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MICHAEL T. GREASON
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GEORGE FRIEDMAN
JAMES S. ALESI
MEMBERS

STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126
Albany NY 12212-5126
(518) 402-0205
FAX:(518) 402-6208

SUSAN BORENSTEIN
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JAYSON S. MYERS
CHIEF ADMINISTRATIVE LAW JUDGE
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CHRISTOPHER M. TATE
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MATTHEW J. TIERNEY
PRINCIPAL ADMINISTRATIVE LAW JUDGE

**DECISION OF THE BOARD
DECISIÓN DE LA JUNTA**

Mailed and Filed: **APR 04 2014**

IN THE MATTER OF:

Appeal Board No. 576528 A

GREGORY W NORTON
99 MYRTLE AVE
HORNELL NY 14843

JEFFERY A DAILEY
AKIN GUMP STRAUSS HAUER & FELD, LLP
TWO COMMERCE SQUARE
2001 MARKET ST., STE. 4100
PHILADELPHIA PA 19103-7013

CITY OF HORNELL
ATTN: SHAWN HOGAN, MAYOR
82 MAIN ST
HORNELL NY 14843

RAFF & BECKER, LLP
470 PARK AVENUE SOUTH
THIRD FLOOR NORTH
NEW YORK NY 10016-6819

JOSEPH G PELYCH
CITY OF HORNELL
211 MAIN ST.
HORNELL NY 14843

MLC STATISTICS
NYS DOL, UIAB
PO BOX 15126
ALBANY NY 12212-5126

A.S.O. - Appeals Section
Department of Labor Office: 801

A.L.J. Case No. 312-03101

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.

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PRESENT: GEORGE FRIEDMAN, MICHAEL T. GREASON MEMBERS

The Appeal Board, on its motion pursuant to Labor Law § 534, has reopened for reconsideration Appeal Board No. 567538, filed April 17, 2013, which reversed the decision of the Administrative Law Judge, granted the employer's application to reopen, and sustained the initial determination disqualifying the claimant

AB 2 (10/06)

from receiving benefits effective September 1, 2011, 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 CITY OF HORNELLS prior to September 1, 2011, cannot be used toward the establishment of a claim for benefits.

By order filed December 30, 2013, the Board remanded the case to the Hearing Section for a hearing. The Administrative Law Judge held a telephone conference 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.

Upon consideration of the entire record, the Board makes the following

FINDINGS OF FACT: Following the claimant's request for a hearing from the initial determination disqualifying him from receiving benefits on the basis of misconduct, a hearing was scheduled for April 2, 2012, in A.L.J. Case No. 312-00949. The hearing notice was addressed to the employer, a municipality, at a post office box utilized by the employer. Mail is picked up from the post office box on a daily basis by the city clerk. Mail addressed to a specific individual is given to that individual; mail addressed to the post office box only is given to the city's finance officer, who has the title of "city chamberlain". The hearing notice was not given to the mayor, who was the individual who would have appeared at the hearing, until after the date of the hearing. As a result, there was no appearance by the employer at the April 2, 2012 hearing.

A new city clerk and a new city chamberlain took office in January 2012. The Department of Labor's Form LO 12, Request for Employment and Wage Data, sent to the employer in or about December 2011, had been addressed to the then-city chamberlain. Mail concerning unemployment insurance forms is handled by the office of the city chamberlain.

OPINION: Pursuant to the rules of the Board, an application to reopen may be granted if the party making the application establishes good cause for its failure to appear at the earlier hearing. The credible evidence, including the evidence adduced at the hearing held pursuant to the Board's remand letter, establishes that the employer did not appear at the April 2, 2012 hearing because the hearing notice was not given to the mayor prior to that date. However, there is no evidence that the municipality did not receive the hearing notice in time, only that it was not disseminated correctly. While the hearing notice was only addressed to a post office box, while earlier notices from the Department of Labor were addressed to the then-city chamberlain, the hearing notice still ended up at the city chamberlain's office. Hence, the absence of a specific individual on the address does not mean that the address on the hearing notice was incorrect or insufficient. We note that the mayor had speculated at the July 2012 hearing that the hearing notice might just have been placed in a personnel file, due to the newly elected city chamberlain's unfamiliarity with all forms received by the municipality. This, however, establishes office failure, only.

The Board has previously held that a failure to appear at a hearing because of office failure does not establish good cause to grant an application to open. We note that the mayor deliberately hung up the telephone during the remand hearing, after expressing his dissatisfaction with the hearing process; as a result, no testimony was elicited that might have established that the employer's failure to appear at the April 2, 2012 hearing was due to anything other than office failure. Accordingly, the employer's application to reopen A.L.J. Case No. 312-00949 must be denied and the Judge's decision in that case, overruling the initial determination, must remain in effect.

DECISION: The decision of the Appeal Board is rescinded.

The decision of the Administrative Law Judge is affirmed.

The employer's application to reopen A.L.J. Case No. 312-00949 is denied.

The initial determination, disqualifying the claimant from receiving benefits effective September 1, 2011, 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 CITY OF HORNEILL prior to September 1, 2011, cannot be used toward the establishment of a claim for benefits, is reversed.

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

GEORGE FRIEDMAN, MEMBER

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MICHAEL T. GREASON, MEMBER