STATE OF NEW YORK
DEPARTMENT OF LABOR
U.I. Adjudication Services Office
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ADJUDICATION SERVICES OFFICE

October 14, 2008

New York State Unemployment
Insurance Appeal Board
110 King Street-6th Floor
New York, NY 10014

Re: [redacted]
SSA# [redacted]
ALJ# 308-04038
AB# 543,361

Members of the Appeal Board:

The Commissioner of Labor submits this statement in support of her appeal in the above captioned matter.

The Commissioner of Labor contends that the claimant quit his job without good cause, because a criminal background check revealed that the claimant had criminal convictions, which legally barred his employer from keeping him as an employee.

The findings of fact of the administrative law judge are not entirely accurate and they are incomplete. The claimant was convicted of criminal possession of a controlled substance in the Third Degree, a Class B felony, and he was subsequently convicted of criminal possession of stolen property in the Fifth Degree (smpp. 12, 59-60; Exhibit #3 Letter from State Department of Health to Claimant dated 02/19/08).

The administrative law judge opined that the doctrine of provoked discharge does not apply, because in a recent Appeal Board Decision, AB 541,712, the Appeal Board ruled that in order for the doctrine of provoked discharged to apply, the claimant must have known of the obligation and its effect on his employment. The Commissioner of Labor disagrees. The claimant was convicted at two different times for two different crimes. He was convicted of a felony. He knew he was committing egregious criminal acts. He knew or should have known that by doing so he could be convicted for his crimes, and that such convictions, could pose a legitimate risk for employers to hire him in various fields where an employer has a legitimate interest in protecting the property or welfare of either the public or a specific individual. The Court and Appeal Board have repeatedly held that the doctrine of provoked discharge is limited to those circumstances where the employer

had no choice, but to discharge the employee where the latter's acts were voluntary. It is immaterial that the conduct resulting in the discharge was not in connection with the last employment (Matter of Williams, 20 AD 3d 636; Matter of Dounn, 71 AD 2d 74; Matter of Goldenthal, 50 AD 2d 858; AB 539,120). In the Matter of Williams, 20 AD 3d 636, the claimant was a Teacher's Aide, but was arrested for a crime committed prior to such employment. The Court does not place any relevance as to whether or not the claimant had worked as a Teacher's Aide prior to her arrest, or whether she knew she would work as a Teacher's Aide after her arrest. The Court found it relevant that the claimant's voluntary action prior to her being hired by her employer legally obligated her employer to terminate her employment. This is what occurred with the claimant at issue, and as such, a voluntary quit without good cause disqualification in accordance with the doctrine of provoked discharge is in order.

For the reasons stated, the decision of the administrative law judge should be reversed.

Very truly yours,

GEORGE REISMAN,
Director of Adjudication Services

Alice Cohen

By: Alice Cohen
Associate UI Hearing Representative

cc: [redacted]
[redacted]
Monroe County Legal Assistance Ctr. – Attn: Jason D. Hoge, Esq. (Rochester, NY)
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STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
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DECISION OF THE BOARD
DECISIÓN DE LA JUNTA

Mailed and Filed: NOV 25 2008

IN THE MATTER OF:

Appeal Board No. 543361

[redacted]

JASON D HOGE
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A.S.O. - Appeals Section
Department of Labor Office: 831

A.L.J. Case No. 308-04038

PLEASE TAKE NOTICE that the commissioner, or any other party affected by this decision who appeared before the Appeal Board, may appeal questions of law involved in such decision to the Appellate Division of the Supreme Court, Third Department, by written notice mailed to the Unemployment Insurance Appeal Board, PO Box 15126, Albany, New York 12212-5126 within THIRTY DAYS from the date this decision was mailed.

POR FAVOR TOME NOTA que el comisionado o cualquier otra parte afectada por esta decision que haya comparecido ante la Junta de Apelaciones puede apelar aspectos legales de dicha decision a Appellate Division of the Supreme Court, Third Department, enviando un aviso escrito a Unemployment Insurance Appeal Board, PO Box 15126, Albany, New York 12212-5126 dentro de los TREINTA DIAS a partir de la fecha en que esta decision fue enviada por correo.

DOCUMENTO IMPORTANTE. PUEDE OBTENER UNA TRADUCCIÓN DEL MISMO LLAMANDO AL 1-888-209-8124 (FUERA DEL ESTADO DE NUEVA YORK 1-877-358-5306)

PRESENT: LEONARD D. POLLETTA, TANYA R. DANIEL MEMBERS

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective February 21, 2008, on the basis that the claimant voluntarily separated from employment without good cause. The claimant requested a hearing.

The Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed August 26, 2008 (A.L.J. Case No. 308-04038), the Administrative Law Judge overruled the initial determination.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statements submitted on behalf of the claimant and the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed as a certified nursing assistant in a nursing home for approximately nine months. On February 19, 2008, the New York State Department of Health (DOH) sent a letter to both the claimant and the employer, advising that the claimant's eligibility for employment by the nursing home was denied pursuant to Article 28-E of the Public Health Law and Executive Law § 845-b. This denial was based on the result of the claimant's criminal background check, which revealed that in 1998, at age 17, he had been convicted of criminal possession of a controlled substance in the third degree, a class B felony, and in 2002, he had been convicted of criminal possession of stolen property in the fifth degree, a class A misdemeanor. DOH advised the employer, in its letter, that the claimant must be promptly removed from employment. As a result of DOH's determination, the employer discharged the claimant the following day.

OPINION: In *Matter of DeGrego*, 39 NY2d 180 (1976), the court held that a provoked discharge occurs where an employee voluntarily engages in conduct which transgresses a legitimate known obligation and leaves the employer no choice but to discharge him. The claimant's convictions establish that he voluntarily engaged in the prohibited conduct and the actions of DOH establish that the employer had no choice but to discharge the claimant; however, it must still be determined whether the claimant's actions transgressed a legitimate known obligation of his employment.

The claimant's convictions occurred ten and six years, respectively, before his discharge, and well before he was first employed by the employer. It cannot reasonably be held that the claimant's conduct transgressed a legitimate known obligation of his employment, when the conduct occurred many years before he was actually employed by the employer. On appeal, the Commissioner has argued that the claimant should have known that his convictions could pose a legitimate risk for employers to hire him in various fields where the employer has a legitimate interest in protecting the property or welfare of either the public or a specific individual. This argument is too broad and far reaching to withstand scrutiny. Under this analysis, any person who has ever been convicted of any crime could be held to have provoked his or her discharge; we do not believe that this was ever the intent of the law, and we decline to adopt such a holding.

The Commissioner's reliance on *Matter of Williams*, 20 AD2d 636 (3d Dept 2005); *Matter of Dounn*, 71 AD2d 746 (3d Dept 1979); and *Matter of Goldenthal*, 50 AD2d 658 (3d Dept 658 (3d Dept 1975), is misplaced. We have previously held that *Williams* and *Goldenthal* are not applicable in circumstances like those now before the Board (see, Appeal Board No. 542980). *Dounn* is similarly inapplicable: The claimant in *Dounn* was a securities clerk who lost his employment pursuant to the regulations of the Securities and Exchange Commission after he pled no contest to federal charges of mail fraud, securities fraud, conspiracy and other charges which had resulted from his conduct as a margin supervisor during a prior employment. Like the claimant in *Goldenthal*, the claimant in *Dounn* would certainly have been aware that his conduct would affect his continued ability to be employed in the securities field. There is no showing that the claimant in the case now before the Board was a certified nursing assistant – or employed in any way in the health care field – in 1998 or 2002, so it cannot be held that he would have been aware that his conduct would affect any continued ability to be employed in the health care field. As there is no evidence that the claimant's conduct transgressed a legitimate known obligation of his employment, he cannot be held to have provoked his discharge. Accordingly, we conclude that the claimant was separated from employment under nondisqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is affirmed.

The initial determination, disqualifying the claimant from receiving benefits, effective February 21, 2008, on the basis that the claimant voluntarily separated from employment without good cause, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

LEONARD D. POLLETTA, MEMBER

HY:EK

TANYA R. DANIEL, MEMBER