STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant
JEFFREY WILLIAMS

D.C.A. Order No. 2D15-2587
R.A.A.C. Order No. 15-01177

vs.

Referee Decision No. 0024174826-03U

Employer/Appellee
CITY OF WINTER HAVEN

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Introduction

On October 1, 2016, the court issued the mandate in *Williams v. Reemployment Assistance Appeals Commission*, 210 So. 3d 75 (Fla. 2d DCA 2016) (No. 2D15-2587), *reh'g denied* (October 4, 2016). Pursuant to that mandate and opinion, R.A.A.C. Order No. 15-01177 (April 27, 2015), and Referee Decision No. 0024174826-03U (February 27, 2015), have previously been set aside and the case submitted to the Department for further administration of the claimant's benefits claim.[1]

While this disposition of the case complied with the court's opinion and mandate, the Commission writes to explain that because the court's opinion in *Williams* cannot be reconciled with either the plain language of the statute as amended in 2011, or the prior interpretation of the amended statute by two other district courts, the Commission will not follow the court's decision in *Williams* in future cases.

This order explains why the Commission has so concluded. *First*, we highlight the 2011 amendments to Chapter 443, in particular the addition of subparagraph (e) to the statutory definition of misconduct (Section 443.036(29)(e), Florida Statutes). *Second*, we review prior appellate precedent interpreting or discussing subparagraph (e). *Third*, we summarize the facts of this case. *Fourth*, we analyze the court's opinion in this case and explain why we believe it reached a result inconsistent with the plain language and legislative history of subparagraph (e),

---

[1] The Commission effectuated the court decision by entry of the ruling of the court into the State of Florida's CONNECT benefits system on November 29, 2016.

inconsistent with sister court precedent relied upon by the Commission but not discussed in the opinion, and inconsistent with the statutory prohibition against construing various subparagraphs of the definition of misconduct in pari materia. And *finally*, we explain the dilemma the *Williams* decision leaves us with and how we resolve it.

I.
The 2011 Amendment to the Definition of Misconduct

In 2011, during the "Great Recession," the Florida Legislature substantially amended Chapter 443. The legislative history of the amendment shows that a significant departure from prior reemployment assistance law was intended. The purpose of the bill was to restore the solvency of the Unemployment Compensation Trust Fund while also mitigating the dramatically increased tax burden on Florida employers. *See* Final Bill Analysis, Bill # CS/CS/HB 7005, p.2. A 2009 trust fund insolvency necessitated Florida's borrowing over $2 billion from the federal government to cover benefit claims. *Id*. In addition, during 2010 alone, over 75,000 Florida employers went out of business as their unemployment taxes soared as much as 800% or more. *Id*.

Senator Nancy Detert, the sponsor of the Senate's version of the bill, elaborated as to the concern for the health of the trust fund:

> Historically, this trust fund has had a balance of 2 billion dollars. Prior to the 2000--prior to 2009, the fund has never been insolvent. As of August of 2009, our 2 billion fund went to zero thanks to the 1.1 [million] unemployed Floridians and we were forced to borrow to fund the trust fund from the Federal Government and there is interest on that money. Last year, the interest was 31 million dollars and in sympathy to our employers, we waived that fee and gave them a 12-month delay, hoping it would give them some time to get back on their feet. So now we're up to this year and that debt has risen to 61.4 million dollars and that's just the interest on the debt. That fee is paid by employers and equates to $9.51 per employee and those bills have already gone out and you may have already heard from some of the employers in your district about the cost of that. So, we have a million unemployed people,

> thousands of businesses that used to pay into the system that are now out of business and a huge debt owed to the Federal Government, so there's more than a good need for unemployment compensation reform.

Fla. S. Comm. on Commerce, recording of proceedings (February 22, 2011) (on file with Fla. State Archives) (Sen. Nancy Detert, bill sponsor, discussing purpose of S.B. 728).

Senator Detert also explained that the legislation was intended to provide relief to employers from the heavy burdens imposed by the dramatic unemployment compensation tax increases necessitated by the recession. The relief, however, was not intended to benefit only employers. Reducing taxes on employers would help mitigate the economic pressure on businesses; in turn fewer businesses would close or lay off personnel, keeping more jobs available for the unemployed population:

> So the trick to making this all come out right for everyone, to be fair, is to try to see that we can keep as many businesses in business as possible. And let me tell you the dire circumstances we're in. As I said at the top of the show here, Florida's unemployment compensation trust fund has historically had two billion dollars in it. And we've all paid unemployment, those of us that are employers and it was never that much money . . . . Now, our employers have to pay millions of dollars just interest on the debt to the Federal Government. So we need to take all those competing interests, come up with a bill that's fair to everyone, almost impossible, at the same time that we work towards making the unemployment compensation trust fund healthy once again. And this package isn't perfect, just like most of the bills we pass, but it's a giant step to getting us in the right direction and the best way to help unemployed people is to see that businesses are healthy so we can find you a job.

Fla. S., recording of proceedings (May 3, 2011) (on file with Fla. State Archives) (Sen. Nancy Detert discussing the purpose of C/S for C/S for S.B. 728).

One of the most significant amendments was to the definition of "misconduct." The legislature's changes are reflected below in standard bill markup format:

> (31)~~(29)~~ "Misconduct," 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 conscious ~~willful or wanton~~ 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 ~~has a right to expect~~ of his or her employee.~~; or~~
>
> (b) Carelessness or negligence to a degree or recurrence that manifests culpability~~,~~ or 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.
>
> (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 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.

The amendment modified each part of the existing definition, and added three additional subparts. The most significant amendment was the addition of subparagraph (e). As discussed in R.A.A.C. Order No. 15-02076 at pg. 6 (September 25, 2015),[2] subparagraph (e) was adapted from the definition of misconduct in the Mississippi unemployment regulations, albeit with changes.[3] The House Final Bill Analysis noted that the addition of subparagraph (e) broadened the grounds upon which misconduct could be shown. Final Bill Analysis, *supra*, at 10-11. In sum, the plain language of the statute, as well as the legislative history, demonstrates that the changes to the definition of misconduct were intended to substantively change prior law.

II.
Interpretation of Subparagraph (e) by the First and Third District Courts of Appeal

Within two years of the 2011 amendments, three district court opinions had discussed or applied subparagraph (e). *See Crespo v. Reemployment Assistance Appeals Commission*, 128 So. 3d 49 (Fla. 3d DCA 2012); *Critical Intervention Services v. Reemployment Assistance Appeals Commission*, 106 So. 3d 63 (Fla. 1st DCA 2013); and *Alvarez v. Reemployment Assistance Appeals Commission,* 121 So. 3d 69 (Fla. 3d DCA 2013). Until *Williams*, these were the only cases to discuss the impact of this new provision.

In *Crespo*, the first case decided, the court noted the newly added subparagraph (e) includes isolated policy violations and thus superseded prior case law:

> Subsection (e) of section 443.036[30] was added by the legislature and became effective June 27, 2011. Accordingly, although the prior case law interpreting "misconduct" establishes that an isolated incident by an employee not following an employer policy does *not* rise to the level of misconduct necessary to disqualify the employee from unemployment benefits, *see e.g., Hernandez v. Am. Gen. Fin. & Fla. Unemployment Appeals Comm'n, 39 So. 3d 476 (Fla. 3d DCA 2010)*, the addition of this new subsection expresses the legislative intent that a claimant may be disqualified from

[2] Available at http://www.floridajobs.org/finalorders/raac_finalorders/15-02076.pdf.

[3] In some states, the specific definition of misconduct is defined by agency regulations, not statutory enactment.

> benefits where it is established he or she committed a "violation of an employer's rule." Once such a violation is established, the burden shifts to the claimant to establish he did not know the rule's requirements, that the rule is illegal or not reasonably related to the job, or that the rule is not fairly or consistently enforced. *§ 443.036(30)(e), Fla. Stat.* (2011).

128 So. 3d at 52. In *Crespo*, the court held that the employer did not establish a violation of the plain wording of the rule. *Id*. at 53. Thus, it was unnecessary to determine the consequences of any rule violation in that case.

In *Alvarez*, the Third District Court of Appeal affirmed a security guard's disqualification from benefits based on a single violation of a rule that precluded unauthorized access to a designated security area. In addressing the Commission's interpretation of the 2011 addition of subparagraph (e), the court explicitly agreed that it expanded the definition of misconduct to include an employee's single violation of an employer's rule:

> While it may well be that this action did not constitute "misconduct" under the prior version of the statute, *see Hernandez v. Am. Gen. Fin.,* 39 So. 3d 476 (Fla. 3d DCA 2010) (holding that a single incident of not following an employer policy does not rise to the level of misconduct necessary to disqualify an employee from receiving unemployment benefits); *Rosas v. Remington Hospitality, Inc.,* 899 So. 2d 390, 391 (Fla. 3d DCA 2005) (same), we are unable to interfere with the finding below that it *was* disqualifying under the present statutory scheme.

121 So. 3d at 70-1 (emphasis in original). In sum, the Third District recognized that under the new subparagraph (e), its prior precedent regarding a violation of an employer's rule, which mirrored the Second District's holdings in *Vilar v. Unemployment Appeals Commission*, 889 So. 2d 933 (Fla. 2d DCA 2004), and *Freddo v. Unemployment Appeals Commission*, 685 So. 2d 874 (Fla. 2d DCA 1996), was not controlling.

While *Alvarez* involved an "intentional" violation of a rule, *Critical Intervention Services* did not. In *Critical Intervention Services,* the claimant was a protection officer assigned to one of the employer's clients, a grocery store. 106 So. 3d at 64-65. The employer established a post order prohibiting any of the officers from pursuing a suspected shoplifter outside the store. *Id*. at 65. Notwithstanding the order, the claimant twice went into the parking lot while confronting a particular suspected shoplifter. *Id*. The referee held the claimant not disqualified because he was not aware of the post order which changed prior practice. *Id*. The Commission affirmed. *Id*.

The First District panel discussed the effect of the 2011 amendment as follows:

> The statutory definition of misconduct is central to this appeal. As of its amendment in 2011, the definition provided that misconduct is:
>
> 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.
>
> § 443.036(30)(e), Fla. Stat. (2011). The employer carries the initial burden of proving misconduct. *See Arbor Tree Mgmt., Inc. v. Fla. Unemployment Appeals Comm'n,* 69 So. 3d 376, 382 (Fla. 1st DCA 2011). Here, there is no dispute that the no-pursuit rule was in place and that Edwards twice went into the Save-A-Lot parking lot to interface with the suspect; CIS therefore carried its burden by submitting evidence of Edwards's rule violation.

Id. at 66.

The court held that while the claimant had established that he was unaware of the change in post orders, the referee made no findings as to whether the claimant met the other part of the test – that he could not reasonably have known of the rule. *Id*. The court remanded the case for additional findings on that issue to determine whether the claimant had established his affirmative defense. *Id*. The court's holding, which simply followed the plain language of the statute, inherently recognized that a rule violation need not be "intentional" in the sense of a "knowing" violation of a rule.

III.
The Facts of the Case

The court's opinion in this case contained no meaningful discussion of the facts, but the facts are crucial to a proper application of the statutory provisions to the case, and to an understanding of how the *Williams* decision conflicts with prior precedent.

The claimant was discharged for violating his employer's rule that required him to notify his supervisor within 24 hours of an arrest or as soon as practicable, and fully declare the charges against him as well as his availability for work status. (R.v.II.212.) The claimant, who had driving duties with the employer, failed to report for six weeks that he had been arrested for driving under the influence. (R.v.I.51-2; R.v.II.192.) The claimant did not know the rule but reasonably could have known the rule because it was readily accessible in the employee handbook, which he was provided prior to his first day of employment. (R.v.I.49,171,180,189.) Moreover, the rule was contained in a section of the handbook on employee discipline, so the claimant could have been aware that he would have been subject to discipline for violating it. (R.v.II.212.) The claimant, however, admitted he did not read the handbook. (R.v.II.190.) His testimony even acknowledged he should have done so:

> I just - - I don't think most people read the fine print until [they] sign up for payment and they find out they owe $350 for some little footnote. That's my stance on it. That is just me. That is not you cause you would read the entire thing apparently. And everyone else in the City would read that thing verbatim before

> they started work that Monday. Yeah you are right I should have read it. You are absolutely right I should have read it and memorized it, every - - I should have asked questions if there were any questions at all . . . cause my livelihood depends on it.

(R.v.II. 190.)

The claimant never provided any reason why he could not have been aware of the rule requiring him to report the arrest. Accordingly, the referee held that the claimant had failed to establish that he could not reasonably have known of the rule. The Commission affirmed the referee's decision disqualifying the claimant for his violation of the employer's policy because the referee's factual findings were supported by competent, substantial evidence and because the referee's holding that the employer established misconduct was legally correct under subparagraph (e).

The Commission's decision was a straightforward application of the statute as applied in *Critical Intervention Services*, as the Commission pointed out to the court in its briefing. The *Williams* court did not reject any factual finding of the referee in its decision.

IV.
The Williams Opinion

In a four-paragraph opinion, the *Williams* court reversed the Commission's order. The court held, "Contrary to the Commission's assertions on appeal, the 2011 addition of subsection (e)1. to the definition of 'misconduct' in section 443.036(29), *see* ch. 2011-235, § 3, at 3485, Laws of Fla., has not changed Florida's abiding precedent that an isolated rule violation based on a good faith error in judgment does not amount to misconduct that would justify a refusal of benefits." 210 So. 3d at 76 (citations omitted). The court added, "A finding [sic] of misconduct requires evidence of an intentional or repeated violation of the employer's rule or policy . . . [b]ecause the record does not contain any evidence that Williams intentionally or repeatedly violated company policy, Williams is entitled to receive unemployment compensation benefits." *Id*. at 77 (citations omitted).

The court did not cite or discuss the language of subparagraph (e).[4] The panel omitted any explanation of why it determined that the language of subparagraph (e) was ambiguous and thus in need of interpretation. Its opinion does not contain any analysis by which the panel determined that subparagraph (e), by itself, contains a requirement that a rule violation be "intentional or repeated," *id*. at 77, despite the absence of such language in the provision. Instead, the court provided a string cite of prior appellate cases with parenthetical quotations of language. Significantly, *Crespo*, *Alvarez,* and *Critical Intervention Services* were not among the cited cases, although they were discussed at length in the Commission's brief given that the referee had relied on subparagraph (e) in her decision.

The court did cite seven cases, several of which involved facts dissimilar to those of this case. However, the cited cases cannot be interpretive of subparagraph (e) because they either 1) pre-date its 2011 creation, or 2) do not involve a rule violation *and* explicitly indicate application of subparagraph (a) or its predecessor.

Cases in the former category include *Vilar, supra,* and *Pascarelli v. Unemployment Appeals Commission*, 664 So. 2d 1089 (Fla. 5th DCA 1995). *Williams, 210 So. 3d at 76-77.* The remaining cases fall into the latter category.

In both *Contreras v. Reemployment Assistance Appeals Commission*, 178 So. 3d 953 (Fla. 4th DCA 2015), and *Morales v. Reemployment Assistance Appeals Commission*, 106 So. 3d 81 (Fla. 3d DCA 2013), the courts made no mention of a rule violation, specifically quoted only subparagraph (a), and concluded only that the employees' actions were not misconduct under (a). *Contreras*, 178 So. 3d at 955-56; *Morales*, 106 So. 3d at 82-83.

Similarly, in *Hernandez v. Reemployment Assistance Appeals Commission*, 114 So. 3d 407 (Fla. 3d DCA 2013), the court made no mention of a rule violation by Hernandez, and specifically analyzed the facts only under subparagraphs (a) and (b), stating "[t]he record fails to reveal that Hernandez acted in 'deliberate violation or disregard' of his employer's reasonable standard of behavior or with a carelessness manifesting 'culpability or wrongful intent.' § 443.036(30)(a)-(b)." *Id*. at 409.

---

[4] The sole interpretive method referenced by the court was, "The unemployment compensation statute must be liberally construed in favor of the claimant." 210 So. 3d at 76. However, the Legislature removed that requirement from Chapter 443 in the 2011 amendment. *See* ch. 2011-235, §2, at 2, Laws of Fla. The *Williams* panel did not discuss how it determined that the provision had continued vitality after the amendment.

Responsible Vendors, Inc. v. Reemployment Assistance Appeals Commission, 172 So. 3d 561 (Fla. 3d DCA 2015), which is a citation-only affirmance, also makes no mention of a rule violation or subparagraph (e), but rather cites the language contained in the pre-2011 definition of misconduct, which contained only the predecessor versions of current subparagraphs (a) and (b), "the employer must prove that the employee behaved intentionally or with a degree of carelessness or negligence that manifests a wrongful intent or evil design." §443.036(29), Fla. Stat. (2010). Moreover, the *Williams* panel apparently overlooked a portion of the language it quoted from *Responsible Vendors*, indicated in italics below:

> *See Responsible Vendors*, 172 So. 3d at 562 ("[T]he employer must prove that the employee behaved intentionally or with a degree of carelessness or negligence that manifests a wrongful intent or evil design, *or otherwise acted in a way that would constitute misconduct as defined in section 443.036(29), Florida Statutes (2015).*")

Williams, 210 So. 3d at 77 (emphasis added). Thus, *Responsible Vendors* recognizes that, if an employer proves that one "otherwise acted in a way that would constitute misconduct as defined in section 443.036(29), Florida Statutes," the employer would not *also* have to prove that the employee "behaved intentionally or with a degree of carelessness or negligence that manifests a wrongful intent or evil design."

Cesar v. Reemployment Assistance Appeals Commission, 121 So. 3d 1181 (Fla. 1st DCA 2013), was decided on a factual issue, not a legal one. *Id*. at 1185 (reversing the Commission "[b]ecause the Commission improperly *rejected* the appeals referee's finding that Ms. Cesar was unaware of the policy prohibiting personal calls from the work phone, *substituted its own finding* that Ms. Cesar knew or should have known of this policy, and *added* its own findings" (emphasis added)). Significantly, as reflected in the court's opinion, the Commission did not reverse the referee's decision in *Cesar* on the basis of subparagraph (e), but instead on the basis of subparagraph (a). *Id*. at 1183 (stating the Commission "concluded that Ms. Cesar 'showed a blatant and reckless disregard for the employer's interests'"); *id*. at 1184 ("We reject the Commission's conclusion that Ms. Cesar 'showed a blatant and reckless disregard for the employer's interests'"). Notably, the *Williams* panel here cited only the footnote to the latter quote without recognition for the main text, which demonstrates that it was a subparagraph (a) case. *Williams*, 210 So. 3d at 77. Thus, the language the *Williams* panel quoted from *Cesar* was again language that was applicable to only a different portion of the definition of misconduct than that at issue in *Williams*.

Because the *Williams* panel relied only on case law interpreting *other subparagraphs* of the definition of misconduct, it appears that the court was attempting to harmonize the various subparagraphs of the definition of misconduct when interpreting subparagraph (e). However, Chapter 443 specifically provides that the various subparagraphs of the definition of misconduct "*may not be construed in pari materia with each other*." §443.036(29), Fla. Stat. (emphasis added). *Cf. Bd. of Trs. v. Lee*, 189 So. 3d 120, 126 (Fla. 2016) ("[U]nder the doctrine of in pari materia, we construe statutes relating to the same subject or object together to harmonize the statutes"). Subparagraphs (a) and (b) were, until 2011, the only portions of the definition of misconduct, and both contain, before and after the 2011 amendments, explicit mental state requirements that gave birth to the body of case law that was cited in the panel's opinion arising from interpretation of subparagraphs (a) and (b).[5] No such mental state requirement is included in the text of (e). Thus, the *Williams* panel's addition of a requirement of intentional or repeated conduct based on prior cases regarding only other subparagraphs of the definition *necessarily* involves the prohibited *in pari materia* construction of the statute.

V.
The Commission's Resolution of the Unrecognized Conflict

The inter-district conflict between *Williams* and prior cases, particularly *Critical Intervention Services,* presents a dilemma for the Commission with respect to which authority it must apply in future cases. While lower tribunals are generally bound by the decisions of all district courts of appeal, such is not the case where an inter-district conflict is present. *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992). While it is clear that in such circumstances a trial court must follow the precedent of the appellate district in which it is located, *id.* at 667, it is not clear how the Commission must treat inter-district conflict.

---

[5] The current version of Section 443.036(29)(a)-(b), Florida Statutes, states:

(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. 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.

(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.

(Emphasis added.)

While the Commission's office is physically located within the jurisdiction of the First District Court of Appeal, appeals of its orders are not limited to that tribunal. *See* §443.151(4)(e), Fla. Stat. (orders of the commission are subject to review in the district court of appeal in the appellate district in one of three locations, at the appellant's choice: 1) where the claimant resides, 2) where the job separation arose, or 3) where the order was issued). Consequently, during the pendency of administrative proceedings, the venue of any subsequent district court of appeal cannot be determined. Any case, regardless of where it arose, can be reviewed in the First District because that is the Commission's situs.

In circumstances of an inter-district conflict, and without the ability to predict the district where a party may take an appeal or any authority establishing what district's law the Commission must apply, the Commission is left with no choice but to choose which of the conflicting districts' case law it will follow in future cases in order to ensure consistent results and provide guidance to agency personnel and parties. *See Jones v. Fla. Ins. Guar. Ass'n*, 908 So. 2d 435, 447 (Fla. 2005) (resolution of the conflict is necessary for purposes of uniformity of Florida law). This choice is not difficult. We find the opinions of the First and Third Districts to be more abundant in facts, more transparent in the interpretation of the amended statute, and more consistent with the plain language of the amended statute.[6] These attributes make the holdings more amenable to application in future cases. The Commission will thus apply the language of the statute as analyzed in prior First District and Third District precedent, and as to cases involving the factual issue addressed in this case, we will apply *Critical Intervention Services*.

---

[6] The lack of discussion of operative facts in the *Williams* opinion may lead to an overbroad interpretation or application of its holding. Even if *Williams* were our choice of authority, we would consider its holding to be *obiter dicta* to the extent it purported to apply to cases differing from the factual scenario of this case. *See Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA 1975) ("[A] purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination is obiter dictum, pure and simple."); *Continental Assurance Co. v. Carroll*, 485 So. 2d 406, 408-9 (Fla. 1986) ("Such dicta is at most persuasive and cannot function as ground-breaking precedent."); *Williams v. Davis*, 974 So. 2d 1052, 1066 (Fla. 2007) (Wells, J., concurring). In particular, we would not follow it as to the issue of negligent violations of a rule, which we have addressed in a number of cases under the "not fairly enforced" defense. *See* R.A.A.C. Order No. 15-02076, *supra*.

VI.
Conclusion

For the reasons outlined above, we are unable to reconcile the *Williams* holding with the plain language of the statute or the holdings of the First and Third District Courts of Appeal in *Critical Intervention Services, Alvarez,* and *Crespo*. The Commission brought these precedents to the attention of the *Williams* panel in its briefing and motion for rehearing; however, the court chose not to address them.

Until the inter-district conflict is resolved judicially or legislatively, the Commission will follow the rule of law established in *Critical Intervention Services*, *Alvarez*, and *Crespo*, which recognizes that evidence of a single rule violation establishes a prima facie case of misconduct under subparagraph (e), and shifts the burden to the claimant to establish the existence of a statutory affirmative defense to avoid disqualification.

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
August 3, 2017 ,
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

*39660869 *

JEFFREY WILLIAMS

SSN:	**Account Number:**
Docket No.0024 1748 26-03	Jurisdiction: §443.151(4)(a)&(b) Florida Statutes
CLAIMANT/Appellant	***EMPLOYER/Appellee***
JEFFREY WILLIAMS	**CITY OF WINTER HAVEN**

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.

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), (13); 443.036(29), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rules 73B-20.016; 20.017.

NONAPPEARANCE (ER): A hearing was scheduled in this matter for 12/24/2014 at 8:00 am. The employer did not appear at the hearing

as a result of the office being closed in observance of the Christmas holiday. On 12/17/2014, the employer attempted to notify the Department of their unavailability and request a continuance. The Department did not receive the request prior to the hearing. An adverse decision was mailed on 12/29/2014. The employer faxed a request to reopen the hearing on 12/29/2014.

A case will be re-opened for a hearing on the merits of the case, when a party requests a reopening within 20 days of rendition of the decision and establishes good cause for not attending a previous hearing. If good cause is not established, the previous decision will be reinstated.

The record reflects that the employer did not appear at the 12/24/2014 hearing due to an office closure. The employer has submitted competent substantial testimony that an effort was made to reschedule prior to the day of the hearing. The employer's reason for failing to appear is considered compelling. The employer exercised due diligence in requesting reopening within twenty days of the decision. Therefore, the employer has established good cause for nonappearance and is entitled to a hearing on the merits of the case.

FINDING OF FACTS: The claimant began working as a full time Building Inspector on 06/03/2013 for City of Winter Haven. Prior to hire, the claimant was made aware of the employer's policy and procedures. In accordance with policy, the claimant knew that he must report a change in his license status as soon as aware or as soon as reasonably possible. Additionally, the claimant was aware that he must report any arrests. Failure to report a license status change or arrest, could result in termination. It should be noted that the claimant was required to operate a vehicle as a part of his job duties. On 08/23/2014, the claimant was arrested for suspicion of driving under the influence. The claimant's license status was not immediately affected. On 10/04/2014, the claimant received a notification by mail from the Department of Motor Vehicles, indicating that his license was suspended. The claimant did not work on the weekend so he was unable to inform the employer, until he returned to work. On Monday, 10/06/2014, when the claimant reported to work, he informed his supervisor that he license had been suspended as a result of his arrest back in August. The employer informed the claimant that he could ride with another employee to perform his work duties until the employer spoke with other individuals who were in charge. For the next few days, the claimant rode with a co-worker in order to perform his job. On 10/10/2014, the employer called a meeting and informed the claimant that he would be discharged for violating the policy to notify. The claimant performed no other services for the employer after 10/10/2014.

CONCLUSION 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 that the claimant was discharged. In cases of discharge, the burden is on the employer to establish that the discharge was for misconduct connected with work. 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). When the employer meets that initial burden, the employee is required to demonstrate the propriety of his/her actions. See *Sheriff of Monroe County v. Unemployment Appeals Commission,* 490 So. 2d 961 (Fla. 3d DCA 1986). The employer shifted the burden to the claimant to come forward with evidence to explain the propriety of the actions. At the hearing, the claimant testified that he reported the change in his license status as soon as he found practical. At the time of the offense, the claimant did not consider his temporary license as a "license status change" due to him still being able to drive. Once the claimant's license was supended, he considered a suspension a status change, therefore reported it when he deemed it practical to report it. The claimant did not realize he should have reported the license status change at the time of the offense. The claimant has submitted justifiable reasoning for failing to report his license status change immediately. In regards to failing to report the arrest, the claimant contends that at the time he did not know of the requirement. The claimant corroberated the fact the he was issued an employer's policy at the time of hire. The claimant agreed that he signed acknowledgement of the handbook indicating that he read it, however, the claimant stated that he never read or memorized the handbook. The claimant added that he later read that he should have reported the arrest immediately when he reviewed the handbook excerpt in preparation for the hearing. The claimant's lack of knowledge is not attributable to the employer based on the fact that the employer provided the claimant the policies and procedures that he should abide by to maintain employment. Ultimately, it is the claimant's responsibilty to become familiar with the policies in order to be in compliance. The claimant did not provide good cause for failing to become familiar with the policies, thus no evidence was presented proving that the claimant could not have reasonably known that the failure to notify was in violation. Based on the evidence and testimony received from the parties, it is concluded that the claimant was in violation of an employer's rule by failing to report the arrest and as a result, was discharged for misconduct connected with work.

DECISION:the determination dated 10/27/2014, holding the Claimant disqualified from receiving benefits beginning 10/05/2014 through 11/08/2014 and until you have earned $4,675.00, is AFFIRMED. The claimant is disqualified from the 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/mailed to the last known address of each interested party on February 27, 2015.

C. PELLOT-STOKES
Appeals Referee

By: C E Demoranville

CONNIE DEMORANVILLE, 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 distribution/mailed 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 distribución/fecha de envìo 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 distribisyon/postaj. 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.
