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PRINCIPAL ADMINISTRATIVE LAW JUDGE

DECISION OF THE BOARD
DECISIÓN DE LA JUNTA

Mailed and Filed:

IN THE MATTER OF:

Appeal Board No. 554634

JULIANE R HUNTER
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A.L.J. Case No. 110-10234

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 decisión que haya comparecido ante la Junta de Apelaciones puede apelar aspectos legales de dicha decisión 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 decisión fue enviada por correo.

DOCUMENTO IMPORTANTE. PUEDE OBTENER UNA TRADUCCIÓN DEL MISMO LLAMANDO
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PRESENT: LEONARD D. POLLETTA, GEORGE FRIEDMAN MEMBERS

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits effective July 16, 2010, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by COMMISSION ON ECON OPPORTUNITY prior to July 16, 2010, cannot be used toward the establishment of a claim for benefits. 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 by the claimant and on behalf of the employer. By decision filed October 18, 2010 (A.L.J. Case No. 110-10234), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.

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

FINDINGS OF FACT: The claimant was employed by a not for profit organization as a mental health counselor for approximately six weeks. On May 10, 2010, the claimant checked "Have Not" box in response to the question on the employer's job application asking whether she had been convicted of a crime in New York state or any other jurisdiction. The claimant signed this section of the job application beneath the paragraph which states: "I understand that my failure to truthfully and accurately state whether I have been convicted of a crime and/or to provide truthful and accurate information concerning the conviction(s) may constitute grounds for denial or termination of any employment."

On December 20, 2001, the claimant pled guilty to welfare fraud in the fifth degree, a misdemeanor, pursuant to Penal Law §158.05. In 2004, the claimant obtained a certificate of relief from disabilities with respect to the December 20, 2001, conviction and renewed the certificate again in 2009. Thereafter, the claimant's attorney advised her that she need not disclose the conviction because the certificate of relief from disabilities meant that she could not be barred from employment as a result of such conviction. The claimant had held other employment without disclosing the conviction on her job application and those employers accepted her explanation after the fingerprint check revealed her conviction.

In early July 2010, the NYS office of children and family services contacted the employer as a result of the claimant's fingerprint background check, indicated that she had a conviction and that a safety assessment would need to be performed. On or about July 6, 2010, the HR coordinator met with the claimant about the request from OCFS that she participate in a safety assessment due to having a criminal conviction; the claimant disclosed that she had been convicted of a misdemeanor in 2001, and that she had received a certificate of relief from disabilities related thereto. On July 15, 2010, the claimant was discharged because she had not truthfully answered the question on the employer's job application whether she had been convicted of a crime.

OPINION: The credible evidence establishes that the claimant was discharged because she failed to disclose her criminal conviction from 2001, on the employer's job application in 2010. We are mindful of the Court's decision in *Matter of Ghorab*, 219 A.D.2d 793 (3d Dept 1995), holding that the claimant's failure to disclose her criminal conviction on the employer's job application was not protected by law solely because she had received a certificate of disabilities. However, we note that the claimant in the instant matter was mistakenly advised by her attorney in 2004, that she was no longer required to disclose her conviction on employment applications and she had followed his advice for six years without adverse consequences from the employers even after her conviction became known to them. Additionally, the claimant in the instant matter pled guilty to welfare fraud in the fifth degree, a misdemeanor, as opposed to the felony conviction of the claimant in *Matter of Ghorab*. Under the extenuating circumstances of the instant matter, we conclude that the claimant's actions do not rise to the level of misconduct. Accordingly, the initial determination is overruled.

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

The initial determination, disqualifying the claimant from receiving benefits effective July 16, 2010, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by COMMISSION ON ECON OPPORTUNITY prior to July 16, 2010, cannot be used toward the establishment of a claim for benefits, is overruled.

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

LEONARD D. POLLETTA, MEMBER

GEORGE FRIEDMAN, MEMBER

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