STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-08134

vs.

Referee Decision No. 13-73817U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition, pursuant to Section 443.151(4)(c), Florida Statutes, of an appeal of the decision of a reemployment assistance appeals referee. By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record. A decision of an appeals referee cannot be overturned by the Commission if the referee's material findings are supported by competent, substantial evidence and the decision comports with the legal standards established by the Florida Legislature. The Commission cannot reweigh the evidence or consider additional evidence that a party could have reasonably been expected to present to the referee during the hearing. Additionally, it is the responsibility of the appeals referee to judge the credibility of the witnesses and to resolve conflicts in evidence, including testimonial evidence. Absent extraordinary circumstances, the Commission cannot substitute its judgment and overturn a referee's conflict resolution.

The issue before the Commission is whether the claimant was discharged by the employer for misconduct connected with work as provided in Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

> The claimant worked as a driver for six years with the employer, an armored transport service. As a driver, the claimant was responsible for the safety of the messenger while entering and exiting the vehicle with money. The claimant understood the importance of looking out for the messenger because he was also at times scheduled as messenger. On or around May 17, 2013, the operations manager received a picture via email of the claimant which appeared to show the claimant sleeping in the armored

> vehicle awaiting the messenger. The email prompted an investigation by human resources being that sleeping on duty was a terminable offense. Before the investigation was complete, the operations manager received a second picture of the claimant sleeping while behind the wheel of the armored vehicle. The claimant was called into human resources to meet with the operations manager. The operations manager showed the claimant the picture indicating he was sleeping on the job and the claimant admitted that he had fallen asleep. The claimant was discharged on June 4, 2013.

Based on these findings, the referee held the claimant was discharged for misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee's material findings of fact are supported by competent, substantial evidence[1] and are adopted in this order. In addition, the Commission also accepts the referee's conclusions of law but writes to clarify the reasons for doing so.

Effective May 17, 2013, Section 443.036(30), Florida Statutes,[2] states that misconduct connected with work, "irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other":

> (a) Conduct demonstrating a conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; or theft of employer property or property of a customer or invitee of the employer.

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[1] The Commission acknowledges that the referee's findings of fact provide more detail regarding the content of the photographs than is supported by the record; however, the material findings are supported by competent, substantial evidence in the record, i.e., the findings that the claimant appeared in the photographs to be sleeping on duty and that when the operations manager confronted the claimant about the photographs he admitted he had been sleeping.

[2] The referee's citation to the version of the statutory definition of misconduct in effect from June 27, 2011, through May 17, 2013, is harmless error since the applicable definition is not materially different; rather, the intent of the amendment effective May 17 was only to provide examples of misconduct and not to affect the function of the statute. *See* House of Representatives Final Bill Analysis, CS/CS/HB 7007, p.35 (May 3, 2013), available at http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h7007z1.EDTS.DOCX&DocumentType=Analysis&BillNumber=7007&Session=2013 (last accessed May 7, 2014).

(b) Carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

(c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

(d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

(e)1. A violation of an employer's rule, unless the claimant can demonstrate that:

a. He or she did not know, and could not reasonably know, of the rule's requirements;

b. The rule is not lawful or not reasonably related to the job environment and performance; or

c. The rule is not fairly or consistently enforced.

2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The record reflects the employer discharged the claimant for sleeping on the job. In determining whether sleeping on the job is misconduct, the Commission considers several factors developed over time in the reemployment assistance case law.[3] Those factors include, but are not limited to, the following:

- the nature of the employee's job responsibilities;
- the location in which the employee was found sleeping;
- whether the employer had a rule prohibiting sleeping on the job;
- whether the employer previously warned the employee for sleeping on the job; and
- the existence of any mitigating factors, e.g., sleepiness caused by illness or medication.

See, *e.g.*, *Lusby v. Unemployment Appeals Commission*, 697 So. 2d 567 (Fla. 1st DCA 1997); *Jennings v. Unemployment Appeals Commission*, 689 So. 2d 1193 (Fla. 4th DCA 1997); *Paul v. Jabil Circuit Company*, 627 So. 2d 545 (Fla. 2d DCA 1993); *Phenix Supply Co. v. Florida Industrial Commission*, 115 So. 2d 431 (Fla. 2d DCA 1959). We conclude that these factors remain relevant and instructive after the 2011 amendment. In particular, we examine the nature of the claimant's job duties at the time of the incident and the harm or potential harm to the employer's interests of the claimant's unauthorized sleeping.

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[3] The courts have not yet issued written opinions analyzing under what circumstances sleeping on the job is misconduct under the statutory definition as amended in 2011 and thereafter. The predecessor definition applied by the courts provided that misconduct included the following:

> (a) Conduct demonstrating *willful or wanton* disregard of an employer's interests and found to be a deliberate violation or disregard of the standards of behavior which the employer has a right to expect of his or her employee; or
> (b) Carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

§443.036(29), Fla. Stat. (2010) (emphasis added). The degree of requisite mental state is lower under the current version of Section 443.036(30)(a), Florida Statutes, than prior to the 2011 amendments, so that conduct that may not have been deemed disqualifying prior to 2011 may rise to that level today.

At the hearing in this case, the claimant altogether denied sleeping on the job and, therefore, did not bring forth any mitigating factors. In addition, the circumstances of this case are particularly egregious. The claimant served as an armored car driver also responsible for providing security for the messenger, who is the armored vehicle personnel responsible for transporting money to and from the vehicle. In Florida, the security service industry, which includes armored vehicle services, is regulated under Chapter 493, Florida Statutes. While the record is silent regarding whether the claimant secured his firearm and the vehicle prior to sleeping, the act of sleeping on duty by itself placed his license at risk. Section 493.6118(1)(f), Florida Statutes, provides for disciplinary action for a person licensed under Chapter 493 for negligence, incompetency, or misconduct in engaging in the licensed activities. The Department of Agriculture and Consumer Services, which is responsible for administering Chapter 493, considers sleeping on duty to be a violation of Section 493.6118(1)(f), Florida Statutes. *See* Department of Agriculture and Consumer Services Security Officer Handbook, p.17.[4]

In addition, the claimant's sleeping on duty jeopardized the safety of the messenger, as explained in the testimony of the operations manager. We note that, according to the U.S. Bureau of Labor Statistics, the rate of fatal injuries for security guards is more than double the rate for all workers. *See* USBLS Monthly Labor Review, February 2012: Security Guard Safety, On guard against workplace hazards, p.6.[5] For 2012, of the 51 reported fatal injuries among security guards, 42 were the result of violence. *See* 2012 Census of Fatal Occupational Injuries, Table A-5, p.6.[6] Among security service occupations, armored vehicle personnel are particularly vulnerable to violent crime. Federal crime statistics gathered by the Federal Bureau of Investigation alone reflect that in the single year of 2011 there were 42 crimes involving armored vehicles resulting in the theft of over six million dollars; among those armored vehicle crimes, firearms were used in 36 and acts of violence were committed in 25 thus resulting in 12 injuries, 5 deaths, and 5 persons taken hostage. *See* Federal Bureau of Investigation Bank Crime Statistics, Federally Insured Financial Institutions, Part IV.[7]

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[4] Handbook available at https://licensing.freshfromflorida.com/forms/P-00092_SecurityOfficerHandbook.pdf (last accessed May 8, 2014).
[5] Available at http://www.bls.gov/opub/mlr/2012/02/art1full.pdf (last accessed May 8, 2014).
[6] Available at http://www.bls.gov/iif/oshwc/cfoi/cftb0272.pdf (last accessed May 8, 2014).
[7] Available at http://www.fbi.gov/stats-services/publications/bank-crime-statistics-2011/bank-crime-statistics-2011 (last accessed May 8, 2014).

Aside from the serious personal safety risks associated with the claimant's conduct, other aggravating factors in this case include the increased exposure to risk of loss of the employer's vehicle as well as the property of its clients that the claimant was responsible to protect. In addition, at the hearing the claimant admitted he was aware that sleeping on the job was a terminable offense under the employer's policy.

Given the number and gravity of the aggravating factors present in this case and the absence of any mitigating factors, the Commission concludes the claimant's actions constitute misconduct under both subsections (a) and (b) of the statutory definition of misconduct. Furthermore, since the claimant violated the employer's rule and understood that sleeping on the job was a terminable offense, his conduct also constitutes misconduct under subsection (e). Accordingly, the referee properly held the claimant disqualified from reemployment assistance benefits.

The Reemployment Assistance Appeals Commission has received the request of the claimant's representative for the approval of a fee for work performed in conjunction with the appeal to the Commission, as required by Florida Statutes Section 443.041(2)(a). In examining the reasonableness of the fee, the Commission is cognizant that: (1) in the event a claimant prevails at the Commission level, the law contains no provision for the award of a representative's fees to the claimant's representative, by either the opposing party or the State (i.e., a claimant must pay his or her own representative's fee); and (2) the amount of reemployment assistance secured by a claimant may be very small. The legislature specifically gave referees (with respect to the initial appeal) and the Commission (with respect to the higher-level review) the power to review and approve a representative's fees due to a concern that claimants could end up spending more on fees than they could reasonably expect to receive in reemployment assistance.

Upon consideration of the complexity of the issues involved, the services actually rendered to the claimant, and the factors noted above, the Commission approves a fee of $650.

The referee's decision is affirmed.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Frank E. Brown, Chairman
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on

5/22/2014 ,

the above Order was filed in the office of the Clerk of the Reemployment Assistance Appeals Commission, and a copy mailed to the last known address of each interested party.

By: Kimberley Pena
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

IMPORTANT:	For free translation assistance, you may call 1-800-204-2418. Please do not delay, as there is a limited time to appeal.
IMPORTANTE:	Para recibir ayuda gratuita con traducciones, puede llamar al 1-800-204-2418. Por favor hágalo lo antes posible, ya que el tiempo para apelar es limitado.
ENPÒTAN:	Pou yon intèpret asisté ou gratis, nou gendwa rélé 1-800-204-2418. Sil vou plè pa pràn àmpil tàn, paské tàn limité pou ou ranpli apèl la.

Docket No. **2013-73817U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant **EMPLOYER/Appellee**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3678-0

DECISION OF APPEALS REFEREE

Important appeal rights are explained at the end of this decision.
Derechos de apelación importantes son explicados al final de esta decisión.
Yo eksplike kèk dwa dapèl enpòtan lan fen desizyon sa a.

Issues Involved:
SEPARATION: Whether the claimant was discharged for misconduct connected with work or voluntarily left work without good cause as defined in the statute, pursuant to Sections 443.101(1), (9), (10), (11); 443.036(30), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

CHARGES TO EMPLOYMENT RECORD: Whether benefit payments made to the claimant shall be charged to the employment record of the employer, pursuant to Sections 443.101(9); 443.131(3)(a), Florida Statutes; Rules 73B-10.026, 11.018, Florida Administrative Code. (If employer charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

Findings of Fact: The claimant worked as a driver for six years with the employer, an armored transport service. As a driver, the claimant was responsible for the safety of the messenger while entering and exiting the vehicle with money. The claimant understood the importance of looking out for the messenger because he was also at times scheduled as messenger. On or around May 17, 2013, the operations manager received a picture via email of the claimant which appeared to show the claimant sleeping in the armored vehicle awaiting the messenger. The email prompted an investigation by human resources being that sleeping on duty was a terminable offense. Before the investigation was complete, the operations manager received a second picture of the claimant sleeping

while behind the wheel of the armored vehicle. The claimant was called into human resources to meet with the operations manager. The operations manager showed the claimant the picture indicating he was sleeping on the job and the claimant admitted that he had fallen asleep. The claimant was discharged on June 4, 2013.

Conclusions of Law: As of June 27, 2011, the Reemployment Assistance Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed in pari materia with each other:

(a) Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.

(b) Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.

(c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

(d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

(e) A violation of an employer's rule, unless the claimant can demonstrate that:

1. He or she did not know, and could not reasonably know, of the rules requirements;

2. The rule is not lawful or not reasonably related to the job environment and performance; or
3. The rule is not fairly or consistently enforced.

The record reflects the claimant was discharged. At the hearing, the referee was presented with conflicting evidence regarding material issues of fact primarily regarding whether the claimant was shown the picture before admitting to the alleged behavior. The referee is charged with resolving these conflicts and, in doing so, must consider the factors set forth by the Unemployment Appeals Commission in Order No. 03-10946. Based on these factors, the referee accepts the testimony of the employer to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer. The facts in this case show that when presented with a picture of himself sleeping on the job the claimant admitted to the operations manager that he had fallen asleep. It was shown that the employer's rule prohibiting sleeping on the job is reasonably related to the job environment where the driver and messenger are responsible for transporting cash and as a driver one is to be looking out for the messenger's safety. The record shows that the claimant was aware of the employer's rule. The claimant's actions constitute a violation of his duties and obligations to the employer which rise to the level of misconduct connected with work. Accordingly, it is held that the claimant's discharge was for misconduct connected with work. The claimant therefore is subject to disqualification. The employer shall remain non-charged.

Decision: The determination dated August 1, 2013, is AFFIRMED.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

This is to certify that a copy of the above decision was mailed to the last known address of each interested party on September 6, 2013.

CATHERINE MILLER
Appeals Referee

By: Gail Allen
GAIL ALLEN, Deputy Clerk

IMPORTANT - APPEAL RIGHTS: This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the mailing date shown. If the 20th day is a Saturday, Sunday or holiday defined in F.A.C. 73B-21.004, filing may be made on the next day that is not a Saturday, Sunday or holiday. If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Department and set forth in a separate overpayment determination. However, the time to request review of this decision is as shown below and is not stopped, delayed or extended by any other determination, decision or order.

A party who did not attend the hearing for good cause may request reopening, including the reason for not attending, at https://iap.floridajobs.org/ or by writing to the address at the top of this decision. The date the confirmation number is generated will be the filing date of a request for reopening on the Appeals Web Site.

A party who attended the hearing and received an adverse decision may file a request for review to the Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org/.** If mailed, the postmark date will be the filing date. If faxed, hand-delivered, delivered by courier service other than the United States Postal Service, or submitted via the Internet, the date of receipt will be the filing date. To avoid delay, include the docket number and claimant's social security number. A party requesting review should specify any and all allegations of error with respect to the referee's decision, and provide factual and/or legal support for these challenges. Allegations of error not specifically set forth in the request for review may be considered waived.

IMPORTANTE - DERECHOS DE APELACIÓN: Esta decisión pasará a ser final a menos que una solicitud por escrito para revisión o reapertura se registre dentro de 20 días de calendario después de la fecha marcada en que la decisión fue remitida por correo. Si el vigésimo (20) día es un sábado, un domingo o un feriado definidos en F.A.C. 73B-21.004, el registro de la solicitud se puede realizar en el día siguiente que no sea un sábado, un domingo o un feriado. Si esta decisión descalifica y/o declara al reclamante como inelegible para recibir beneficios que ya fueron recibidos por el reclamante, se le requerirá al reclamante rembolsar esos beneficios. La cantidad específica de cualquier sobrepago [*pago excesivo de beneficios*] será calculada por la Agencia y establecida en una determinación de pago excesivo de beneficios que será emitida por separado. Sin embargo, el límite de tiempo para solicitar la revisión de esta decisión es como se establece anteriormente y dicho límite no es detenido, demorado o extendido por ninguna otra determinación, decisión u orden.

Una parte que no asistió a la audiencia por una buena causa puede solicitar una reapertura, incluyendo la razón por no haber comparecido en la audiencia, en https://iap.floridajobs.org/ o escribiendo a la dirección en la parte superior de esta decisión. La fecha en que se genera el número de confirmación será la fecha de registro de una solicitud de reapertura realizada en el Sitio Web de la Oficina de Apelaciones.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Desempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org/.** Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y el número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

ENPÒTAN – DWA DAPÈL: Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat nou poste sa a ba ou. Si 20^{yèm} jou a se yon samdi, yon dimanch oswa yon jou konje, jan sa defini lan F.A.C. 73B-21.004, depo an kapab fèt jou aprè a, si se pa yon samdi, yon dimanch oswa yon jou konje. Si desizyon an diskalifye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

Yon pati ki te gen yon rezon valab pou li pat asiste seyans lan gen dwa mande pou yo ouvri ka a ankò; fòk yo bay rezon yo pat ka vini an epi fè demann nan sou sitwèb sa a, https://iap.floridajobs.org/ oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat yo pwodui nimewo konfimasyon an se va dat yo prezante demann nan pou reouvri kòz la sou Sitwèb Apèl la.

Yon pati ki te asiste seyans la epi ki pat satisfè desizyon yo te pran an gen dwa mande yon revizyon nan men Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org/.** Si ou voye l pa lapòs, dat ki sou tenb la ap dat ou depoze apèl la. Si ou depoze apèl la sou yon sitwèb, ou fakse li, bay li men nan lamen, oswa voye li pa yon sèvis mesajri ki pa Sèvis Lapòs Lèzetazini (*United States Postal Service*), oswa voye li pa Entènèt, dat ki sou resi a se va dat depo a. Pou evite reta, mete nimewo rejis la (*docket number*) avèk nimewo sekirite sosyal moun k ap fè demann lan. Yon pati k ap mande revizyon dwe presize nenpòt ki alegasyon erè nan kad desizyon abit la, epi bay baz reyèl oubyen legal pou apiye alegasyon sa yo. Yo p ap pran an konsiderasyon alegasyon erè ki pa byen presize nan demann pou revizyon an.