings assigned by her supervisor in an effort to teach her basic information about the work. The claimant never completed any of the readings because she found them boring. Her overall performance remained unsatisfactory and

her employment was terminated. The Commission held that, although unsatisfactory performance, alone, would not constitute misconduct, the claimant's failure to carry out reasonable instructions designed to improve her knowledge and skills was tantamount to a willful disregard of the duties and obligations she owed the employer.

(d) Insubordination can manifest itself in one of two ways. First, an employee can deliberately refuse to follow the reasonable, legitimate instructions of a supervisor. In so doing, he demonstrates a deliberate defiance for proper authority. Second, an employee could participate in conduct which shows a flagrant disrespect for a supervisor's position and authority. Ware v. Adesso Precision Machine Co., Commission Decision 31397-C (July 25, 1989), MT 255.4. In this case, the claimant directed profanity at an officer of the corporation and called him a liar. This was found to be insubordination of the second type and a disqualification was imposed.

For insubordination of the first type, See Gynn v. Kahn & Feldman, Incorporated, Commission Decision 4105-C, (October 25, 1963), MT 255.302, in which the claimant was disqualified for benefits after being discharged for her refusal to accompany her supervisor to an area to discuss her duties. See also The Haven Shelter & Services, Inc. v. Hay, No. 2755-07-2 (Va. Ct. App. Oct. 21, 2008), discussed in the "Manner of Performing Work" section.

Similarly, in Anderson v. Glass Marine, Incorporated, Commission Decision 13211-C, (April 8, 1980), MT 255.1, the Commission held that the claimant's refusal to report immediately to his supervisor for instructions was not justified by the latter's use of profanity and that the discharge, based upon such refusal, was for misconduct.

In Hale v. Southwest Sanitation Co., Inc., No. 1071-98-3 (Va. Ct. App. Nov. 24, 1998), customers began complaining to the employer because the claimant, a garbage collector, would not fully empty their trashcans. The claimant had stopped emptying loose trash because it could escape his truck in violation of city littering ordinances, and he objected to bagging the loose trash on the grounds that it was unsanitary. When the employer instructed the claimant to completely empty the trashcans, including bagging the loose trash if necessary, the claimant refused. The court found the claimant's refusal to comply with his employer's reasonable request amounted to misconduct because it was in deliberate disregard for the employer's business interests. The fact that customers were complaining about the claimant's actions underscored the finding of insubordination.

As in all misconduct cases, in order to determine whether a claimant's act or omission constitutes insubordination, it is necessary to make a finding as to the reasonableness of the employer's request or expectation as well as a finding as to the existence of circumstances sufficient to mitigate the conduct in question.

If the claimant merely volunteered to perform an act that she did not otherwise have a duty to perform, the failure to perform in accordance with later instructions by the employer does not constitute misconduct. See Peck v. VEC, No. 2469-01-4 (Va. Ct. App. Aug. 20, 2002). In Peck, the claimant volunteered to pick up some packing boxes for the employer's wife. When the claimant notified the employer's wife the next morning that she intended to pick up the boxes in a few days, the employer's wife became upset, telling claimant that she wanted the boxes sooner than that. The claimant was then discharged. The court held that the claimant merely volunteered to pick up the boxes as an accommodation to the employer's wife, and thus her failure to pick them up according to the later instructions from the employer's wife did not constitute a violation of an employment rule or a willful disregard of the employer's interest.

Where the claimant, a magistrate, who had been warned about her failure to adhere to the employer's bond schedule, was discharged after she continued to impose excessive bond requirements, the Commission held that her actions were a willful disregard of a clear and reasonable directive from her superiors. Vines v. Committee of Judges Systems, Commission Decision 9661-C, (September 7, 1977), MT 255.1.

In Bistawros v. Virginia Employment Commission, No. 2207-00-4 (Va. Ct. App. Feb. 20, 2001), the employer's clients reported to the employer their concerns with the claimant, who was discussing witchcraft at work, including accusing co-workers of practicing witchcraft. The employer warned and counseled the claimant not to discuss witchcraft at work, but, when he continued to do so, the employer terminated him. The court found that the claimant's disobedience of a reasonable request from his employer constituted insubordination that amounted to misconduct connected with work.

In Denisar v. Virginia Employment Commission, No. 2861-03-4 (Va. Ct. App. Aug. 17, 2004), the claimant was a truck driver who normally worked until 5:00 pm each day, although it was customary to work overtime until the scheduled work was completed. One Friday, at 4:15 pm, the claimant was asked by a store manager to carry one more load. Even though the work could have been completed by 5:00 pm, the claimant refused because he had plans to celebrate his birthday that night. The Court of Appeals affirmed the Commission and circuit court decision that held the claimant

was terminated for misconduct connected with work based on his insubordination.

The conduct of a claimant who threatened co-workers and supervisors and further ignored specific instructions to stop his abusive behavior was held to be a willful disregard of the employer's interests. Todd v. Roanoke Cafeteria, Inc., Decision UI-72-2043, (October 17, 1972); aff'd by Commission Decision 5808-C, (November 6, 1972), MT 255.15.

Contrast the Ware decision with that in Kennedy's Piggly Wiggly Stores, Inc. v. Cooper, 14 Va. App. 701, 419 S.E.2d 278 (1992) MT 255.4. There, the claimant, who had been out of work due to illness, was not allowed to return due to some conflicts between various doctor statements concerning his health. He was called into a meeting with company officials that lasted over two hours.

This meeting concluded after the chief executive officer of the company told the claimant that if he wanted to keep his job he was expected to do what he was told. The claimant responded with a brief outburst of profanity and was subsequently discharged. Although the Appeals Examiner and the Commission found that the claimant's discharge had been due to misconduct, both courts found that it did not. This was because the claimant had no record of prior similar incidents, the outburst occurred in private, and came about only after the claimant had been in the meeting for over two hours. The Court of Appeals went on to state that it was not holding that an employee would be entitled to curse or verbally revile his employer at least once and still be entitled to unemployment benefits; however, the facts of this particular case were such as would support an award of them.

In other circumstances, one instance of using abusive language with an employer can constitute insubordination rising to the level of misconduct connected with work. See Wood v. Virginia Employment Commission, 20 Va. App. 514, 458 S.E.2d 319 (1995). There, the claimant was called into a vice president's office to discuss why she had refused to perform a task when requested by a supervisor. Over the course of the discussion, the claimant became upset, and used abusive, profane language to express her disgust with her work environment. The court distinguished this case from Cooper, noting that unlike in Cooper, the claimant had been previously cautioned about her language, there was no provocation from the employer, and the remarks were "calculated to challenge the organizational authority of the company."

Helmick v. Martinsville-Henry County Economic Development Corporation, 14 Va. App. 853, 421 S.E.2d 23 (1992) MT 255.1 and 485.3, also involved insubordination. In this case, the claimant was discharged for a number of incidents, including directly

refusing to prepare a particular report. The Court of Appeals specifically declined to decide whether any of the incidents standing alone would constitute misconduct, but found that when all were considered together, they did constitute a prima facie case so as to shift the burden to the claimant to show mitigating circumstances. Even though there had been some delay between the last incident and the time the claimant was discharged, it was held that this did not constitute mitigating circumstances as was found in the case of Robinson v. Hurst Harvey Oil, Inc., 12 Va. App. 936, 407 S.E.2d 352 (1991) MT 485.3, because the employer should not be expected to respond to each individual incident; nevertheless, she had been specifically warned that her behavior was unacceptable and subsequently placed on probation. Furthermore, the claimant was not entitled to work out the 30-day probationary period since there had been no guarantee that this would be permitted.

Britt v. VEC, 14 Va. App. 982, 420 S.E. 2d 522 (1992) MT 255.05, involved a claimant who was discharged after a third incident of talking back to a supervisor. He had received oral reprimands on the first two occasions so as to be aware just what was expected of him concerning future conduct. The court specifically rejected the contention that the third incident was an isolated occurrence so as to fall under the Kennedy's Piggly Wiggly Stores doctrine. The first incident involved a telephone conversation where neither the claimant nor the supervisor were at work. Despite this, the topic of the conversation was the claimant's shift schedule so as to make it connected with his work. The second incident involved the allegation that the claimant failed to recognize the person he was speaking to as a supervisor. The Commission found that she had identified herself as such, and the court found this to be a credibility decision beyond its purview to disturb. Finally, the court chose not to "second-guess" the Commission with respect to rejecting the claimant's proffered mitigating circumstances for the third incident, and he was found to have been properly disqualified for benefits.

(e) Relations with Other Employees -- In Dent v. Coronet Casuals, Decision UI-73-3108, (December 7, 1973); aff'd by Commission Decision 6161-C, (January 9, 1974), MT 390.4, it was held that the claimant's uncooperative attitude as manifested by her persistence in engaging co-workers in heated arguments amounted to a willful and deliberate disregard for the standards of behavior the employer had a right to expect.

The case of Baker v. Babcock & Wilcox Co., 11 Va. App. 419, 399 S.E.2d 630 (1990) MT 390.25, involved a security guard who was discharged from his job after a female employee who was working alone late reported that he had deliberately exposed himself to her. Even though he denied doing this, and while the complaining

witness did not testify at the Appeals Examiner's hearing, the Commission found, and the court affirmed, that there was sufficient evidence to establish that his discharge had been due to a deliberate and willful violation of the standards of behavior expected of him as an employee. This was, in part, because the claimant's statements concerning the incident had started out with a flat denial of any problems between him and the complaining employee, and then evolved into a scenario in which he ultimately admitted that she could have indeed seen parts of his body that should have been covered. Additionally, the Virginia Court of Appeals held that the claimant's constitutional rights were not violated when a statement from the complaining employee was admitted in lieu of her testimony, inasmuch as the claimant had the right to subpoena this individual to the Appeals Examiner's hearing so as to make her available for cross-examination. Moreover, it was held that, under the circumstances of this case, there was no absolute constitutional right of cross-examination and that the claimant had no property right to unemployment compensation.

Baker is also important for its judicial recognition of the Commission's procedures that allow the introduction of hearsay evidence, although the court specifically declined to rule whether hearsay evidence alone could support a finding. There was enough non-hearsay evidence, primarily in the form of the claimant's own testimony, to establish virtually all of the facts in the case.

(3) Intoxication -- The Virginia General Assembly recognizes alcoholism and other forms of drug addiction as illnesses, and in the absence of a statutory or judicial mandate to the contrary, the Commission must comply with this policy. **Goodman v. J. W. Ferguson and Son, Inc.**, Commission Decision 25210-C, (July 5, 1985), MT 15.2. In **Goodman**, the claimant was discharged for excessive absenteeism that was attributable to his hospitalization for drug addiction. It was held that because the employer had been notified of the claimant's hospitalization, there could be no finding of misconduct.

A similar conclusion was reached in **Cox v. Dunham & Bush, Inc.**, Commission Decision 7248-C, (December 5, 1975), MT 270, where the claimant's employment was terminated pursuant to an agreement he was compelled to accept which provided for automatic termination if he suffered a recurrence of alcoholism on or off the job. The Commission stated that in view of the fact that the claimant had been medically diagnosed as being a chronic alcoholic, it was evident that the recurrence of alcoholism was beyond his control and that such recurrences do not amount to misconduct.

Notice that in each of the aforementioned cases, the claimant had been medically diagnosed as being a drug addict or alcoholic.

These cases do not necessarily apply when the discharge is based upon incidents of drug usage that occur on or off the job. Evidence of use of an intoxicant or a controlled substance on the job may constitute a prima facie showing of misconduct in connection with employment. The same is true of evidence that establishes that a claimant was under the influence of a drug while at work. Where the latter is alleged, the adjudicator must examine the facts closely to determine the sufficiency of the evidence. "Under the influence" is not always readily established. See "Burden of Proof" in this Guide.

(4) Manner of Performing Work -- In cases which involve a discharge based upon the claimant's manner of performing work or the quality of a claimant's work, the adjudicator must be aware of the distinction between lack of ability and indifference, carelessness or negligence. A finding of misconduct will depend on the degree of culpability attributable to the claimant. See generally Epperson v. Norfolk-Baltimore and Carolina Lines, Inc., Commission Decision 577-C, (May 18, 1950), which includes the following statement:

Neither is mere inefficiency, unsatisfactory conduct, errors in judgment or the like to be deemed misconduct.

But compare Williams v. Pinkerton's, Inc., Commission Decision 6074-C, (September 4, 1973), MT 310.1, where the poor quality of the claimant's reports, coupled with his tardiness in filing them, tended to exhibit a disregard of the employer's interests. The Commission held that inefficiency, when combined with factors that are within the claimant's control, may lead to a finding of misconduct.

The Court of Appeals has distinguished between unintentional conduct and repeated, long term acts. Borbas v. VEC, 17 Va. App. 720, 440 S.E.2d 630 (1994). The claimant was a corrections official who was terminated after three separate security violations during her fifteen months of employment. Noting that the negligent acts were unrelated and non-volitional, as well as the short duration of the claimant's employment, the Court held that such unintentional conduct does not amount to misconduct related to work. The Court also observed that there was no evidence that the claimant had ever satisfactorily performed her job.

Repeated, long-term acts, however, may amount to misconduct. In Whitt v. Ervin B. Davis & Co., Inc., 20 Va. App. 432 (1995), the claimant was disqualified after her performance deteriorated for "an unknown reason." The nature of the claimant's conduct was not alone sufficient to support an inference of willfulness. However, a decline in job performance after prior satisfactory performance

of identical duties and warnings leads to an inference of a willful disregard of the employer's interests. Although the decline may be attributable to good cause, the claimant, and not the employer, bears the burden of showing the deterioration was not due to some intentional conduct- either an act or failure to act- on the part of the claimant. Absent mitigating evidence, the nature and frequency of claimant's willful, detrimental acts can support the employer's prima facie case. See below. Israel v. Virginia Employment Comm'n, 7 Va. App. 168, 176, 372 S.E.2d 207, 211 (1988) for cases involving truck drivers.

In Craft v. VEC, 8 Va. App. 607, 353 S.E.2d 271 (1989) MT 310.1 and 300.25, a disqualification for misconduct was upheld in the case of a bookkeeper for a public high school who, at the beginning of her last year of work, was found to have failed to perform her duties in a timely or proper manner. She was given assistance in getting the books in proper order; however, at the end of the school year it was found that they were in disarray again and many thousands of dollars were unaccounted for. The Commission held, and the courts affirmed, that the claimant's failure to properly perform her duties was not due to mere inability or poor performance, rather it was due to a conscious choice not to do what she had been told to do and not to ask for assistance when it became apparent to her that she could not get her duties completed.

However, the employer must show that claimant's acts amounted to a conscious disregard of the employer's interests. In Craig v. Colley Avenue Office Supplies, Commission Decision 23759-C, (August 13, 1984), MT 300.05, the claimant, who worked as a salesman on a commission basis, failed to achieve the employer's minimum sales requirement. Although his supervisor advised him of ways to improve and the claimant's performance was slightly better, he was discharged because of his low sales volume. The Commission noted that it had not been shown that the claimant initiated or failed to initiate any action with the intent of preventing an increase in his sales production and further that it was not reasonable to even suspect a willful disregard of the employer's interest because the more the claimant sold the more money he earned.

In an unpublished decision, the Court of Appeals noted that neither Borbas nor Whitt, "contains the requirement that 'there must be evidence that appellant demonstrated an ability to perform her job satisfactorily' before she may be found to have committed misconduct disqualifying her from receiving unemployment benefits." The Haven Shelter & Services, Inc. v. Hay, No. 2755-07-2 (Va. Ct. App. Oct. 21, 2008). Ms. Hay was a victim's advocate who was terminated for disobeying direct orders from her superior by sitting at the counsel's table at hearings, writing

out talking points for the victim to read on the witness stand, and turning in a time sheet that failed to represent she had been late to a hearing where she was required to appear. Certainly, when a claimant argues that misconduct is merely due to inexperience or inability, one way the employer can rebut such an argument is through evidence of prior satisfactory performance. But, the court found, it is not the only way. Here, the evidence showed that the claimant's misconduct was due to a difficulty with supervision rising to the level of insubordination, and thus not inexperience or inability. Her willful acts in disregard for her employer's interests therefore amounted to disqualifying misconduct.

When a claimant is terminated from employment because of his poor job performance and he has not received any warnings that his work is unsatisfactory, there can be no finding of willful disregard for the employer's interests or the duties and obligations owed to the employer. **Miller v. J. Henry Holland Corporation**, Commission Decision 7470-C, (February 9, 1976), MT 300.05. In **Miller**, the claimant asserted that he was told he was being let go because of a lack of work and the employer, who could not remember what the claimant was told, indicated that the claimant was discharged for poor performance. The Commission held that the evidence failed to establish any intentional or deliberate act or course of conduct that would constitute misconduct. This holding is consistent with that in **Keene v. Rebecca Coal Company**, Decision S-7912-7754, (July 9, 1959), MT 300.3, in which the claimant, a coal loader who had been discharged for inefficiency by the same employer on a prior occasion, was terminated for poor performance. The Commission held that the claimant's inefficiency did not amount to misconduct because it was evident that he had never been put on notice that his performance was substandard. **See also Rice v. Trovato Electric Company, Inc.**, Decision TEC-1, (October 27, 1961), MT 300.3 (deliberately decreasing rate of production despite warnings amounts to misconduct).

In **McNamara v. Virginia Employment Commission**, Dec. No. 2317084 (Va. Ct. App. Aug. 18, 2009), a published Court of Appeals decision, the Court of Appeals affirmed the Commission's decision that the claimant's job performance did not amount to misconduct. Although the Court addressed in detail certain credibility issues, the substantive issue was the claimant's job performance.

(5) Trucker Negligence

Cases involving the job performance of truck drivers should be treated separately from other job performance cases. A claimant's act or acts in these types of cases only constitutes misconduct if the claimant is sufficiently culpable for the act or acts. **See Griffin v. Shively**, 227 Va. 317 (1984) (discussing varying levels

of negligence). In analyzing these types of cases, the Examiner should first determine if the claimant was terminated for a single act or for recurrent acts.

If a claimant is terminated for a single act, the second step in the analysis is to determine whether the claimant's act amounted to gross negligence. A claimant should only be disqualified for benefits if the single act amounted to gross negligence. In Courtney v. Pollard Delivery Service, Inc., Commission Decision 4728-C (May 9, 1968), MT. 310.1, it was held that the claimant, an experienced truck driver who failed to follow standard procedures in uncoupling a trailer, was so grossly negligent as to reflect a willful disregard of the employer's interest.

In a case where a single act of ordinary negligence caused a substantial monetary loss for the employer the Commission held that the act did not constitute misconduct. Poland v. T.D.L.C., Inc., Commission Decision 30841-C (November 8, 1988), MT 310.05. In Poland the claimant was a truck driver who had an accident causing \$21,000 in damages. She was inexperienced and apparently slammed the brakes too hard when a car pulled in front of her rig. Even though she paid a fine for driving too fast for the road conditions, her subsequent discharge was not found to be disqualifying. These cases illustrate the need to concentrate on the severity of the negligence rather than the severity of any damage that results from it in deciding whether a single incident constitutes misconduct.

If a claimant is terminated for recurrent acts, the second step in the analysis is to determine whether each accident, standing alone, manifested a willful disregard of the employer's business interests. If not, the claimant's termination may still be misconduct if the acts, taken together, would manifest a willful disregard for the employer's interests. Israel v. VEC, 7 Va. App. 169 (1988) (citing Branch, 219 Va. at 611, 249 S.E.2nd at 182). In Israel, the claimant was involved in two accidents within one week, both involving the employer's coal truck. The first accident occurred when the claimant met an oncoming truck at a point in a narrow road where the two trucks could not pass. The claimant attempted to back up to allow the other truck to pass, but the shoulder of the road collapsed and the truck ended up in a ditch, causing \$1000 in damage. A week later, the claimant checked his mirrors and began backing up at a service station. However, he struck a utility pole that was in a blind spot, causing \$200 in damage.

The court found that each accident, on its own, amounted to no more than ordinary negligence, and would therefore not amount to acts manifesting a willful disregard of the employer's business interests. Further, the court found that despite the close

proximity of the accidents in time, the two accidents taken together did not amount to a willful disregard of the employer's interests because the claimant did not disobey any of the employer's procedures or policies, and, in the second accident, took steps to protect the employer's interest in the truck by checking his mirrors before backing up. The claimant was therefore qualified for benefits.

In Chappelle v. Groome Transportation, Inc., Commission Decision 23868-C (August 31, 1984), MT 300.1, the claimant, a tractor-trailer driver, was involved in three accidents within a four-month period, all of which were caused by claimant's negligence. The first accident involved the claimant striking another car as both automobiles made a left hand turn; next, the claimant tried to drive through a tight space, but hit a parked truck; and third, the claimant jack-knifed when he slammed on his brakes because a car in front of him slowed down to make a turn, causing damage to the trailer from hitting the tractor. The Commission found that the claimant's conduct was so recurrent as to manifest sufficient culpability to constitute misconduct.

It should be noted that some employers allege violation of a safety policy in truck driver negligence cases. The Examiner should be aware that vehicular accident cases involving professional truck drivers are best analyzed under a willful misconduct analysis, due to the negligence factor, although the employer's publication of a written safety policy or rules, and its practice of progressively counseling its employees for violations of its preventable accident policy, only serves to strengthen its case particularly when the claimant has been involved in multiple, preventable accidents.

(6) Money Matters

Ordinarily, the way an employee manages his debts is a personal and private matter unconnected with his work. It is a different matter, however, when he mismanages his debts in a manner that impairs the status or function of the employer-employee relationship to the employer's detriment. When an employee forces his creditors to garnish his earnings, he exposes his employer to continuing service of judicial process, complicates his administrative burden and increases the cost of conducting his business. Moreover, when an employer, withholds a portion of a paycheck, the depressing effect on employee morale tends to erode the quality of the work product. Branch v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609, at 612 249 S.E.2d 180 (1978), MT 485.6.

Most cases included in this sub-heading in the Precedent Decision Manual concern garnishments imposed upon the claimant. Although

the employer in Branch had a company rule that established a limit on the number of garnishments to be tolerated, the Virginia Supreme Court found that the rule was sufficiently vague to permit more than one interpretation. The Court interpreted the rule in the light most favorable to the claimant and concluded that he had not violated it. However, the case is noted here because the aforementioned quote is applicable to all garnishment cases whether the facts include a rule violation or not.

NOTE: Under Virginia law (Code 34-29(f)), "No employer may discharge any employee by reason of the fact that his earnings have been subject to garnishment for any one indebtedness."

c. Recurrent Acts or Omissions

While single incidents of poor judgment, negligence or inefficiency may not necessarily be sufficient to warrant a disqualification under the statute, misconduct may exist when there is a recurring pattern of behavior which shows a willful disregard or indifference to the duties owed to the employer. The cases that follow involve recurrent behavior:

(1) Mistakes in Job Performance -- In Blubaugh v. R. R. Donnelley & Sons, Co., Commission Decision 19940-C, (November 23, 1983); aff'd by Circuit Court of Rockingham County, Law No. 6882, (February 25, 1985), MT 300.25, the quality of the claimant's work deteriorated after he had performed satisfactorily for the first three months of his employment. The Commission held that his failure to concentrate on the quality of his work and his ever-increasing number of mistakes formed a recurring pattern of negligence that manifested his willful disregard for the duties and obligations owed to his employer.

(2) Negligence -- Where the claimant, a tractor-trailer driver, was discharged because he was involved in three accidents within a four-month period (all of which were caused by his negligence), it was held that his conduct was so recurrent as to manifest sufficient culpability to constitute misconduct. Chappelle v. Groome Transportation, Inc., Commission Decision 23868-C, (August 31, 1984), MT 300.1.

(3) Money Matters -- See also Huffman v. Blue Bird East, Commission Decision 23534-C, (October 17, 1984), MT 485.6, which includes the aforementioned language from Branch and applies it where the claimant was discharged for excessive garnishments even though he had not technically violated the employer's rule on the subject. The Commission held that the claimant, who had 14 garnishments in 11 years (six within the last 15 months of employment), had engaged in a recurring pattern of conduct that manifested a willful disregard of the employer's interests.

3. In Connection with Work

In order to impose a disqualification for misconduct, there must be a finding that the claimant's discharge was based on misconduct connected with his work. Thus, if there was a discharge for misconduct but the conduct complained of did not impair the status or function of the employer-employee relationship to the employer's detriment, the requirements of the statute have not been met. See also Branch v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609 at 612, 249 S.E.2d 180 (1978), MT 485.6, and Branch v. Brown and Williamson Tobacco Corporation, Commission Decision 6971-C, (July 29, 1975), MT 85 & MT 490.05. In Branch v. Brown and Williamson, *supra*, the claimant was arrested and convicted on a charge of felonious abduction. Although he was sentenced to five years of confinement, he appealed the conviction and obtained his release on bond. When he attempted to return to his job as a filter-tip machine operator, he was not allowed to do so because of the employer's policy that prohibited the return of an employee who is absent because of a criminal conviction. The Commission held that no disqualification could be imposed even though it was evident that the claimant's discharge was the result of misconduct because the misconduct (the abduction) was not connected with his work.

Compare Branch with Brady v. U. S. Military District of Washington, Commission Decision UCFE-479, (August 1, 1979), MT 85.

The claimant, who worked as an editorial assistant, was required to maintain a top-secret security clearance classification. She was convicted of a felony and, as a result, lost the necessary security clearance. It was held that although the felony did not occur within the scope of her employment, the claimant knew or should have known that her clearance would be revoked and she would lose her job, and further, because the loss of the clearance resulted in a detriment to her employer, her acts constituted misconduct in connection with employment.

Notice that virtually all the cases involving this issue that were decided after Brady depend on a finding of a substantive detrimental effect on the employer. One exception follows.

In Ashe v. VEPCO, Commission Decision 16700-C, (July 1, 1982); aff'd by Circuit Court of Virginia Beach (November 10, 1983), MT 85, the claimant, a meter service man, was discharged because he had been convicted of possession of an unregistered firearm, a felony. The Commission held that because the claimant's job required him to have contact with customers at their homes and places of business rather than at the employer's premises, a reasonable nexus between the misconduct and the work had been established. It was noted that the customers should be free from

having convicted felons from coming into their yards.

The language referring to conduct as being inextricably interwoven with the job duties comes from a line of pre-Brady cases. Among these was the case of Self v. ABEX Corporation, Commission Decision 8283-C, (August 11, 1976), MT 85, which involved a claimant, who while on layoff status, entered the employer's premises in an apparent intoxicated condition and created a disturbance. It was held that while he was technically "off the job," he was still attached to the employer and since management could not be expected to tolerate his behavior, his discharge was for misconduct in connection with the work.

In Goad v. Rental Uniform Service of Bedford, Incorporated, Commission Decision 19292-C, (September 7, 1982), MT 85, the claimant was employed as a route service representative and was required to drive a motor vehicle in the performance of his duties. While he was off the job, he was arrested and convicted of driving under the influence of intoxicants. His license to drive was revoked and his employment was terminated. It was held that although the misconduct did not occur within the scope of his employment, it was so inextricably interwoven with the requirements of his job as to constitute misconduct in connection with his work.

However, where the claimant, who was suspended from driving company vehicles by his employer, assigned dock work, and placed on six months' probation, was terminated subsequently for obtaining two convictions for speeding in his private vehicle, the Commission held that the misconduct was not connected with the work because there was no showing that the convictions caused a substantive detrimental effect on the employer. Malone v. Thalhimer's Brothers, Commission Decision 16605-C, (January 11, 1982), MT 85. This case serves to illustrate the point that it is not enough to assume the existence of a substantive detrimental effect upon the employer. Such a finding must be supported by evidence.

In the case of Coan v. Consolidated Cigar Corporation, Commission Decision 29542-C, (February 5, 1988), MT 85, the claimant was fired after he had recklessly operated a company leased vehicle, resulting in damage to that car, as well as, to two police vehicles. After discussing the Brady, Ashe, and Goad cases, the Commission held that an act of misconduct which occurred outside the scope of employment or while the claimant was off duty will be connected with his work if (a) there is a reasonable nexus between the claimant's job duties and the misconduct; or (b) if the misconduct had a substantive detrimental impact on the employer; (c) if the misconduct constituted a violation of any duty or obligation owed to the employer, whether expressed or implied.

In **Britt v. VEC**, 14 Va. App. 982, 420 S.E.2d 522 (1992) MT 255.05, the Virginia Court of Appeals rejected a claimant's contention that a telephone conversation he had with his supervisor in which he behaved insubordinately was not connected with his work. Even though they were not on duty at the time, the conversation centered on the claimant's work schedule and he received a reprimand as a result of it. Thus, it was properly considered as a prior occurrence when he was discharged after two more similar ones.

4. Mitigating Circumstances

Recall that in **Branch v. Virginia Employment Commission and Virginia Chemical Company**, the Supreme Court held that a disqualification for misconduct in connection with the work could be imposed only in the absence of mitigating circumstances.

We are of opinion that the conduct of an employee which results in garnishment is conduct connected with his work and where, as here, such conduct is recurrent, knowingly violative of a company rule, and unexcused by mitigating circumstances, it constitutes misconduct within the intendment of the statute. **Branch** 219 Va. 609 at 612.

Before a disqualification under Section 60.2-618(2) of the **Code** is warranted, there must be a finding of a prima facie showing of misconduct in connection with the work and lack of mitigating circumstances (219 Va. 611 - 612). The above-mentioned language contained in **Branch** suggests that the presence of circumstances sufficient to mitigate the claimant's behavior prevents a disqualification. **See also Hupp v. Worth Higgins & Associates**, Commission Decision 25019-C, (August 7, 1985), MT 45.35 & MT 255.1. Therefore, it is necessary to carefully examine the context in which the objectionable behavior has occurred. The claimant has the burden of proving mitigating circumstances.

In **Virginia Employment Commission v. Gantt**, 7 Va. App. 631, 376 S.E.2d 808 (1989); **aff'd** en banc 9 Va. App. 225, 383 S.E.2d 271 (1989), MT 255.05, the Virginia Court of Appeals discussed the subject of mitigation as follows:

Mitigating circumstances are likely to be those considerations which establish that the employee's actions were not in disregard of those interests. Evidence of mitigation may appear in many forms which, singly or in combination, to some degree explain or justify the employee's conduct. Various factors to be considered may include: the importance of the business interest at risk; the nature and purpose of the rule; prior enforcement of the rule; good cause to justify the violation; and consistency with other

rules. Therefore, in order to constitute misconduct, the total circumstances must be sufficient to find a deliberate act of the employee which disregards the employer's business interest.

The Gantt holding concerning mitigation was cited in the case of Robinson v. Hurst Harvey Oil, Inc., 12 Va. App. 936, 407 S.E.2d 352 (1991) MT 485.3. There, the claimant had been discharged from her job after she was found to have consumed small quantities of the employer's food over a long period of time. Although this was found to constitute a prima facie case of misconduct in connection with her work, the claimant was nevertheless found qualified for benefits on the grounds that the three-month delay between the time the employer was first made aware of the claimant's actions and the time she was ultimately discharged amounted to a condonation of her behavior. This was especially true inasmuch as the employer, after discovering what the claimant had done, never warned her about it or even suggested that she might be terminated as a result. Instead, she was allowed to work as though nothing had happened until a suitable replacement for her was found.

In Bryant v. United Parcel Service, Commission Decision 18879-C, (October 13, 1982), MT 390.2, the claimant was discharged for fighting on the job. Since it was evident that the claimant had violated the employer's rules by engaging in a fight on the company's premises, a prima facie showing of misconduct was established. However, his conduct was mitigated by the fact that he responded to defend himself from an unprovoked attack and he used only as much force as was necessary to repel his assailant.

Similarly, in Tyree v. White Tower Management Corporation, Decision UI-75-2451, (March 21, 1975); aff'd by Commission Decision 6762-C, (May 1, 1975), MT 485.2, the Commission found that the claimant, a waitress, violated the employer's dress code and that she sold Avon products in the employer's restaurant contrary to company policy. However, her actions were mitigated by the fact that her doctor had instructed her to wear certain clothing as a temporary measure and the employer had condoned the sale of the cosmetics for an extended period.

Even though there was evidence of prima facie misconduct in each of the aforementioned cases, the presence of sufficient mitigating circumstances prevented a disqualification in connection with the work. While there is an explanation for the behavior in question, it is not always sufficient to relieve the claimant of culpability. Compare the results in Bryant with that in Cooper v. Newport News Shipbuilding, Commission Decision 19538-C, (November 5, 1982), MT 390.2, in which the claimant was discharged for fighting on the job in violation of a yard regulation. The claimant repelled his attacker by drawing a knife but went on the offensive after the attacker backed away. It was held that this

action was outside the scope of self-defense and was threatening, intimidating and coercive behavior. In Cooper, the alleged self-defense failed to constitute sufficient mitigation for pursuing an employee with a weapon.

Where the claimant, an alcoholic, attempted to justify her violation of the terms of her employment by alleging that the staff at the health facility was too strict and her counselor was not accessible, the Commission held that these explanations were not sufficient to mitigate her abandonment of the employment agreement. Kirkland v. GNB Incorporated, Commission Decision 26138-C, (December 31, 1985), MT 485.05. Similarly, in Fogle v. Philip Morris, Inc., Commission Decision 30439-C, (July 14, 1988), MT 485.45, mitigation was not found where a claimant who had been discharged, after being arrested on company property for possessing drugs and drug paraphernalia, admitted that he was an addict. His conduct was still found to be manifestly deliberate and willful.

5. Burden of Proof

The quantum of proof required to establish misconduct is a preponderance of the evidence. The burden to show misconduct rests with the employer. Brady v. Human Resource Institute, 231 Va. 28, 340 S.E.2d 797 (1986), MT 190.05; Dimes v. Merchants Delivery Moving and Storage, Inc., Commission Decision 24524-C, (May 10, 1985), MT 190.05; and The Kroger Company, t/a Westover Dairy v. Virginia Employment Commission, et al., Commission Decision 16730-C, (December 1, 1981), remanded by the Circuit Court of the City of Lynchburg (November 12, 1982). This burden is not carried by mere allegation. It requires specific detailed information to establish that it is more likely than not that the misconduct actually occurred. Harris v. Tidewater Regional Transit, Commission Decision 24516-C, (January 24, 1985), MT 190.15.

Where the employer merely alleges excessive absenteeism, but provides no evidence as to dates, company rules or warnings given to the claimant, there is no prima facie showing of misconduct. See Heller v. A&P Tea Company, Commission Decision 3297-C, (October 15, 1958), MT 15.05.

Although the employer must bear the burden of establishing misconduct, it may be shown by the claimant's evidence even when the employer's evidence alone is insufficient. It is important to determine whether it satisfied the purpose for which it is offered. For example, as noted earlier in this Guide, cases involving an allegation that the claimant was discharged for being under the influence of an intoxicant or controlled substance can be difficult when the employer produces no evidence other than

test results. In addition to questions concerning the validity and authenticity of the test and testing procedures for drugs (other than alcohol), there is the question as to the existence of standard levels at which a person may be presumed to be under the influence or in the case of marijuana, whether the results establish how the drug entered into the system. In Harris v. Tidewater Regional Transit, the evidence, which consisted of an unsigned, uncertified lab report, was deemed to be insufficient to establish that the claimant had violated the company rule which prohibited the use of an intoxicant within 12 hours of reporting to work.

In Northern v. U-Tote'm of Virginia, Inc., Commission Decision 5484-C, (October 13, 1971), MT 485.05, the employer offered results from a polygraph test to show that the claimant was responsible for shortages in petty cash. It was held that the test results, standing alone, were not sufficient to establish misconduct. See also Icenhour v. Food World, Inc., Commission Decision 24967-C, (June 10, 1985), MT 190.15, in which it was held that a written pre-test admission of guilt which was dictated by the polygraph examiner and signed under threat of discharge was of dubious value in establishing misconduct. In Watford v. Wilson Trucking Corporation, Commission Decision 18757-C, (October 22, 1982), MT 190.05, the Commission held that when the employer attempts to carry the burden of proof with such test results, there must be additional corroborating evidence which is (1) admissible under the rules of evidence followed by administrative tribunals; (2) relevant and material to the agency inquiry; and (3) credible.

The Virginia Supreme Court clearly stated in Branch v. Virginia Employment Commission and Virginia Chemical Company that the claimant has the burden of proving mitigating circumstances. Again, if there is evidence of sufficient mitigation, there can be no disqualification regardless of the source of proof. Note that neither party generally may carry its burden of proof by merely presenting the proceedings and/or findings of another administrative tribunal. See Munsey v. Kersey Manufacturing Company, Commission Decision 9022-C, (March 15, 1977), MT 5, in which a claimant offered proof of his reinstatement in his job with back pay as proof that his actions did not constitute misconduct and Ware v. American Safety Razor, Commission Decision 14560-C, (October 31, 1980), MT 190, where the Commission held that the finding by an arbitrator that an employer had not complied with the technical requirements of its collective bargaining agreement would have no bearing on the issue of misconduct.

Frequently, objections are made to the admissibility of a reliance on hearsay evidence. In the case of Casey v. VEC, Frederick

County Circuit Court, Chancery No. C-86-168, (April 17, 1987), MT 15.1 & MT 190.15, the Court noted that hearsay evidence has been held to be admissible in Virginia administrative hearings. Hearsay evidence is admissible in unemployment compensation proceedings, and if its probative effect was more than a scintilla of evidence and sufficient from which a rationale mind could draw an inference of the truth of the matters asserted therein, this would be enough to justify a finding thereon despite contradictory testimonial evidence. See also Baker v. Babcock & Wilcox Co., 11 Va. App. 419, 399 S.E. 2d 630 (1990) MT 290.25.

In the case of Upton v. Southeastern Roofing & Siding, Commission Decision 28298-C, (March 31, 1987), MS 5, the Commission rejected the claimant's argument that he should prevail since the employer had agreed to withdraw any objections to his claim for benefits. It is the statutory duty (Section 60.2-111.A of the Code of Virginia) of the Commission to administer the unemployment insurance program in Virginia and its adjudicatory functions cannot be delegated to either of the parties in a particular case.

The fact that criminal charges may be pending against a claimant carries no weight in an unemployment compensation case, despite the possibility that a grand jury may have found "probable cause" that the claimant committed the crime which would amount to misconduct in connection with work. The claimant in such a situation is still entitled to the constitutional presumption of innocence until proven guilty. The fact that a claimant may have been found innocent of criminal charges stemming from a work-related incident does not preclude a finding of misconduct in an unemployment insurance case since the burden of proof in a criminal case is much higher than that in an administrative proceeding. The fact that a claimant has been convicted, either after trial or through a plea of guilty, of a crime which would amount to misconduct in connection with work will be given full faith and credit and it is not necessary to re-litigate the criminal case at an unemployment insurance hearing. The adjudicator should always ascertain the status of any criminal charges pending in a benefits case since a conviction can be brought into consideration at any time until a Commission decision becomes final.

III. Suitable Work

A. Statement of Law

Section 60.2-618(3) of the Code provides as follows:

Disqualification for benefits. -- An individual shall be disqualified for benefits upon separation from the last employing unit for whom he has worked thirty days or from any subsequent employment unit:

3.a. If it is determined by the Commission that such individual has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the Commission or to accept suitable work when offered him. The disqualification shall commence with the week in which such failure occurred, and shall continue for the period of unemployment next ensuing until he has performed services for an employer during thirty days, whether or not such days are consecutive, and subsequently becomes totally or partially separated from such employment.

b. In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience, his length of unemployment and the accessibility of the available work from his residence.

c. No work shall be deemed suitable and benefits shall not be denied under this title to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

- (1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;
- (2) If the wages, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; or
- (3) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

B. Typical Issues

Initially, the analysis of cases adjudicated under the aforementioned statute requires a finding as to the existence of a referral or an offer. No disqualification can be imposed unless one of the two has occurred. If the evidence establishes the existence of a referral or an offer, there must be a finding as to

whether the work in question was suitable for the individual. In this regard, the adjudicator has a statutory obligation to consider those factors set forth in subsections (b) and (c) of Section 60.2-618(3), and it is imperative that his written determination or decision reflects such an analysis. Again, if the job was unsuitable, the claimant will not be disqualified for refusing it. In the event the evidence shows that the claimant was referred to or offered available, suitable work, the issue then becomes whether his refusal was for good cause.

1. Referral/Offer

a. The statute contemplates referrals made by an employment office of the Commission for job openings that can be identified by job orders. See Coles v. Migrant & Seasonal Farmworkers Association, Inc., Commission Decision 24988-C (June 17, 1985), SW 170.05, in which it was held that a claimant could not be disqualified for rejecting a referral made by her former employer and Johnson v. Halifax County Senior High School, Commission Decision 12681-C, (October 4, 1979), SW 170.1, which stated that the absence of a job order would invalidate a referral and preclude the imposition of a disqualification under the statute.

b. The lack of an actual referral slip does not invalidate a referral if a claimant by his actions or attitude precludes it being given to him. In Thomas v. U. S. Army Finance & Army Accounts Office, Commission Decision UCFE-99, (February 23, 1968), SW 170.1, the Commission held that the claimant by demonstrating a total lack of interest in the job, in effect, refused the referral and was subject to disqualification under the statute even though the employment office did not formally present her with a written referral slip. It was noted that while the Code is silent on what constitutes a proper referral, it does not contemplate or require the Commission's Job Service Division to perform a useless act.

Contrast Thomas, supra, with the case of Beadles v. J. P. Stevens & Company, Inc., Commission Decision 27823-C, (November 29, 1986), SW 170.1, in which no valid referral was found since the interviewer did not disclose the name of the potential employer and told the claimant, in effect, that it would be all right if she wanted to pursue her own job leads first. The mere fact that a claimant expresses some apprehension about a potential referral does not mean that it has been refused.

c. The failure to make reasonable efforts to contact an employer to which an individual has been referred constitutes a refusal of the referral. In Adeyinka v. Charles E. Smith, Commission Decision UCX-73-93, (October 1, 1973), SW 265.3, it was held that a claimant who, by his action manifested a disinterest in reporting for a scheduled interview, would be subject to

disqualification. Similarly, in Decision S-197-402, (August 18, 1952), SW 265.3, it was held that a claimant who had been given a referral by the employment office and received no answer on the phone in his one attempt to contact the employer, had failed to apply for work as directed.

Additionally, an unemployed individual is expected to personally apply for work as well as use other reasonable means to contact an employer. This section of the Code requires an earnest attempt to obtain employment. A claimant who merely approaches a prospective employer and does not communicate a sincere desire to obtain a job does not satisfy this requirement. See Meredith A. Newcomb, Commission Decision UCX-30, (August 18, 1967), SW 265.25. Similarly, an undue delay in pursuing a referral is tantamount to a refusal to apply for work. See Ferguson v. Wytheville Knitting Mills, Commission Decision 3453-C, (January 14, 1960), SW 150.05, in which it was held that with the employer being within a reasonable commuting distance, as well as the availability of public transportation, a claimant who delayed 11 days in applying for work because she lacked personal transportation had acted in a manner which was tantamount to a refusal to apply without good cause.

d. A bona fide offer must be clear as to its terms. There must be some statement of the duties and responsibilities included in the job, a starting date, and a starting rate of pay. The offer of work must be communicated to the claimant. See Chaplin v. A.S.R. Products, Inc., Commission Decision 3371-C, (June 26, 1959), SW 330.15. A general statement of availability or the posting of vacancies to be filled, without more, is not sufficient to constitute a bona fide offer of work. See Amos v. Celanese Fibers Company, Commission Decision 5631-C, (May 22, 1972), SW 330.1, in which it was held that the employer had not made a bona fide offer to a claimant by merely listing job openings so that interested employees could bid for them.

2. Suitability of the Work

The statute lists the only factors that must be considered in determining the suitability of a given job for a particular claimant. There are no distinctions between full-time and part-time work and union and non-union employment. See Martin v. Climate Trane Air Conditioning Co., Decision UI-74-2148, (September 6, 1974); aff'd by Commission Decision 6474-C, (October 18, 1974), SW 450.4, and Browning v. Wise Construction Company, Inc., Commission Decision 339-C, (April 6, 1948) SW 475.05. The relative weights of the factors will depend on the circumstances. For example, while prior training and experience may justify a job refusal that occurs before a claimant has had a reasonable chance to explore labor market opportunities that make use of his highest

level of skills, such justification diminishes as the length of unemployment increases. See Clark v. American Viscose Corporation, Commission Decision 880-C, (November 16, 1953), SW 5.

There is no presumption that any particular work is suitable for a claimant even though it might consist of the same job he had done previously. A claimant's refusal in such a case may be viewed with skepticism or seem totally unjustified to the adjudicator. However, it is the adjudicator's responsibility to insure that the record contains sufficient evidence to enable him to make a proper finding with respect to the prevailing wage, hours and other terms and conditions of employment. Usually, such evidence is furnished by local office personnel who have experience in accepting job orders from and making referrals to local employers for the type of work in question.

In the case of Johnson v. Virginia Employment Commission, et al., 8 Va.App. 441, 382 S.E.2d 476 (1989), the Virginia Court of Appeals first took the opportunity to address the issue of job refusal that arose as the result of a situation that occurs with some regularity. The claimant had been discharged from her job and eventually was found to be qualified for benefits with respect to her separation. While her appeal was pending, the employer offered her re-employment at a lesser skilled position, at a slightly lesser pay rate, and on a different shift. If she took it, she had to agree that she would be on probation for a year with no ability to bid on other jobs, and the period of time she had been unemployed would be considered as a disciplinary suspension. It was held that, although the work was suitable, the claimant had good cause to refuse it due to the conditions attached. The discussion of these two factors went as follows:

"Suitability" of employment and "good cause" for refusal involve separate determinations but they are not mutually exclusive. The same factors may, but will not necessarily, be considered in each determination. Generally "suitability" entails an evaluation limited to the nature and characteristics of the job in relation to the skills, training, and experience of the particular employee and the length of unemployment. The determination of "good cause" to refuse employment, however, will involve a much broader inquiry than merely considering whether the intrinsic aspects of the job are acceptable to the prospective employee. "Good cause" to refuse a job offer may arise from factors totally independent of those criteria used to determine whether a job is suitable to a particular employee; however, some or all of those factors intrinsic to the job may be considered in combination with extrinsic circumstances to determine whether good cause exists for the employee to refuse the employment. Thus, in reviewing the commission's decision, we address separately the distinct issues of suitability of work and good cause.

a. Health, Safety, & Morals

The type of proof required to establish that work is unsuitable under the aforementioned statute is similar to that needed to establish good cause for leaving work under Section 60.2-618(1).

For example, the Supreme Court of Virginia has held that a claimant who provided medical documentation to show that he was recovering from a recent illness and that third shift work would be detrimental to his health had carried the burden to show that the job offered by his former employer was unsuitable. See U.C.C. & Jones v. Dan River Mills, Inc., 197 Va. 816 (1956), SW 235.05.

If the work offered includes a requirement that will force a claimant to violate his religious beliefs, the job is unsuitable. See Rohrer v. Buchanan County Sheriff Department, Commission Decision 22174-C, (March 9, 1984), SW 90 & VL 90.

In McCreary v. Virginia Employment Commission, Commission Decision 13040-C, (March 19, 1980), SW 515.35, the claimant declined an offer of work as a secretary because she felt the job was located in an unsafe area. It was held that although her apprehensions may have been real to her, she had not shown that the work itself represented a hazard to her health or safety, and that she had refused suitable work without good cause.

b. Physical Fitness, Prior Training & Experience

The type of proof needed to establish that the work offered is unsuitable because of a claimant's physical fitness is identical to that required to establish that it represents a detriment to his health. The claimant would bear the burden of establishing the existence of his physical limitations by a preponderance of the evidence.

Work which does not utilize skills commensurate with a claimant's prior training and experience, and which pays substantially less than what she earns in her usual occupation is not suitable unless her period of unemployment has been sufficient to explore the employment opportunities commensurate with her prior training and experience. See Eagle v. Wood Insurance Company, Commission Decision 23719-C, (September 7, 1984), SW 195.05, in which it was held that even though the work offered paid the prevailing wage in the area, the job as an envelope stuffer was not suitable because of the claimant's prior training and experience as a full-time secretary, as well as, her relatively short period of unemployment. The same rationale was used by the Commission in Fitzgerald v. Dan River Mills, Inc., Commission Decision 384-C, (September 24, 1948), SW 500.5, in which the claimant refused a job as a "charwoman" which paid little more than 50% of what she had earned in her previous employment as a loom cleaner. It was

held that in view of the claimant's length of unemployment and her prior training and experience, the work was unsuitable.

c. Length of Unemployment

A claimant should be accorded a reasonable amount of time to explore the labor market opportunities in his usual trade occupation or profession, and during this time, no disqualification should be imposed for his failure to accept an offer of other work. See Eagle and Dodson v. Dan River Mills, Inc., Commission Decision S-13278-12985, (December 14, 1962); aff'd by Commission Decision 4017-C, (January 25, 1963), SW 295, in which it was held that a claimant who had earned \$2.18 per hour and was offered a job paying \$1.62 per hour 16 days after she became unemployed had refused work which was not suitable.

d. Accessibility of the Work from Claimant's Residence

Obviously, location may affect the suitability of the work. The statute does not require a claimant to accept every offer of employment irrespective of its location. However, transportation to and from work is the responsibility of each employee. In order to find that the work was inaccessible, it must be shown that transportation, (public or private) is unavailable or that transportation difficulties are of a substantial nature and insurmountable by ordinary common sense and prudence.

In Lambert v. Lester Lumber Company, Commission Decision 3534-C, (August 3, 1960), SW 150.15, it was held that work which was located approximately 164 miles from the claimant's residence was not within a reasonable commuting distance and was, therefore, not suitable.

A claimant who refused work because of a lack of transportation but who fails to present evidence to establish that such problems could not be resolved by ordinary common sense and prudence fails to carry the burden to show that the work was not suitable. See Ralph v. Coronet Casuals, Inc., Commission Decision 5975-C, (May 31, 1973), SW 150.2.

However, it has been held that when there was no public or private transportation available for the 35-mile commute between the claimant's home and the third shift job offered to her, such work was not suitable. See Lambert v. General Electric Company, Commission Decision 6357-C, (July 3, 1974).

e. Prevailing Wage

If the wage offered is substantially below that which prevails for similar work in the claimant's labor market, the work is not

suitable within the meaning of the aforementioned statute. See Michael v. Burkeville Veneer Company, Commission Decision 5836-C, (January 2, 1973), SW 500.7, in which the work offered the claimant paid a wage which was 37% below those prevailing for similar work in the locality. In Baker v. Clinch Valley Lanes, Commission Decision 7863-C, (June 2, 1976), VL 500.5, it was held that a difference of 13% between the prevailing wage and the wage offered was clearly substantially less favorable to the claimant and rendered the work unsuitable.

Notwithstanding the Commission's holding in Eagle, (See "Prior Training and Experience"), it does not necessarily follow that work is unsuitable merely because it pays less than the claimant's last job. In Williams v. Craddock-Terry Shoe Corporation, Decision S-4215-4129, (April 17, 1956), SW 500.35, it was held that work that paid the prevailing wage within the labor market was suitable for the claimant even though the pay was approximately 17% less than her earnings in her last employment.

But see Young v. Mick or Mack, Commission Decision 2432-C (December 13, 1984), where the Commission held that when a claimant was demoted with a pay reduction of approximately one third and transferred to a different store, and even though the new work paid within the pay rate for similar work in the locality, the work was unsuitable and the claimant should have the opportunity to explore the local labor market before having to suffer such a pay reduction.

f. Vacant Due to Labor Dispute

A position is vacant due directly to a strike, lockout, or other labor dispute if it is a position that is affected by an ongoing dispute of that nature. The fact that the claimant may have been offered a job that was previously held by a non-striking or strike-breaking employee does not make it one that is only indirectly the result of the dispute. It is Commission policy to remain neutral with respect to labor disputes, neither paying benefits to those belonging to the same grade or class of workers directly involved in them, nor providing replacement workers to the affected employer. See Rothe v. Covington Virginian, Decision UI-81-9133, (September 10, 1981), SW 480.

3. Interpretations of Good Cause

If the work in question is suitable, a claimant must show that his failure to apply for it or his refusal to accept it when offered was for good cause. Obviously, in the absence of a statutory definition, a finding of good cause would depend on the evaluation of each claimant's total circumstances. As can be seen in the following cases, the test is one of necessitous and compelling

circumstances. Thus, with the exception of the statutory exclusions set forth in Section 60.2-618(1), the definition of good cause within the context of a job refusal is the same as that for voluntarily leaving employment.

a. Seniority Rights

A claimant who refuses available, suitable work because it would jeopardize his seniority rights does not have good cause if he has been unemployed for a considerable length of time. See Clark v. American Viscose Corporation, Commission Decision 880-C, (November 16, 1953), SW 5.

b. Domestic Circumstances

When difficult personal circumstances prevent a claimant from accepting suitable work, such refusal may be for good cause. In Mullins v. Wise Clinic, Commission Decision 22671-C, (February 24, 1984), SW 155.1, the Commission held that a claimant who had been forced to let go her baby-sitter after her own layoff and who had no child care arrangements, had good cause to refuse a call to work on a day-to-day basis and, therefore, should not be disqualified. However, the Commission also held that she was ineligible for those weeks in which she was unavailable for work due to her child care problems. See also Sage v. VEC, et al. Circuit Court of Smyth County, Law No. 1704, (February 29, 1988), SW 155.1.

c. Conscientious Objections

In Rohrer v. Buchanan County Sheriff Department, Commission Decision 22174-C, (March 9, 1984), SW 90 & VL 90, it was implied that a claimant would have good cause to refuse an offer of otherwise suitable work because one of the conditions of employment would require him to violate his religious beliefs.

d. Unreasonable Conditions of Employment

When an employer seeks to impose an unreasonable or unduly restrictive condition on the work offer, the claimant may have good cause to refuse it. In Gittman v. Southco Corporation, Commission Decision 25372-C, (July 31, 1985), SW 265.45, it was held that an employer's demand for assurances that a claimant would not apply for work elsewhere was so restrictive as to give her good cause for refusing the offer of work.

On the other hand, the potential penalties to be incurred from accepting non-union work do not constitute good cause merely because a claimant could be fined or expelled from his union for doing so. See Browning v. Wise Construction Company, Inc.,

Commission Decision 339-C, (April 6, 1948), SW 475.05 & LD 125.05.

Further, when offering a job to a former employee, an employer may put reasonable remedial conditions on the offer based on past job performance. In Sword v. Automotive Industries, No. 1373-98-3 (Va. Ct. App. Apr. 6, 1999) the claimant was found disqualified from receiving benefits when she refused a reasonable offer to return to her former employer, doing the same work on the same shift for the same hourly rate. The employer imposed several conditions on the offer, including sixty days of work without absence before the claimant could accrue vacation time and requiring the claimant to work all mandatory overtime. The court found that because the original separation was based on excessive absenteeism, the employer's conditions were remedial and not punitive; thus, the claimant lacked good cause to reject the offered work and was properly disqualified.

IV. Fraud

A. Statement of law

Section 60.2-618(4) of the Code provides in pertinent part as follows:

Disqualification for benefits. -- An individual shall be disqualified for benefits upon separation from the last employing unit for whom he has worked thirty days or from any subsequent employing unit:

4. For fifty-two weeks, beginning with the date of the determination or decision, if the Commission finds that such individual, within thirty-six calendar months immediately preceding such determination or decision, has made a false statement or representation knowing it to be false, or has knowingly failed to disclose a material fact, to obtain or increase any benefit or payment under this title, the unemployment compensation (law) of any other state, or any other program of the federal government which is administered in any way under this title, either for himself or any other person. Additionally, such individual shall be ineligible for benefits until he has repaid the Commission the sum that has been fraudulently obtained.

B. Typical Issues

1. Standard of Proof and Burden of Proof

Under other disqualification sections of the Code, the quantum of proof required to establish a disqualification is by a preponderance of the evidence. However, a finding of fraud

requires clear and convincing evidence. Moreover, the Commission has the burden to present a prima facie showing of fraud. In the Matter of Mary Mortensen, Commission Decision UCFE-1025, (May 3, 1985), MS 340.1, the claimant was suspected of falsifying her claim for benefits by reporting a job contact which she had not actually made. The Commission held that the presentation of mere hearsay evidence concerning an employer's recollections by a Commission employee was not sufficient to establish that the claimant had not made the contact as reported or that she deliberately made a false statement in order to receive benefits. It was noted that the best evidence concerning the contact would be the testimony of the claimant and the prospective employer.

2. Use of Future Benefits to Offset the Sum Obtained Through Fraud

Because an individual who has been disqualified for benefits under the aforementioned section of the Code is ineligible for future benefits until he has repaid the Commission that sum which he fraudulently obtained, any subsequent benefits which might be payable otherwise under Title 60.2 of the Code may not be used to offset such sum.

V. Incarceration

A. Statement of Law

Section 60.2-618(5) of the Code provides in pertinent part as follows:

Disqualification for benefits. -- An individual shall be disqualified for benefits upon separation from the last employing unit for whom he has worked thirty days or from any subsequent employing unit:

If such separation arose as a result of the unlawful act which resulted in a conviction and after his release from prison or jail until he has performed services for an employer during thirty days, whether or not such days are consecutive, and subsequently becomes totally or partially separated from such employment.

B. Typical Issues

1. Eligibility for Benefits While Confined

Effective July 1, 1993 this issue, formerly considered under this section of the Code, is now considered as a weekly eligibility issue under section 60.2-612(10).

2. Disqualification for Period of Release After Incarceration

In order to impose a disqualification for a period following incarceration, there must be a showing that the claimant was convicted of committing an unlawful act, and that his separation occurred as a result of that act.

INTRODUCTION TO MISCELLANEOUS

The three statutory issues addressed in this section of the Guide appear in Chapter 6 of Title 60.2, and concern violations, penalties and liabilities. Although there are three other provisions within Chapter 6, they involve criminal sanctions, and thus, are not subjects for administrative adjudication. Of the issues that are adjudicated by the Commission, liability to repay overpayments under Section 60.2-633 is heard most frequently. Cases involving receipt of back pay after reinstatement (Section 60.2-634) and deprivation of further benefits (Section 60.2-635) for persons convicted under Chapter 6 are relatively rare. In these matters, as in all of those that are decided pursuant to Title 60.2, the adjudicator must take care that the record includes sufficient facts to enable him to make complete and accurate findings of fact and conclusions of law.

I. Overpayment

A. Statement of law

Section 60.2-633 provides as follows:

Receiving benefits to which not entitled. -- Any person who has received any sum as benefits under this title to which he was not entitled shall be liable to repay such sum to the Commission. In the event the claimant does not refund the overpayment, the Commission shall deduct from any future benefits such sum payable to him under this title unless the overpayment occurred due to administrative error, in which case the Commission shall deduct only fifty percent of the payable amount for any future week of benefits claimed, rounded down to the next lowest dollar until the overpayment is satisfied. Administrative error shall not include decisions reversed in the appeals process. In addition, the overpayment may be collectible without interest by civil action in the name of the Commission. The Commission may, for good cause, determine as uncollectible and purge from its records any benefit overpayment which remains unpaid after the expiration of seven years from the date such overpayment was determined, or immediately upon the death of such person or upon his discharge in bankruptcy occurring subsequently to the determination of overpayment. Any existing overpayment balance not equal to an even dollar amount shall be rounded to the next lowest even dollar amount.

B. Typical Issues

1. Receipt of Benefits in Good Faith and in the Absence of Fraud

A claimant, who files his claim in good faith, makes no false statements to the Commission and is disqualified on that claim after he has received benefits is liable to repay such sum to the Commission if he does not appeal the disqualification, thereby allowing it to become final. See Hudnall v. Jet Services, Inc., Decision UI-74-593, (March 21, 1973); aff'd by Commission Decision 6277-C, (May 10, 1974), MS 340.15. However, a timely appeal of a Deputy's Determination, Appeals Examiner's decision, Commission Decision, or a decision of a court of competent jurisdiction operates to stay any overpayment determination or collection effort until the determination or decision becomes final. In the Matter of Jeffrey Rubin, Commission Order 26287-C, (January 24, 1986), MS 95.15 and MS 340.05.

2. Overpayment Includes All Benefits Paid Subsequent to Effective Date of Disqualification

In Siman v. City of Norfolk, Commission Decision EB-62, (September 22, 1981), MS 340.05, the claimant filed a claim for extended benefits effective August 31, 1980. A deputy's determination held that he was not subject to disqualification by reason of his separation from employment. Following the employer's appeal, the Appeals Examiner issued a decision on October 21, 1980 that reversed the deputy's determination and held the claimant disqualified for benefits. The decision was not appealed, and it became final on November 14, 1980. In the meantime, the claimant was paid \$385 in extended benefits, and, when a new benefit year began October 5, 1980, he filed a new claim under which he received a total of \$888. The deputy later issued an overpayment determination that held the claimant liable for \$1,273. The claimant argued that under Section 60.1-61, it was improper to hold him overpaid for benefits issued prior to November 14, 1980, the date the disqualification became final. In its opinion, the Commission cited the consistent administrative practice of imposing disqualifications retroactively to the effective date of the claim and reasoned that since the General Assembly had not seen fit to disturb that practice, it had implicitly adopted that interpretation of the statute. Therefore, it was held that the claimant was not entitled to any benefits paid subsequent to August 31, 1980, and he was liable to repay \$1,273.

3. Administrative Error

Prior to 1985, outstanding overpayment balances were offset against subsequent benefits payable on a dollar-for-dollar basis until the overpayment was satisfied. This meant that a claimant with an old overpayment of a substantial amount might never receive any benefits on a new claim for many weeks. In order to ease the burden of individuals in such a situation, where the overpayment had been caused by administrative error, this section was amended to provide for a 50 percent offset in such cases. This way a claimant can receive some benefits even though the overpayment is outstanding. Note, however, that there is no forgiveness of half the overpayment where administrative error is involved; rather, the offset will continue at 50 percent of the subsequent weekly benefit amount until the overpayment is fully satisfied.

Administrative error cannot, by statute, be found in cases where there has been a reversal as a result of an appeal. This probably eliminates a majority of overpayments from consideration for the 50 percent offset. Cases where an overpayment has resulted from criminal or administrative fraud would never constitute administrative error since there would be a finding that the

claimant caused the overpayment. In the case of Teresa Hobson, Commission Decision 26931-C, (May 9, 1986), MS 340.2, the claimant was found to be overpaid for reasons other than administrative error when she neglected to disclose that she had refused an offer of work extended to her by the company which had bought out her employer. Thus even if the failure to disclose facts was due to mere neglect, oversight, or error on the part of a claimant or employer (such as the reporting of wages or a back pay award), a finding of administrative error could not be made.

Administrative error could include such things as data entry mistakes, duplicate payments, payment beyond the expiration of a benefit year, payments in excess of the weekly benefit amount, payments made during a period of disqualification or ineligibility, payments made after the claimant has properly reported wages or a pension which should have reduced the weekly benefit amount, or payments made after the claimant has properly disclosed facts which would result in a disqualification or ineligibility (such as a return to work, a refusal of work, or illness or injury in a particular week). In the case of In re Eugene A. Singleton, Commission Decision 27588-C, (September 26, 1986), MS 340.05, the claimant reported promptly that his monetary determination which showed wages in his base period for an employer for whom he had not worked was in error. Nonetheless, he was paid benefits based on the incorrect monetary determination. Six months later, a reprocessed monetary determination removed the incorrect wages, thereby reducing the claimant's weekly benefit amount and causing him to be overpaid for three weeks. The Commission held that the failure to act upon the claimant's information constituted an administrative error within the meaning of the statute.

This list is merely illustrative and is not meant to be exhaustive.

II. Effect of Receiving Back Pay After Reinstatement on the Job

A. Statement of Law

Section 60.2-634 provides as follows:

Receiving back pay after reinstatement. -- Whenever the Commission finds that a discharged employee has received back pay at his customary wage rate from his employer after reinstatement such employee shall be liable to repay any benefits paid to such person during the time he was unemployed. When such an employee is liable to repay benefits to the Commission, such sum shall be collectible without interest by civil action in the name of the Commission.

B. **Typical Issues**

Although there are no cases on this subject in the **Precedent Decision Manual**, it is obvious that in order to decide a matter pursuant to this provision, the adjudicator must establish certain facts, including the following:

1. whether or not the claimant has been reinstated in his former employment;
2. the effective date of such reinstatement;
3. the date and amount of compensation paid by the employer to the claimant;
4. whether such compensation constituted back pay at the claimant's customary wage rate;
5. the inclusive dates of the claimant's unemployment; and
6. the amount of unemployment benefits, if any, received by the claimant during his period of unemployment.

III. **Deprivation of Further Benefits for Persons Finally Convicted Under Chapter 6 of Title 60.2**

A. **Statement of Law**

Section 60.2-635 provides as follows:

Deprivation of further benefits. -- Any person who has been finally convicted under this chapter shall be deprived of any further benefits for the one-year period next ensuing after the date of conviction.

B. **Typical Issues**

The **Precedent Decision Manual** includes no cases adjudicated under this statute. To develop an adequate record pursuant to this provision, the evidence must include the following information:

1. the nature of the conviction, the statute under which the claimant was convicted and the punishment received;
2. the date and place of conviction which includes an identification of the Court in which the matter was decided; and
3. the date such conviction became final.