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DECISION AND NOTICE OF DECISION
DECISIÓN Y AVISO DE LA DECISIÓN TOMADA

A.L.J. Case No. 312-00949

Mailed and Filed: April 4, 2012

IN THE MATTER OF:

GREGORY W NORTON
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CITY OF HORNELL
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Department of Labor Office: 801

Hearing Requested: January 30, 2012

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. **READ IMPORTANT INFORMATION ON REVERSE SIDE REGARDING YOUR RIGHT TO APPEAL.** 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.

POR FAVOR TOME NOTA: 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, puede apelar dentro de **VEINTE DIAS** contados a partir de la fecha en que esta decisión fue enviada por correo. **LEA LA INFORMACIÓN IMPORTANTE AL REVERSO SOBRE SUS DERECHOS DE APELACIÓN.** Cualquiera de las partes que falle en comparecer a la audiencia, tiene el derecho de solicitar que se reabra su caso. Para que dicha solicitud sea otorgada, la parte interesada debe solicitarlo dentro de un periodo de tiempo razonable y debe establecer buena causa por no haber comparecido a la audiencia.

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

ISSUES: Loss of employment through misconduct.

The Department of Labor issued 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 HORNELL prior to September 1, 2011 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 by and on behalf of the claimant.

FINDINGS OF FACT: The claimant worked for the employer from April 2, 2001 through August 22, 2011 as a police officer. The employer has a policy of which the claimant was aware which states: any call received through dispatch or 911, where any police service is provided, will be written into the complaint log book, assigned a number and entered into the computer system as a call for service, including: the case number; date and time of incident; date and time of complaint; officer taking initial report; officer assigned; the nature or

type of incident; name, address, and phone number of complainant; and a narrative of the call including a description of the police action. The employer's policy further states that: the following information will be recorded for all requests for police service, printed legibly on the complaint report log: the date and time of service request; the name and address of the complainant; the name and address of other persons involved; the nature of the service requested; the location of the reported incident; the time the request was dispatched and the primary officer assigned; the time of police arrival; the identification of all assisting units; the time the officers returned to service; the action taken by the assigned personnel; and the complaint control number assigned to the service request.

On August 13, 2011, the claimant was working as the desk officer taking calls for service. The claimant was working with two other police officers. The claimant, as desk officer, was not allowed to leave his work area. The claimant received a call at 1:25am regarding an alcohol related car accident. The claimant assigned the two officers to the accident. The officers went to the accident site. The claimant received a call from a city resident at 1:32am stating that there was a person walking on the train tracks. The resident told the claimant that he had spoken to the individual walking on the train tracks but the person just walked away. The claimant took the city resident's name and contact information on a sheet of paper as well as the location of the individual on the rail road tracks. The claimant told the resident that both of the officers on duty were tied up at an accident and that he would send someone as soon as they were available. The claimant did not log this call and information into the computer system because police services were not dispatched. The claimant spoke to one of the officers on scene of the accident regarding the accident and also informing the officer of the resident's call regarding a person on the rail road tracks. At 1:37am the claimant dispatched a towing truck to the car accident scene and the two officers returned to the employer's business location. At 2:05am, the claimant received a call from Norfolk railroad stating that an individual had been hit on the railroad tracks. The claimant took all necessary information regarding this call. The claimant dispatched the two officers to the railroad scene. The claimant logged all necessary information into the computer system regarding the 2:05am call from Norfolk. The claimant was suspended without pay pending a possible criminal investigation on August 22, 2011. The claimant was told at this meeting that charges may be brought against him. In a second meeting on August 22, 2011, the claimant was told that the Steuben County District Attorney's office was conducting an investigation. The claimant was told by the mayor that he was going to be terminated if he did not resign. The claimant submitted his resignation on August 31, 2011. The claimant resigned rather than wait for termination in an effort to save his police career. The claimant had also been told by his union representation that going to arbitration would be a coin toss.

The employer's mayor spoke with a representative of the Department of Labor prior to issuance on the initial determination. The mayor told the Department of Labor that the employer was going to attempt to discharge the claimant through disciplinary proceedings.

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 claimant involuntarily separated from employment with the employer on August 31, 2011 in lieu of discharge. The claimant's testimony is accepted in absence of any evidence to the contrary. The claimant credibly testified that he took a call from a resident at 1:32am on August 13th for a person walking on the rail road tracks but that because the only other officers on duty were at an alcohol related car accident he was unable to dispatch them at the time. While the claimant acknowledged that he took notes of this call on paper and did not enter the information into the computer system, the claimant's conduct is consistent with the employer's policy regarding reporting which provides the reporting requirements for when police services are provided. As no police services were provided due to unavailability of officers at the time of the call, the employer's policy did not require that the claimant enter the 1:32am call into the employer's computer system. The claimant credibly testified that when he received the 2:05am call from Norfolk, he dispatched the officers on duty and then available to the scene and entered the necessary information into the employer's computer system. The claimant further credibly testified that: he was told by the mayor that he was going to be terminated if he did not resign; and that he decided to resign to protect his police career and because the union representative told him going to arbitration would be a coin toss. It is significant that the mayor's statement to the Department of Labor that he was going to attempt to discharge the

claimant supports the claimant's testimony. As the substantial evidence establishes that: the claimant followed the employer's policies on August 13th in not entering the resident's call into the computer system where police services were not dispatched and in entering the call into the computer where he dispatched available officers to the railroad scene; and that the claimant involuntarily separated from employment after being told he would be discharged if he did not resign, I find that the claimant's conduct does not constitute misconduct. Accordingly, the claimant was involuntarily separated from employment under non disqualifying circumstances.

DECISION: 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 overruled.

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

/s/ Dusty Renee Tinsley

Administrative Law Judge