STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 15-02331

vs.

Referee Decision No. 0025104188-06U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the claimant's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision wherein the claimant was held disqualified from receipt of benefits.

Upon consideration, the Commission finds that the appeal of the referee's decision was timely filed. The Commission has jurisdiction to decide the case.

On appeal to the Commission, evidence was submitted which had not been previously presented to the referee. The parties were advised prior to the hearing that the hearing was their only opportunity to present all of their evidence in support of their case. Florida Administrative Code Rule 73B-22.005 provides that the Commission can consider newly discovered evidence only upon a showing that it is material to the outcome of the case *and* could not have been discovered prior to the hearing by an exercise of due diligence. The Commission did not consider the additional evidence because it does not meet the requirements of the rule.

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 began working for the employer on November 3, 2012, as a delivery driver. The employer operates as a produce grocer and deliver[er].

The employer's policy prohibits employees from having unprofessional or inappropriate behavior toward coworkers and the employer's customers. The employer also required the claimant to attend ethics training on April 1, 2013 to learn customer relation skills.

On March 25, 2014, the employer issued the claimant a verbal warning because of a customer complaint that the claimant was upset because he had been waiting outside of the business to complete the delivery. In [an] attempt to make the delivery, the claimant was instructed by the customer to return portions of the delivery because the delivery was late. The employer was informed that once the claimant left the business, he was upset, had used foul language and knocked over plates. The claimant denied using foul language, being upset in the presence of the customer, or knocking over plates.

On October 3, 2014, the employer issued the claimant a final written warning after receiving a manager complaint that during his morning shift, while the claimant was checking the liquid on his truck, he had asked a manager for assistance. Instead of assisting the claimant, the manager only showed him where the liquids where located. The complaint informed the employer that the claimant became upset with the manager and yelled at him by stating, "Fuck this office, I'm not scared of anyone in this ['fucking'] office!" The claimant, however, admitted to [saying] "This is bullshit!"

On January 16, 2015, the employer received a complaint from one of its customers that the claimant, while performing a delivery, engaged in an argument with one of the employer's customers. The customer complained that the delivery was late and the he could hear the claimant banging on the delivery door from across the restaurant. The claimant, however, stated that the customer yelled at him and declared that he was fired. The claimant denied engaging in an argument with the customer, but did admit to telling the customer that "I make more money than you, so how can you fire me."

The employer discharged the claimant on January 16, 2015, for poor conduct in violation of the employer's policy.

Based on these findings, the referee held the claimant was discharged for misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes procedural errors occurred during the hearing process, the referee's decision contains inconsistent findings, and material issues of fact were not developed during the hearing; consequently, the case must be remanded.

The record reflects that the claimant was discharged for violating the employer's policy that prohibits unprofessional or inappropriate behavior toward coworkers and the employer's customers. However, the referee did not properly develop the record regarding the allegations and circumstances surrounding the claimant's discharge. The employer's transportation manager provided testimony regarding three incidents that led to the issuance of a verbal warning, a final written warning, and the discharge of the claimant. This testimony was based on what other people who did not testify at the hearing had told the transportation manager and there were no written reports or statements of these individuals submitted for the hearing. The transportation manager's testimony regarding what these other nontestifying witnesses told him would normally be considered inadmissible hearsay. However, the record also reflects that the claimant may have admitted to the transportation manager the conduct and behavior reported by those other people. The referee, however, failed to develop the record sufficiently to enable the Commission to determine if, in fact, the claimant made such admissions. Such statements are not inadmissible hearsay under the law, as they fall within a hearsay exception and thus may support a material finding of fact. *See* §90.803(18), Fla. Stat. The referee asked the transportation manager if the claimant admitted "to his actions" without specifically asking the transportation manager what the claimant admitted to or said to him when he confronted the claimant about the three incidents. Additionally, the referee never asked the claimant if he admitted to the allegations reported to the transportation manager when the transportation manager confronted him about them, and he did not ask the claimant what he told the transportation manager when he was confronted about each incident. The claimant denied the allegations when he testified at the hearing, but the referee made a credibility determination in favor of the employer that would overcome that testimony if the employer offered competent, non-hearsay evidence regarding the claimant's prior admissions. As the record now stands, the Commission cannot determine if there is competent evidence offered by the employer regarding whether the claimant admitted to the transportation manager the reported allegations and whether the claimant was discharged for disqualifying reasons under the law. We

note that the allegations as reported to the transportation manager and as testified by him at the hearing can be considered "corroborative" hearsay, which may supplement and explain other evidence, but to be used for such purposes, the record must reflect competent, substantial evidence that the corroborative hearsay explains.

Pursuant to Florida Administrative Code Rule 73B-20.024(3), the appeals referee "shall examine or cross-examine any witness as is necessary to properly develop the record." A hearing record must include background information from each party that includes, at a minimum, the claimant's dates of employment; job title; full-time or part-time status; scheduled days and hours of work; the claimant's supervisor's name and title; and an affirmative statement from each party regarding whether the claimant was discharged, quit the job, or was laid off for lack of work. Further, the referee is expected to ensure that the decision rendered contains dates of employment and relevant specific details concerning the claimant's employment and separation. Additionally, each party should be questioned regarding the testimony of the other, such that the hearing record properly reflects the testimony and response to each allegation or assertion. The referee must then make findings of the believed testimony. Vague, undated and insufficient findings render a reviewing authority unable to test the validity under the law of the decision resting upon those facts.

Additionally, the record reflects the parties in this case offered varying accounts of the events surrounding the claimant's separation from employment. The referee made findings that are inconsistent with the credibility determination he made in favor of the employer because his findings include evidence presented by the claimant that was rebutted by the employer's evidence. Additionally, certain of his other findings are inconsistent with the employer's evidence.

Furthermore, the record reflects the underlying "Notice of Approval" determination appealed by the employer that was issued on March 9, 2015, indicated that chargeability would be reviewed after a written response from the employer had been received. The issue of the employer's chargeability was not listed as an issue on the notice of hearing or addressed at the hearing. The notice of hearing indicated only that the issue to be addressed would be that of the claimant's separation. Florida Administrative Code Rule 73B-20.015, requires that a notice of hearing include a statement of the issues to be decided by the referee. As a result of not properly including the proper issues on the hearing notice, the employer has been denied notice of relevant issues.

Finally, the referee improperly told the parties that all hearsay evidence is admissible in reemployment assistance appeals hearings. This statement, although technically true, could be misleading. 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 also 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 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. The referee's statement may have led the parties to believe that hearsay testimony not otherwise admissible under a hearsay exception can support a material finding of fact by itself. This is not true under the statute. *See*, *e.g.*, *Tassone v. Florida Unemployment Appeals Commission*, 662 So. 2d 1003, 1004-05 (Fla. 1st DCA 1995).

In order to address the issues raised above, the referee's decision is vacated and the case is remanded. The referee is directed on remand to send the parties a notice of hearing setting forth the issues to be addressed at the hearing as being separation, charging, and timeliness of employer written response to claim. The referee shall then develop the record regarding whether the employer submitted a timely response to the claimant's claim. The referee shall then develop the record in greater detail and render a decision addressing the issues that contains accurate and specific findings of fact concerning the events that led to the claimant's separation from employment, a determination regarding whether the claimant admitted to the allegations when confronted by the employer, and a proper analysis of those facts along with an appropriate credibility determination made in accordance with Florida Administrative Code Rule 73B-20.025(3)(d).

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 7/10/2015, 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

*41205690 *

Docket No.0025 1041 88-06 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES Employer

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.

Findings of Fact: The claimant began working for the employer on November 3, 2012, as a delivery driver. The employer operates as a produce grocer and delivery.

The employer's policy prohibits employees from having unprofessional or inappropriate behavior toward coworkers and the employer's customers. The employer also required the claimant to attend ethics training on April 1, 2013 to learn customer relation skills.

On March 25, 2014, the employer issued the claimant a verbal warning because of a customer complaint that the claimant was upset because he had been waiting outside of the business to complete the delivery. In attempt to make the delivery, the claimant was instructed by the customer to return portions of the delivery because the delivery was late. The employer was informed that once the claimant left the business, he was upset, had used foul language and knocked over plates. The claimant denied using foul language, being upset in the presence of the customer, or knocking over plates.

On October 3, 2014, the employer issued the claimant a final written warning after receiving a manager complaint that during his morning shift, while the claimant was checking the liquid on his truck, he had asked a manager for assistance. Instead of assisting the claimant, the manager only showed him where the liquids where located. The complaint informed the employer that the claimant became upset with the manager and yelled at him by stating, "Fuck this office, I'm not scared of anyone in this "fucking" office!" The claimant, however, admitted to staying "This is bullshit!"

On January 16, 2015, the employer received a complaint from one of its customers that the claimant, while performing a delivery, engaged in an argument with one of the employer's customers. The customer complained that the delivery was late and the he could hear the claimant banging on the delivery door from across the restaurant. The claimant, however, stated that the customer yelled at him and declared that he was fired. The claimant denied engaging in an argument with the customer, but did admit to telling the customer that "I make more money than you, so how can you fire me."

The employer discharged the claimant on January 16, 2015, for poor conduct in violation of the employer's policy.

Conclusion of Law: 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 and evidence in this case show that the claimant was discharged for poor conduct in violation of the employer's policy.

The employer's policy prohibited the claimant from having unprofessional or inappropriate behavior toward coworkers and the employer's customers. The claimant admitted to being aware of the policy and also attending ethics training.

The employer warned the claimant about his conduct toward its customers and coworkers and the claimant was aware of how to conduct himself in dealing with its customer and coworkers. The claimant admitted to using foul language toward a supervisor and that he made unprofessional comments to a customer in the final incident.

The employer provided primarily hearsay evidence in support of its contention that the claimant engaged in conduct amounting to inappropriate conduct contemplated under the Florida Reemployment Law. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding s. 120.57(1)(c), hearsay evidence may support a finding of fact if:

1. The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and

2. The appeals referee or special deputy 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.

The appeals referee finds that the employer's testimony, concerning the customer complaints against the claimant, is hearsay, but is trustworthy and probative that the interests of justice are best served by its admission into evidence.

Therefore, it is concluded that the claimant's actions were a substantial disregard of an employee's duties and obligations to the employer, which constitutes misconduct connected with work within the meaning of the law. The claimant is disqualified from the receipt of benefits.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Reemployment Assistance Appeals Commission has set forth factors to be considered in resolving credibility questions. These factors include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the hearing officer finds the testimony of the employer to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

Decision: The determination of the claims adjudicator dated March 9, 2015, is **REVERSED**. The claimant is

disqualified from the receipt of benefits from January 11, 2015, plus the next five weeks, and until the claimant earns $4,675.

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 April 22, 2015.

A. LOUIS
Appeals Referee

By: D. Hillegas

DAVID HILLEGAS, 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.
