STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-00075

vs.

Referee Decision No. 0008673010-02U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the employer's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision which held the claimant not disqualified from receipt of benefits.

Pursuant to the appeal filed in this case, the Reemployment Assistance Appeals Commission has conducted a complete review of the evidentiary hearing record and decision of the appeals referee. *See* §443.151(4)(c), Fla. Stat. By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record.

The referee's findings of fact state as follows:

> The claimant was a Public Safety Officer for [the employer]. The claimant arrived at an incident, but did not prepare a report, as the incident was located in an area outside of the employer's jurisdiction. The employer had policies and procedures which may have addressed preparing incident reports, but the employer did not produce the policies and procedures. The record did not show that the claimant was aware of the necessity to prepare a report of an incident occurring outside of the employer's jurisdiction. The employer told the claimant to prepare a report regarding the incident which occurred outside of the employer's jurisdiction. The employer discharged the claimant on April 24, 2013, for not timely preparing that report.

Based on these findings, the referee held the claimant was discharged for reasons other than misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee erroneously disregarded the employer's evidence; consequently, the case must be remanded.

Section 443.036(30), Florida Statutes (2012), 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.
>
> (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.
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> (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.
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> (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 rule's 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.

At the hearing, the employer's witnesses testified the claimant was discharged for insubordination. According to the employer's witnesses, while still on probation as a result of a prior dissimilar incident, the claimant allegedly failed to timely write a report after being ordered to do so. The employer presented the termination letter and documents generated because of an internal affairs investigation which were marked as an exhibit. The internal affairs investigation report contained unofficial transcripts of sworn interviews of witnesses who had firsthand knowledge of the final incident. Without specifically referring to the employer's evidence, the referee held the employer did not present competent evidence to meet its burden of proof. It is unclear, therefore, whether the referee properly analyzed the employer's evidence.

Under Section 443.151(4)(b)5.a., Florida Statutes: "*Any part of the evidence may be received in written form*, ..." As the statutory language implies, documentary evidence should be received and considered competent where properly admissible, and an absolute preference for oral testimony over probative documentary evidence is unjustified. However, documentary evidence often is, or contains, hearsay, and its admissibility as evidence competent to support a finding of fact must be properly determined. In making evidentiary rulings, the referee must be guided by the statutory standard in Section 443.151(4)(b)5., Florida Statutes, as well as, when applicable, the Florida Evidence Code.

"Hearsay" evidence is an oral or written assertion made outside the hearing, which is offered into evidence to prove the truth of the matter asserted. *See* §90.801, Fla. Stat. Under Section 443.151(4)(b)5.c., Florida Statutes, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, and *is competent to support a finding of fact* if the hearsay evidence falls within an exception to the hearsay rule and would be admissible over objection in civil actions. Even if the hearsay evidence does not fall within one of the exceptions contained in Section 90.803 and 90.804, Florida Statutes, *it is competent to support a finding of fact* under the new statutory "residual exception" if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the referee determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence. *See* §443.151(4)(b)5.c.(I)-(II), Fla. Stat.

In determining whether documentary evidence is admissible and competent (whether or not hearsay) to serve as the basis for a finding of fact pursuant to Section 443.151(4)(b)5.c., Florida Statutes, the referee is required to make and outline the following analysis in the decision:

- Confirm that the evidence was properly provided to the parties, either by the referee as an attachment to the notice of hearing or by proper advance transmittal by the offering party to the referee and other party;
- Determine whether the evidence can be authenticated, i.e., whether a witness can explain with personal knowledge what the document is and how it was created or obtained;
- Identify whether the evidence is in fact hearsay, or, alternatively, is tangible non-hearsay evidence that is admissible and competent without any further showing;
- If the document is hearsay, determine whether one of the statutory exceptions in the Florida Evidence Code applies; if so, it should be admitted and deemed competent;[1]
- If the evidence does not fall within the exceptions in the Florida Evidence Code, then the referee should determine whether the residual exception applies, including whether the party against whom the documents are being offered had a reasonable opportunity to review such evidence prior to the hearing, and whether the hearsay evidence is trustworthy and probative and the interests of justice would best be served by its admission as competent evidence;
- If the evidence meets the statutory requirements for its admission as competent evidence, an analysis must then be made regarding such evidence in light of any conflicting evidence that may have been presented by the opposing party.
- If the evidence is hearsay that does not meet one of the statutory exceptions, it should still be admitted to corroborate, supplement, or explain other evidence, but will not be competent to serve as the sole basis for a material finding of fact.

[1] We note that statements of non-testifying witnesses that are properly authenticated may constitute business records if they were prepared in the course of business, as opposed to being prepared specifically as evidence for a hearing.

While some of the documents offered by the employer do contain hearsay, the employer's documents fall within a statutory exception to the hearsay rule as a business record and should be admitted as competent evidence. Section 90.803(6), Florida Statutes, defines a business record as:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.[2]

The documents submitted by the employer include both transcripts and summaries of statements taken under oath by the employer pursuant to an investigation. If the employer offers proper foundation – such as testifying that the investigations were conducted pursuant to regular business practice of the office, or were regular activities of the office – then witness statements taken in connection with the investigations are admissible and competent evidence under either the business or public record exceptions, or both. Even if these exceptions are not applicable, the witness statements must still be evaluated to determine their admissibility and competence under the "residual" exception of Section 443.151(4)(b)5.c.(I)-(II), Florida Statutes.

When an employer submits a written statement of a nontestifying witness, the referee must follow the process outlined above to determine its admissibility and competence. Specifically, the referee must first decide whether the claimant has had a reasonable opportunity to review the statement/report prior to the hearing (as with all documentary or tangible evidence). Under Florida Administrative Code Rule 73B-20.014(3), 24 hours advance receipt is required for evidence to be admissible under the residual exception. The referee must then determine whether the evidence can be authenticated (again, as is required with any documentary or

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[2] The records also fall within the public records exception. *See* §90.803(8) Fla. Stat. While that exception is primarily intended to allow third parties to use relevant government records as evidence, nothing prohibits a public employer from offering its own records under the public records exception if they meet the requirements of the exception.

tangible evidence). As stated in Section 90.901, Florida Statutes, authentication requires "evidence sufficient to support a finding that the matter in question is what its proponent claims." This requirement is not onerous – it merely requires that someone with personal knowledge testify as to what the document is and how the document was prepared, received, or was retained as a record, etc. Finally, the referee must determine whether to admit the statement/report into evidence for either general (competent hearsay) or corroborative, supplemental or explanatory hearsay (otherwise inadmissible hearsay) purposes. The referee does not simply deny admission of any competent hearsay evidence the referee deems to be less credible than the claimant's testimony. If the referee does admit the competent hearsay evidence into the record, the referee can nonetheless find the claimant's evidence/testimony that conflicts with the written statement is more credible.

In this case, the referee's decision does not contain a proper evidentiary evaluation of the employer's documents. Contrary to the referee's apparent conclusion, the reemployment assistance statute specifically allows for the consideration of documentary hearsay evidence as competent even when the declarant is not available for cross-examination. Although Section 443.151(4)(b)5.c., Florida Statutes, grants referees the duty to determine whether evidence submitted in accordance with Florida Administrative Code Rule 73B-20.014(3) may be used to support a finding of fact, referees do not have the authority to simply disregard a piece of evidence because the declarant does not testify. Instead, the referee must first evaluate how trustworthy and probative the evidence is. Then the referee must resolve any evidentiary conflicts in evidence presented by the parties to determine which evidence is more credible. While a referee can deem the evidence of one party more credible than the other, Section 443.151(4)(b)5.c., Florida Statutes, was crafted in order to permit parties to present evidence drafted by nontestifying witnesses. A blanket refusal to appropriately evaluate that evidence or address its credibility would amount to denial of a fair hearing.

In order to address the foregoing issues, the referee's decision is vacated and this matter is remanded for the rendition of a new decision addressing the competency of the employer's hearsay evidence. On remand, the referee is directed to properly evaluate the employer's hearsay evidence and render a decision that contains accurate and specific findings regarding whether the claimant's actions constituted misconduct under the statutory definition of misconduct. If necessary, the referee decision should also include an appropriate credibility determination in accordance with Florida Administrative Code Rule 73B-20.025(3)(d)2.

The Commission notes that the claimant's Notice of Appeal was filed by a representative for the claimant. Section 443.041, Florida Statutes, provides that a representative for any individual claiming benefits in any proceeding before the Commission shall not receive a fee for such services unless the amount of the fee is approved by the Commission. The claimant's representative shall provide the amount, if any, the claimant has agreed to pay for services, the hourly rate charged or other method used to compute the proposed fee, and the nature and extent of the services rendered, not later than fifteen (15) days from the date of this Order.

The decision of the appeals referee is vacated and the case is remanded for further proceedings.

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 8/27/2014, 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: Ebony Porter
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
REEMPLOYMENT ASSISTANCE PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314 5250

*19637324 *

Docket No.0008 6730 10-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant ***EMPLOYER/Appellee***

APPEARANCES
Employer
Claimant Representative
Employer Representative
Claimant

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.

Findings of Fact: The claimant was a Public Safety Officer for the employer,

The claimant arrived at an incident, but did not prepare a report, as the incident was located in an area outside of the employer's jurisdiction. The employer had policies and procedures which may have addressed preparing incident reports, but the employer did not produce the policies and procedures. The record did not show that the claimant was aware of the necessity to prepare a report of an incident occurring outside of the employer's jurisdiction. The employer told the claimant to prepare a report regarding the incident which occurred outside of the employer's jurisdiction. The employer discharged the claimant on April 24, 2013, for not timely preparing that report.

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 shows that the employer discharged the claimant. The burden of proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). In this case, the employer did not meet that burden of proof. The employer's witness provided primarily hearsay information regarding the job separation. The employer's witness did not personally attend the incident which precipitated the matter herein; the employer's witness did not tell the claimant to complete the report; the employer's witness did not overhear the employer tell the claimant to prepare the report and the employer's witness did not personally discuss the report with the claimant prior to the completion of the report by the claimant. The actions of the claimant, as described by the claimant, did not meet the definition of misconduct under Florida Statutes 4430.36(30)(a)(b)(c)(e). The claimant did not deliberately violate a known company rule or policy. Accordingly, the claimant was discharged for reasons other than misconduct.

The record reflects that the claimant was represented by an attorney in this hearing. The attorney that

represented the claimant in these proceedings did not charge any fees to the claimant for that representation.

Decision: The determination dated September 4, 2013, is REVERSED to hold that the claimant is not disqualified from receipt of benefits.

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 distributed to the last known address of each interested party on December 20, 2013

DON HYMAN
Appeals Referee

By: 

YVETTE HARVEY, 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 above 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 connect.myflorida.com or by writing to the address at the top of this decision. The date of the confirmation page will be the filing date of a request for reopening on the Department's 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 connect.myflorida.com o escribiendo a la dirección en la parte superior de esta decisión. La fecha de la página de confirmación será la fecha de presentación de una solicitud de reapertura en la página de Internet del Departamento.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; 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 20yèm 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, connect.myflorida.com oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat cofimasyon page sa pral jou ou ranpli deman pou reouvewti dan web sit depatman.

Yon pati ki te asiste odyans la epi li resevwa yon desizyon negatif kapab soumèt yon demann pou revizyon retounen travay Asistans Komisyon Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); https://raaciap.floridajobs.org. Si poste a, dat tenm ap dat li ranpli aplikasyon. Si fakse, men yo-a delivre, lage pa sèvis mesaje lòt pase Etazini Sèvis nan Etazini Nimewo, oswa soumèt sou Entènèt la, dat yo te resevwa ap dat li ranpli aplikasyon. Pou evite reta, mete nimewo rejis la ak nimewo sosyal demandè a sekirite. Yon pati pou mande revizyon ta dwe presize nenpòt ak tout akizasyon nan erè ki gen rapò ak desizyon abit la, yo epi bay sipò reyèl ak / oswa legal pou defi sa yo. Alegasyon sou erè pa espesyalman tabli nan demann nan pou revizyon yo kapab konsidere yo egzante.
