STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JUNE 05, 2023

IN THE MATTER OF:
Appeal Board No. 628678

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective September 15, 2022, 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 MATERNITY HOME OF THE HUDSON VALLEY, INC prior to September 15, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

Upon due notice to all parties, a telephone conference hearing was held at which all parties were accorded a full opportunity to be heard. The claimant was present but was not prepared to proceed and, therefore, is deemed to have failed to appear at the hearing. By default decision filed January 3, 2023 (022-28263), the Administrative Law Judge sustained the initial determination.

The claimant applied to reopen the decision of the Administrative Law Judge filed January 3, 2023.

Upon due notice to the parties, the Administrative Law Judge held a telephone conference hearing at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed March 17, 2023 (), the Administrative Law Judge granted the claimant's application to reopen 022-28263, and overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on

behalf of the employer.

We have reviewed the entire record and have considered the testimony and other evidence. It appears that no errors of fact or law have been made with respect to the issue of the claimant's application to reopen A.L.J. Case No. 022-28263. The findings of fact and the opinion of the Administrative Law Judge, insofar as they concern that issue, are fully supported by the record and, therefore, are adopted as the findings of fact and the opinion of the Board.

Our review of the record, however, reveals that the case should be remanded to hold a hearing concerning the initial determination disqualifying the claimant on the basis of misconduct. Further testimony and other evidence is needed regarding the circumstances of the claimant's separation from employment.

Initially, the parties shall be questioned regarding the nature of the employer's facility. This information is needed to assess the parties' testimony regarding the existence and/or importance of a policy regarding staffing and scheduling.

In light of the employer witnesses' testimony about the employer's policy requiring staff to inform the executive director of any schedule changes, the claimant's denial that such a policy existed, and the employer's contention on appeal that evidence of the claimant's receipt of this policy is available, the employer is directed to produce evidence that the claimant received the policy in evidence as Exhibit 4, and that the claimant knew or should have known of its existence.

Given the claimant's testimony that she was not required to reach out to the employer about scheduling, or any changes to her schedule, the September 8, 2022 email submitted by the employer on appeal shall be received into evidence. The parties shall be questioned regarding the reason the claimant sent this email, and whether this was the claimant's usual practice. Documentary evidence to support each party's position should be produced.

Since the employer's executive director testified that both she and the house director had several discussions with the claimant about their dissatisfaction with her changing her schedule without notifying the executive director, according to policy, the employer is directed to provide evidence of the dates and contents of such discussions, and who was present for these communications.

The text message sent by the employer to the claimant requesting her presence at a meeting on September 15, 2022, and the claimant's response, in the file at page 9, shall be received into evidence, and the employer should be directed to produce any other written communications with the claimant on September 15, 2022.

The claimant shall be questioned regarding the reason she was not able to complete her shift on September 15, 2022, when she became aware of the situation that prompted her to ask a volunteer to fill in for her, and the reason she was not able to meet with the director and executive director as requested later on that date. The claimant's 11:01 A.M. text message to the volunteer, in the file at page 7, shall be received into evidence. The claimant shall be questioned regarding the appointment referred to in the text, and provide documentary evidence to support her testimony. Since the claimant testified that she made this request to the volunteer by text at 10:02 A.M., she is directed to produce the text to which she referred in her testimony.

All documents produced pursuant to this remand, and any other relevant documents produced at the remand hearing, shall be received into the record after the appropriate confrontation and opportunity for objection.

The parties are placed on notice that failure to produce the evidence directed by the Board may result in the hearing Judge or the Board taking an adverse inference against that party, and deciding that the evidence not produced would not have supported that party's position.

The hearing Judge may receive into the record any other evidence needed to decide the matter.

DECISION: The decision of the Administrative Law Judge, insofar as it granted the claimant's application to reopen 022-28263, is affirmed.

The claimant's application to reopen 022-28263, is granted.

The decision of the Administrative Law Judge, insofar as it overruled the initial determination disqualifying the claimant from receiving benefits, effective September 15, 2022, 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 ON VALLEY, INC prior
to September 15, 2022 cannot be used toward the establishment of a claim for benefits, is rescinded.

Now, based on all of the foregoing, it is

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issue of the claimant's disqualification on the basis of misconduct, only, upon due notice to all parties and their representatives; and it is further

ORDERED, that the Notice of Hearing shall identify as the Purpose of Hearing the remanded issue of misconduct, only; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and so that at the end of the hearing all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the remanded issue only, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

RANDALL T. DOUGLAS, MEMBER