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CHIEF ADMINISTRATIVE LAW JUDGE

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SUZANNE T. HAGEN
SENIOR ADMINISTRATIVE LAW JUDGE

DECISION AND NOTICE OF DECISION

A.L.J. Case No. 306-04911

Mailed and Filed:

JUL 19 2006

IN THE MATTER OF:

KENUSHCA LEWIS
193 SHORECLIFF DR
ROCHESTER NY 14612

DEPAUL COMMUNITY
SERVICES INC
1931 BUFFALO RD
ROCHESTER NY 14624-1535

JASON HOGE, ATTY
19 WEST MAIN STREET 4TH FLOOR
ROCHESTER NY 14614

Department of Labor Office: 801

Hearing Requested: June 23, 2006

PLEASE TAKE NOTICE that this decision has been duly mailed on the date listed above. If you appeared at the hearing and are not satisfied with this decision, you may appeal within **TWENTY DAYS** from the date this decision was mailed. Any party who failed to appear at the hearing has the right to apply to reopen the case. For the application to be granted, the party must apply within a reasonable time and must establish good cause for its failure to appear. **READ IMPORTANT INFORMATION ON REVERSE SIDE.**

POR FAVOR TOME NOTA que esta decisión ha sido debidamente enviada por correo en la fecha que aparece arriba. Si usted asistió a la audiencia y no está satisfecho con la decisión, usted puede apelar dentro de los **VEINTE DIAS** a partir de la fecha en que esta decisión fue enviada por correo. Cualquiera de las partes que falle en comparecer a la audiencia, tiene derecho de aplicar para que reabran su caso. Para que la apelación sea aceptada, la parte interesada debe aplicar dentro de un período de tiempo razonable y debe establecer buena causa por no haber comparecido a la audiencia. **LEA INFORMACIÓN IMPORTANTE AL REVERSO.**

ISSUES: Claimant's Application to Reopen Case No. 30604231.
Loss of employment through misconduct.

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits effective April 6, 2006, 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 the employer prior to April 6, 2006 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

A telephone conference hearing was held at which testimony was taken. There were appearances on behalf of the claimant and the employer.

FINDINGS OF FACT: The claimant worked for the employer from June 4, 2004 through April 1, 2006 as a part time counselor. The claimant was charged with issuing a bad check in February 2000. On March 30, 2000 the charges against the claimant were disposed of with an adjournment contemplating dismissal (ACD). The condition of the ACD was that if the claimant was not charged with any other crime within six months from the date of disposition of the charges, the charges would be dismissed. The claimant was not charged with any other crime in the six month period and the charges were dismissed.

The claimant completed an application for employment with the employer on May 4, 2004. The claimant answered no to the question which asked if she had ever plead guilty or no contest to, or been convicted of a crime. The application contained a clause which provided that misrepresentation or omission of facts is cause for dismissal. In March 2006 the claimant applied for a transfer to a new position with the employer. Due to a change in the law a background check was now required in connection with the transfer application. The background check revealed the February 2000 charge, however due to the court's failure to register the information the charge did not appear on the records to have been dismissed. The employer discharged the claimant believing that the claimant had falsified information on her original application for employment regarding conviction of a crime.

OPINION: Pursuant to Labor Law § 593 (3), a claimant is disqualified from receiving benefits after having lost employment through misconduct in connection with that employment. Pursuant to Labor Law § 527, the wages paid in such employment cannot be used to establish a future claim for benefits.

The credible evidence establishes that the employer discharged the claimant because the employer believed that the claimant had falsified information regarding a conviction of a crime on her application for employment. I assess more weight to the claimant's testimony than to the employer's testimony because the claimant's testimony was more consistent with the overall facts and circumstances of her separation from employment. Significantly, the claimant credibly testified and produced documentary evidence to show that the charge against her in February 2000 had been dismissed. It was through no fault of the claimant that the court did not register the dismissal information. Under those circumstances when the claimant answered no to the question on the employment application about whether she had been convicted of a crime, the claimant's answer was correct. The claimant did not falsify any information. The employer chose to discharge the claimant for reasons it deemed appropriate, however the claimant's separation from employment was not due to misconduct.

Accordingly, I conclude the claimant was separated from her employment under non disqualifying circumstances.

DECISION: The claimant's application to reopen A.L.J. Case No. 30604231 is granted.

The initial determination is overruled.

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

/s/ M.R. Sokolowski

Administrative Law Judge