STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-01650

vs.

Referee Decision No. 0021237215-03U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

I.
Introduction

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 holding 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.

On review of the appeal in this case from a decision issued on March 13, 2014, based on an appeal heard by [one referee] on February 28, 2014, the Commission discovered that a previous evidentiary hearing involving the same parties and same issues was conducted by [another referee] on December 12, 2013. Our review of the December 12 hearing reflected that it contains additional evidence relevant to the issues before the Commission which had not been developed in the February 2014 hearing.

Accordingly, the Commission gave notice of its intent to take administrative notice of the record for the December 12, 2013, hearing and provided the parties with an opportunity to respond to its proposed action. As the parties provided no responses, the Commission has taken notice of the December 12, 2013 hearing, and the recording of that hearing as well as all related documents have been adopted as part of the record for this appeal.

II.
Proceedings Below

The referee's findings of fact state as follows:

> The claimant began working for the listed employer, during the summer of 2013, as a full-time horseman. The claimant informed the manager that he was quitting because he did [not] get paid time and a half. The claimant worked over 40 hours from the second pay period to his last. The claimant made the manager aware of his concerns at least four times from the first month up until the week of separation that he was not getting paid for the overtime he worked. The manager advised the claimant that he didn't have to get paid overtime because the business was considered agricultural. The claimant voluntarily quit during the middle of October 2013 for not receiving compensation for the overtime he worked.

Based on these findings, the referee held the claimant voluntarily left work for good cause attributable to the employing unit. Upon review of the record and the arguments on appeal, the Commission concludes that some of the referee's findings and conclusions are not supported by competent, substantial evidence, and that the referee misapprehended the issues in this appeal. Additionally, although the referee made findings consistent with the claimant's testimony in the February 28, 2014 hearing, the referee failed to include a credibility determination as required by Florida Administrative Code Rule 73B-20.025(3)(d)2. Upon consideration of the record in the December 12, 2013 hearing along with the February 24, 2014 hearing, the Commission vacates those findings which were based on disputed testimony due to the material inconsistencies between the claimant's testimonies at the two hearings. Accordingly, the case must be remanded for additional factual findings and a credibility determination as to certain issues not resolved in this appeal.

III.
<u>Analysis</u>

Section 443.101(1), Florida Statutes, provides that an individual shall be disqualified from receipt of benefits for voluntarily leaving work without good cause attributable to the employing unit. Good cause is such cause as "would reasonably impel the average able-bodied qualified worker to give up his or her employment." *Uniweld Products, Inc. v. Industrial Relations Commission*, 277 So. 2d 827 (Fla. 4th DCA 1973).

An employee may have good cause to quit due to the employer's failure to pay overtime rates in two circumstances. First, the claimant will have good cause if the employer and employee agree at the time of hire or thereafter that the claimant will be paid overtime for hours over 40 per week (or a similar arrangement), but the employer subsequently materially and unilaterally changes that agreement or otherwise fails to comply with it. *See generally San Roman v. Unemployment Appeals Commission*, 711 So. 2d 93, 95 (Fla. 4th DCA 1998); *LeCroy v. Unemployment Appeals Commission*, 654 So. 2d 1054, 1056 (Fla. 1st DCA 1995). Second, the employee will have good cause to quit attributable to the employer if the employer's failure to pay an overtime premium is a violation of the Fair Labor Standards Act ("FLSA"), the primary federal wage and hour law. *See*, *e.g.*, *Madison v. Williams Island Country Club, Ltd.*, 606 So. 2d 687 (Fla. 3d DCA 1992); *Mueller v. Harry Lee Motors*, 334 So. 2d 67 (Fla. 3d DCA 1976). This is true even if the employer did not promise to pay such overtime. In either event, however, the claimant must attempt to preserve his employment by addressing the issue with the employer. *Lawnco Services, Inc. v. Unemployment Appeals Commission*, 946 So. 2d 586 (Fla. 4th DCA 2006).

The record reflects the claimant in this case worked as a "horseman" or "farm help" laborer at boarding stables for horses operated by the employer. The claimant's customary job duties included cleaning horse stalls and feeding horses. The referee concluded the claimant quit his job for good cause attributable to the employer because the employer was not paying the claimant overtime rates. The employer, however, contends it was not required to pay the claimant overtime rates because, as a horse farm, it is considered an agricultural employer exempt from overtime requirements.

A. The Present Record Does Not Reflect That the Employer Altered or Breached an Agreement of Hire

As to the agreement of hire issue, the referee erroneously concluded that the failure to pay overtime was "contrary to the terms of the claimant's employment." The claimant did not contend at the hearing that he reached an express agreement with the employer to be paid overtime. When asked in the February hearing if there was any discussion at the time of hire regarding being paid overtime, the claimant answered, "I just took an assumption that, it being a business, that he had to follow the federal and state regulations. There was nothing said about straight time. I just took for granted that he had to follow the federal law and pay time and a half." The employer testified that the claimant knew that he would not receive time and a half for overtime hours and that he would receive straight time for all hours. In this case, while the parties differ as to the understanding the claimant had as to whether he would be paid overtime, there is no evidence offered by either party that the employer *agreed* to pay overtime. Accordingly, we reject the referee's finding that the employer had altered or breached the agreement of hire.

B. The Employer Was Not Required to Pay the Claimant Overtime Pursuant to FLSA Because the Agricultural Exemption Applied

As to the labor law requirements, minimum wage and overtime issues are governed by the FLSA, 29 U.S.C. §201 et seq., as well as the Florida Minimum Wage Act, Section 448.110, Florida Statutes. The employee is never required to accept a basic compensation structure that clearly and facially violates the FLSA or Minimum Wage Act. In this case, it is clear that the claimant was paid above the relevant federal and Florida minimum wage at all times. However, he was not paid overtime premium rates for hours worked over 40 per week. The issue is thus whether or not the employer was required by the FLSA to pay the claimant overtime.

If an employee is "covered" by the FLSA, the employee is presumptively entitled to both minimum wage [29 U.S.C. §206(a)] and overtime [29 U.S.C. §207] protections. We note that the employer in this case did not contend that it was not covered by the FLSA.[1] However, the FLSA contains a number of exemptions for various classes of employers or employees. The employer bears the burden of proof

[1] The record in this case is not sufficient to determine whether or not the employer was covered by the FLSA. Remand for this issue is not necessary, however, based on our resolution of these issues.

to establish an exemption. *Clements v. Serco, Inc.*, 530 F.3d 1224, 1227 (10th Cir. 2008). Exemptions are to be narrowly construed. *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Some exemptions apply to both the minimum wage and overtime provisions [29 U.S.C. §213(a)]; others apply only to the overtime requirement [29 U.S.C. §213(b)].

In the February 2014 hearing, the referee failed to ask the employer numerous relevant and necessary questions, including whether the claimant was paid overtime and, if not, why the employer did not pay the claimant overtime. However, the record was better developed in the December 2013 hearing. In that hearing the employer contended it was not required to pay the claimant overtime due to the agricultural exemption. Thus, the FLSA overtime issue in this case turns on whether the claimant was exempt due to the "agricultural" exemption.[2]

Pursuant to 29 U.S.C. §213(b)(12), "The provisions of section 207 of this title [the overtime requirement] shall not apply with respect to . . . *any employee employed in agriculture* or [in irrigation for agricultural purposes]" (emphasis added).

"'Agriculture' includes farming in all of its branches and among other things includes . . . *the raising of livestock*, bees, fur-bearing animals or poultry, and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." 29 U.S.C. §203(f) (emphasis added).

"Livestock" is defined in the regulations as including "cattle (both dairy and beef cattle), sheep, swine, *horses*, mules, donkeys, and goats." 29 C.F.R. §780.120 (emphasis added).

"Raising of livestock" includes "such operations as breeding, fattening, *feeding*, and *general care of livestock*. Thus, employees engaged exclusively in feeding and fattening livestock in stock pens where the livestock remains for a substantial period of time are engaged in the 'raising' of livestock. The fact that the livestock is not bred on the premises does not characterize the fattening as something other than the raising of livestock." 29 C.F.R. §780.121 (emphasis added). The regulations do not require that the livestock be raised for slaughter or for work purposes. For example, the regulations specifically address the situation of caring for race horses: "[e]mployees engaged in the breeding, raising, and training of horses on farms for

[2] Based on the referee's questions in the February hearing, it appears that the referee incorrectly believed the agricultural exemption related to the issue of wage credits. *See* §443.1216(5), Fla. Stat.

racing purposes are considered agricultural employees. Included are such employees as grooms, attendants, exercise boys, and watchmen employed at the breeding or training farm. On the other hand, employees engaged in the racing, training, and care of horses and other activities performed off the farm in connection with commercial racing are not employed in agriculture." 29 C.F.R. §780.122.

The regulatory language, specifically including that related to the situation of racehorses, makes clear that the care of horses on a farm is considered agricultural work even if the horses are not utilized as traditional farm work horses. While the regulations do not specifically address the situation of a boarding farm, the definitions include such general activities as those the claimant performed, and we see no reason to distinguish between horses stabled for boarding for recreational purposes, and those boarded for racing purposes, in the absence of any case law holding otherwise. Nor is the fact that some of the horses may be owned by other individuals dispositive, if the employer cares for the animals as provided in the regulations.

In response to the employer's contentions, the claimant merely stated his understanding that all employers had to pay overtime.[3] He also contended that other employees such as drivers or those who worked in the feed store got paid overtime rates, and that only he and another stable hand did not. The employer explained that he did pay such individuals overtime because they did not perform farm work, unlike the claimant.

Contrary to the claimant's assumptions, the employer's payment of overtime to other employees supports the employer's contention that it properly paid the claimant. Drivers and individuals working in the feed store have job duties that may not meet the agricultural exemption. The claimant, however, did meet the requirements of the exemption. Therefore, the employer had no legal duty to pay him overtime.

Because the employer did not violate any agreement of hire or applicable law in failing to pay the claimant overtime rates, the claimant failed to show that he had good cause to quit attributable to the employer. Thus, the employer cannot be charged in this case if the employer timely submitted its UCB-412 response to the notice of claim. §443.131(3)(a)1., Fla. Stat.

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[3] He also testified that he was told by a lawyer that he was entitled to overtime. This statement is hearsay, and we give it no weight for factual findings, nor would any such opinion be authority for a legal conclusion.

C. Additional Fact-Finding is Necessary to Determine Whether the Claimant Must Be Disqualified

Whether or not the claimant is disqualified requires additional fact finding and legal analysis, and thus the case must be remanded for this purpose. Whether or not the claimant was advised at the time of hire that he would not be receiving overtime premium is a contested issue of fact. The employer testified at both hearings (with more detail in the first hearing) that the claimant was aware that he would be paid straight time, while the claimant testified there was no discussion about only receiving straight time pay. The referee must resolve this conflict and make a specific factual finding. If the claimant resigned knowing at the time he began work that he would not receive overtime premium, the claimant must be disqualified for resigning without good cause attributable to the employer. On the other hand, if the referee finds that the claimant was not aware because the issue had not been discussed between the parties, the referee must determine whether a material provision of the employment agreement remained unresolved at the time of hire due to mutually contradictory assumptions between the parties. On occasion, the Commission has held that, where an employee commenced work with an employer but discovered due to mutually mistaken assumptions that the material terms of employment were not what had been expected, a voluntary resignation did not terminate “employment” within the meaning of the statute. This has been held to be the case even when the employee performed compensable work for the employer. This doctrine has been applied, however, to short duration employment of a few days or weeks at the most where the employee resigned after learning of the misunderstanding regarding the terms of employment. It is not clear whether this doctrine is appropriate to apply here. If the claimant failed to raise the overtime issue promptly with the employer after receipt of pay, or continued work for some duration after being advised that he would not be paid overtime rates, the claimant may have accepted the lack of overtime premium as a term of employment even though it was not originally agreed upon.

The referee should make additional findings as to whether and when the claimant discussed the overtime issue with the employer. At the February hearing, the claimant testified that he raised his concerns regarding overtime pay with the owner on several occasions prior to quitting his job. By contrast, at the December hearing, the claimant testified he spoke to the owner’s wife on several occasions. By contrast, the owner consistently denied the claimant raised any concerns prior to quitting his job. In resolving this conflict, the referee must pay careful attention to

discrepancies between the claimant's testimony at the first hearing and the second as to whom he advised regarding the overtime issue, and what response he got. For example, at the second hearing, the claimant also testified he was advised by the employer that he was considered agricultural exempt, but he did not so testify at the first hearing.

Finally, there was conflicting testimony about the reason for resignation. The claimant testified he quit due to not receiving overtime, but the owner testified that the claimant said he resigned because he could not work weekends anymore. There was a slight discrepancy between the owner's testimony at the December and February hearings as to when the conversation occurred, but the owner was consistent that the conversation occurred after the claimant quit, rather than before. The referee should resolve this conflict and make appropriate findings as well.

In order to address the issues raised above, the referee's decision is vacated and the case is remanded. On remand, the referee is directed to review the record from both hearings and render a decision that contains accurate and specific findings of fact concerning the issues identified herein, include an appropriate credibility determination made in accordance with Florida Administrative Code Rule 73B-20.025, and reach appropriate conclusions of law as to whether the claimant must be disqualified. A supplemental hearing is not required unless the referee deems it advisable.

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
11/26/2014 ,
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 PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314 5250

*24572043 *

Docket No.0021 2372 15-03 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES 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.

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.

Issues Involved: CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant will 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 charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

Findings of Fact: The claimant began working for the listed employer, during the summer of 2013, as a full-time horseman. The claimant informed the manager that he was quitting because he did get paid time and a half. The claimant worked over 40 hours from the second pay period to his last. The claimant made the manager aware of his concerns at least four times from the first month up until the week of separation that he was not getting paid for the overtime he worked. The manager advised the claimant that he didn't have to get paid overtime because the business was considered agricultural. The claimant voluntarily quit during the middle of October 2013, for not receiving compensation for the overtime he worked.

Conclusions of Law: The law provides that a claimant who voluntarily left work without good cause as defined in the statute will be disqualified for benefits. "Good cause" includes only cause attributable to the employing unit or illness or disability of the claimant requiring separation from the work. However, a claimant who voluntarily left work to return immediately when called to work by a permanent employing unit that temporarily terminated the claimant's work within the previous 6 calendar months, or to relocate due to a military-connected spouse's permanent change of station, activation, or unit deployment orders, is not subject to this disqualification.

The record reflects that the claimant was the moving party in the separation. Therefore, the claimant is considered to have voluntarily quit. The burden of proof is on the claimant who voluntarily quit work to show by a preponderance of the evidence that quitting was with good cause. Uniweld Products, Inc., v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). It was shown that the claimant quit for not receiving compensation for the overtime he worked. Good cause for voluntarily leaving a job is such cause as will reasonably impel the average, able-bodied, qualified worker to give up employment. Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). It was shown that these conditions are contrary to the terms of the claimant's employment and, therefore, constitute good cause for quitting attributable to the employer. Accordingly, the claimant is not disqualified from the receipt of benefits.

Decision: The determination dated February 3, 2014, 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 distributed to the last known address of each interested party on March 13, 2014

DARCY ETIENNE
Appeals Referee

By:

MEGAN BRIGHTMAN, 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.

An equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. All voice telephone numbers on this document may be reached by persons using TTY/TDD equipment via the Florida Relay Service at 711.