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I can Hammer out any Problem!

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WHY LACK OF PERFORMANCE IS NOT MISCONDUCT FOR UNEMPLOYMENT BENEFITS

Based on the Virginia Employment Commission (VEC) Case Law, Rules, and Regulations

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Definitions

VEC FAQ's - Glossary

<http://www.vec.virginia.gov/faqs/glossary>

16VAC5-10-10 of the Virginia Administrative Code "Definitions"

<https://law.lis.virginia.gov/admincode/title16/agency5/chapter10/section10/>

Act - The Virginia Unemployment Compensation Act as set out in Title 60.2 (§ 60.2-100 et seq.) of the Code of Virginia. Commission means the Virginia Employment Commission as defined in § 60.2-108 of the Code of Virginia.

Actively Seeking Work - That you *personally* visit several employers each week in your efforts to find work. You are required to provide the VEC, when requested, with information about each employer or company you visit while seeking work. These visits are called *job contacts*. (*)

Actively Seeking Work - Job Contacts - You must conduct an *active work search* and report two (2) or more Job Contacts each week. (*) Resumes are acceptable job contacts if that is the employer's requirement. Certain occupations require the use of resumes as the usual and customary means of soliciting work. If you have one of these occupations, *faxing, mailing, and Emailing resumes to prospective employers will be acceptable in lieu of personally contacting employers*. The VEC has also made the decision to permit telephone calls as an allowable method of making work search contacts. If a *claimant fails to provide enough information to verify a job contact* then the Commission cannot exercise its option to do so, but it does not establish falsification. www.vec.virginia.gov/book/export/html/915

Base Period - The base period is the first four of the last five completed calendar quarters prior to the effective date of your claim. If your claim is filed in January, February, or March 2009, your base period is October 2007 through September 2008. If your claim is filed in April, May, or June 2009, your base period is January 2008 through December 2008. If your claim is filed in July, August, or September 2009, your base period is April 2008 through March 2009. If your claim is filed in October, November, or December 2009, your base period is July 2008 through June 2009. The wages earned in the base period determine your monetary entitlement. Determine your base period.

Benefits - The compensation payable to an individual, with respect to his unemployment, under the unemployment insurance law of any state or under any federal program in which such compensation is payable in accordance with applicable state law.

Blind Ad - Any job announcement or advertisement where the name of the employer/company is not provided. Responses to blind ads for jobs or openings are not acceptable as job contacts.

Burden of Proof - The necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause. Black's Law Dictionary

Burden of Proof, Unemployment Compensation Benefits - The burden of proof is on the *employer to show misconduct* by a preponderance of evidence. Once the employer has proven misconduct, the burden shifts to the *claimant to prove mitigating circumstances*. When Claimant is Discharged (fired), then the burden is on the *employer to prove the claimant was fired due to misconduct*. When Claimant Quits, then the *employer must show the claimant was not forced to quit*, and once established the *claimant must show good cause for leaving*. [Virginia Unemployment Compensation- What Employers Need To Know](#)

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Calendar Quarter - The period of three consecutive calendar months ending on March 31st, June 30th, September 30th, or December 31st.

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

Claimant - An unemployed individual who files a claim for unemployment compensation.

Covered Employment - Employment as defined in Section 60.2-612 through Section 60.2-618 of the Code of Virginia performed for an employer or federal employment as in Chapter 85, Title 5, U.S. Code

Duration of Benefits - The number of total weeks of benefits a claimant may potentially draw during a benefit year. §60.2-602, §60.2-607

Earned Income - According to the IRS, all income from employment, such as Wages; Salaries; Commissions; Bonuses; Tips; and other taxable employee compensation derived from paid work for working for an organization or the profit from owning a business. Examples of Income that are *Not Earned Income* are: Interest, Dividends, Retirement Income [Pension or 401(k) Withdrawals] Social Security Benefits, Unemployment Benefits, Alimony, and Child Support.

Employer - An employing unit that meets the liability requirements under the law and is required to pay unemployment insurance taxes. §60.2-210

Employment - Any service performed by an individual for remuneration under any written or oral contract of hire with an employing unit. §60.2-212 (Exemptions to "employment," Section §60.2-219.)

Executive or Corporate Officer - Is (i) the president, vice-president, secretary, treasurer or other officer, elected or appointed in accordance with the charter and bylaws of a corporation and (ii) the managers elected or appointed in accordance with the articles of organization or operation agreement of a limited liability company. It does not include persons with the title of director or LLC member. A Corporate Officer who is a primary owner of the legal entity and files a claim for benefits will require a determination if the officer is unemployed through no fault of their own and beyond their control.

Extended Benefits (EB) - Unemployment benefits paid to a claimant after regular benefits have been exhausted, during periods of prescribed high national or state unemployment levels. §60.2-610, 611

In-Person Hearing - A hearing where the parties, witnesses and representatives personally appear before the appeals examiner or special examiner.

Interstate Claimant - An individual who claims benefits under the unemployment insurance law of one or more liable states through the facilities of an agent state. The term interstate claimant shall not include any individual who customarily commutes from a residence in an agent state to work in a liable state unless the commission finds that this exclusion would create undue hardship on such claimants in specified areas.

Liable Employer - The employing unit for whom a claimant last worked during 30 days, whether or not such days were consecutive, or 240 hours prior to filing an initial, additional claim for benefits.

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Maximum Benefit Amount - The total amount of benefits that an individual may receive during his benefit year. (This amount is determined by multiplying his weekly benefit amount and the number of weeks of benefits for which he may qualify.) §60.2-607

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.

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.)

Partially Unemployed Individual - An individual who during a particular week (i) had earnings, but less than weekly benefit amounts, (ii) was employed by a regular employer, and (iii) worked, but less than his normal customary full-time hours for such regular employer because of lack of full-time work.

PIN - It is your personal identification number. You must use it each time you claim your weekly benefits through the VRS. You will be asked to provide the last four digits if you make a telephone inquiry about your claim. Your PIN will be sent to you in a separate mailing after you file your claim. It is very important that you keep the number confidential and do not share it.

Qualification For Benefits - After filing application for benefits, the VEC will decide if you meet three separate requirements: 1) Monetary eligibility; 2) Separation qualification; and 3) Weekly eligibility.

Minimum Benefit - In Virginia, an individual must have *earned income at least a total of \$3,000 in two quarters in the base period*. The Minimum Benefit is \$60 per week.

Maximum Benefit - In Virginia, an individual must have *earned income at least \$18,900.01 in two quarters during the base period* for the maximum weekly benefit amount. The Maximum Benefit amount is \$378 per week. www.vec.virginia.gov/pdf/uitransactben.pdf

(Base Period is the first four of the last five completed calendar quarters prior to the claim date)

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.

Severance And Dismissal Pay - For the purpose of taxation and benefits, all payments made by an employer at or subsequent to an employee's separation, except that payments which are exclusively for services performed prior to separation shall not be treated as severance or dismissal pay. Such payments may be allocated by the employer for any period following separation so long as such allocation is at a weekly rate at least equal to the average weekly wage received by such employee during the last calendar quarter preceding the separation, and will in such cases be deemed to have been paid in those weeks covered by the allocation.

If no allocation is made by the employer, payments will be deemed allocated to the last day of work.

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Suitable Work - Many factors are taken into consideration in determining whether work is suitable. These factors include your *previous work experience, your physical and mental fitness, risk to your health, safety, or morals, and the distance from your home*. You must report all job offers that you decline when you file your weekly claim for benefits.

Telephone Hearing - A hearing where all parties, witnesses and representatives participate before the appeals examiner by way of a telephone conference call.

Total Unemployment - The unemployment of an individual for any week in which he performs no work and has no wages payable to him, whether or not he is attached to an employing unit's payroll.

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

The [Virginia] Guide For Effective Unemployment Insurance Adjudication, 2010 - 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. www.vec.virginia.gov/vecportal/unins/pdf/effectiveuiadjudication.pdf

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, thereafter. The cash value of all remuneration payable in any other medium other than cash.

Waiting Week - The first week of eligibility in a claim year is a waiting week and is not paid. Only one waiting period week is served in a benefit claim year. §60.2-612.9

Week - Seven consecutive days *beginning on Sunday and ending the following Saturday at midnight*.

Weekly Benefit Amount (WBA) - The weekly benefits payable to a totally unemployed individual. The amount is based on prior earnings. §60.2-602

Workers' Compensation - A mandatory insurance requirement for most employers. It provides statutory benefits to covered workers who are injured in their employment. Virginia law requires every employer who regularly employs more than two employees part-time or full-time to carry workers' compensation coverage. *Glossary of Workers' Compensation Terms*:
www.vwc.state.va.us/sites/default/files/documents/VWC-Glossary-of-Terms.pdf

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State Unemployment Weekly Maximum Benefit Amounts

Unemployment Taxes are paid by the employer organization to the federal government and the state, which then pays the unemployed person. Just like medical insurance benefits, unemployment benefits are simply another “*Employee Benefit*” to the employee, but it is considered “*Wage Income*,” and is taxable to the unemployed person at the Federal level, but it is exempt in Virginia.

Each state provides its own *Unemployment Monetary Determination* or *Weekly Benefit Amount*. The current U.S. unemployment weekly benefit maximum amount, average is \$422; from a high of \$1,103 per week for 30 weeks for Massachusetts to a low of \$235 per week for 26 weeks for Mississippi. Virginia unemployment maximum weekly benefit at \$378 per week for 26 weeks is *near* the average.

U.S. DEPARTMENT OF LABOR
Office of Unemployment Insurance
SIGNIFICANT PROVISIONS OF STATE UNEMPLOYMENT INSURANCE LAWS
EFFECTIVE JULY 2017

	BENEFITS						COVERAGE	TAXES			
	Earnings/ Employment Needed in Base Period to Qualify ¹	Computation of Weekly Benefit Amount	Weekly Benefit		Weekly Earnings > Disregarded	Calculation of Number of Benefit Weeks ⁴		Number of Benefit Weeks ⁵	Size of Payroll (Length of Employment / Wages Paid) ⁶	2017 Wages Subject to Tax	2017 Minimum & Maximum Rates ⁷ New Employer Rate ⁸
			Mini- mum	Maxi- Mum							
VA	\$3,000 in highest 2 qtrs of BP	1/50 of the 2 highest qtrs.	\$60	\$378	\$50	See table in law	12-26	20 weeks or \$1,500 in any qtr	\$8,000	0.13% 6.23% 2.53%	

<https://ows.doleta.gov/unemploy/content/sigpros/2010-2019/July2017.pdf>

During the Great Recession, the federal government extended unemployment benefits additional weeks, but as the economy improved they were discontinued.

VEC Procedures

The VEC (Virginia Employment Commission) procedures are that after you apply online for unemployment benefits, you will receive an *Award Statement* listing your *Monetary Determination*, which currently is a maximum of \$378 Gross per week for a maximum of 26 Weeks. Some applicants might receive less money and a shorter time span. If you worked in another state within the last 18 months, then you might receive more money by filing with that state.

It is recommended that you have 10% Federal Taxes withdrawn from your unemployment benefit payments. Of the 41 states that tax wages, 5 states completely exempt unemployment benefits from tax (California, New Jersey, Oregon, Pennsylvania, and Virginia). VA Code §58.1-322 (C)(25)

Filing and receiving unemployment benefits will not appear on credit reports. Credit reports only list credit and debt-related information. Only a former employer’s Payroll Department and the VEC will know about your filing and receiving unemployment benefits.

The VEC only communicates by U.S. Mail and will refer to you as “*The Claimant*.”

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Claimant Notice of Telephonic Fact Finding Interview

By U.S. Mail, the Claimant will receive a “*Claimant Notice of Telephonic Fact-Finding Interview*” stating:

A telephone fact-finding interview may be conducted by a Deputy of the Virginia Employment Commission in connection with your unemployment insurance benefits on _____ at _____.

The following issue(s) has been raised concerning your eligibility for unemployment compensation:

WHETHER OR NOT YOU WERE DISCHARGED OR SUSPENDED FOR MISCONDUCT
Issues such as pension, vacation, severance, holiday pay, etc. that may affect your entitlement to unemployment benefits may be discussed during this hearing.

THE EMPLOYER MAY PARTICIPATE IN THE INTERVIEW

PROCEDURES FOR THE PROCEEDING

The deputy will call you at the scheduled time. Please answer your phone promptly; do not wait for the deputy to leave a message because the hearing will start without you if you do not answer when called.

USE OF THE TELEPHONE:

Once the proceeding begins each party will have the opportunity to speak and present its case fully. Each party will have the opportunity to question other participants.

It is important to:

1. Identify yourself before speaking.
2. Speak clearly and slowly into the telephone.
3. Do not interrupt the speaker. The deputy will afford each party the opportunity to address all information presented by the other party.
4. If, at any time during the proceeding, you have difficulty hearing the conversation, notify the Deputy immediately.
5. If you lose the connection, hang up and wait for the Deputy to call you again to continue the proceeding.

Telephonic Fact Finding Interview

Generally, the VEC will request a “*Telephonic Interview*” or “*Telephonic hearing*” with a “Deputy” who might not be an attorney, but usually a person who has been with the VEC a long time.

The company or an “*Agent of the company,*” such as *Equifax Unemployment Cost Management* or *Talx* has the right to participate the “*Telephonic Interview*” to present their side of the issue.

If you received a *Separation and Release Agreement* stating that the company or its Agent will not challenge Unemployment, then make sure you list it on the VEC-B-60.MD “*Claimant’s Statement Concerning Discharge-Suspension*” and mention it in the “*Telephonic Interview.*”

In addition, *if it is true,* you should explain that you were told you were “*Not a good fit.*” Stress that you were “*Doing your job to the best of your ability.*” This shows the Deputy that you were trying to do a good job for the company.

If the company or an “Agent,” does not attend, then the Deputy might quickly end of the “Telephonic Interview,” and mention that the *Notice of Deputy’s Determination* will be mailed. You might receive a letter in 3 weeks that you won and then the VEC will pay your Unemployment Benefits retroactively.

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Question

At my last job, I was written up for “*Lack of Performance*” and “*Not Following my Supervisor’s Instructions*,” but they included things that I did not control. Later, they let me go and told me that I was fired for “*Lack of Performance*” and “*Not following my Supervisor’s Instructions*.”

I filed for Unemployment Benefits, but the Virginia Employment Commission scheduled a telephone hearing. Can I still get Unemployment if I was fired?

Issues

1. Was the Employer’s first charge of “*Lack of Performance*,” a form of “Misconduct?”
2. Was the second charge of “*Not following Supervisor’s Instructions*” only related to the first charge and invalid?

Answer:

Code of Virginia

[§ 60.2-618 \(b\)](#) of the Code of Virginia entitled, “*Disqualification for benefits*” provides five “*Elements of Misconduct*,” but it appears that nothing in this section of the Code relates to “*Performance*.”

§ 60.2-618(b) For the purpose of this subdivision, “misconduct” includes, but shall not be limited to:

(1) An employee's confirmed positive test for a nonprescribed controlled substance, identified as such in Chapter 34 (§ [54.1-3400](#) et seq.) of Title 54.1, where such test was conducted at the direction of his employer in conjunction with the employer's administration and enforcement of a known workplace drug policy. Such test shall have been performed, and a sample collected, in accordance with scientifically recognized standards by a laboratory accredited by the United States Department of Health and Human Services, or the College of American Pathology, or the American Association for Clinical Chemistry, or the equivalent, or shall have been a United States Department of Transportation-qualified drug screen conducted in accordance with the employer's bona fide drug policy. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

(2) An employee's intentionally false or misleading statement of a material nature concerning past criminal convictions made in a written job application furnished to the employer, where such statement was a basis for the termination and the employer terminated the employee promptly upon the discovery thereof. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

(3) A willful and deliberate violation of a standard or regulation of the Commonwealth, by an employee of an employer licensed or certified by the Commonwealth, which violation would cause the employer to be sanctioned or have its license or certification suspended by the Commonwealth. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

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(4) 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.

(5) An employee's loss of or failure to renew a license or certification that is a requisite of the position held by the employee, provided the employer is not at fault for the employee's loss of or failure to renew the license or certification. The Commission may consider evidence of mitigating circumstances in determining whether misconduct occurred.

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+60.2-618>

Virginia Case Law

The 2010 Guide for Effective Unemployment Insurance Adjudication produced by the Office of Commission Appeals, Virginia Employment Commission states:

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

In McNamara v. Virginia Employment Commission, Dec. No. 2317084 (Va. Ct. App. Aug. 18, 2009), in a published 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.

In Hupp v. Worth Higgins & Associates, Inc., Commission Decision 25019-C, (August 7, 1985), MT 255.1, 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.

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.

In Craig v. Colley Avenue Office Supplies, Commission Decision 23759-C, (August 13, 1984), MT 300.05, The Commission held ‘However, the employer must show that claimant’s acts amounted to a conscious disregard of the employer’s interests.’

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 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.

<https://www.vec.virginia.gov/vecportal/unins/pdf/effectiveuiadjudication.pdf>

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Not Following Supervisor's Instructions

The Employer's second charge to the employee of "*Not following Supervisor's Instructions*" by exhibiting a "*Lack of Performance*," was "*Bootstrapping*."

Black's Law Dictionary

Black's Law Dictionary 523 (9th ed. 2009) defines "*Bootstrap*" as:

"2. *To reach an unsupported conclusion from questionable premise.*"

<http://thelawdictionary.org/eps-bootstrapping>

Since the original charge of "*Lack of Performance*," was incorporated in the second charge, of "*Not following Supervisor's Instructions*," under *Black's Law Dictionary* definition of *Bootstrapping*, it is an invalid charge.

Conclusion

In the Telephonic Fact Finding Interview, the Claimant should state:

Clearly, the Claimant was *Not Discharged* or *Suspended* for "*Misconduct*."

§ 60.2-618 (b) of the Code of Virginia entitled, "*Disqualification for benefits*" provides five "*Elements of Misconduct*," but nothing in this section of the Code relates to "*Performance*."

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.

In Hupp v. Worth Higgins & Associates, Inc., Commission Decision 25019-C, (August 7, 1985), MT 255.1, the Commission held that, unsatisfactory performance, alone, would not constitute misconduct.

In Craig v. Colley Avenue Office Supplies, Commission Decision 23759-C, (August 13, 1984), MT 300.05, The Commission held 'However, the employer must show that claimant's acts amounted to a conscious disregard of the employer's interests.'

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Summary Conclusion

At the end of the Telephonic Fact Finding Interview, the Claimant should state:

Therefore, the Claimant asks that the Virginia Employment Commission Deputy to conclude the Fact-Finding Interview that Claimant was "Not" Discharged or Suspended for *Misconduct*" and that the Claimant be *Awarded Full Unemployment Benefits*.

Thank you for your consideration and please let Claimant know the *results of this request*.

