STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 15-03947

vs.

Referee Decision No. 0025918924-04U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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

Pursuant to the appeal filed in this case, the Reemployment Assistance Appeals Commission has conducted a complete review of the evidentiary hearing record and decision of the appeals referee. *See* §443.151(4)(c), Fla. Stat. The Commission's review is generally limited to the evidence and issues before the referee and contained in the official record.

The referee's findings of fact state as follows:

> The claimant was a [carrier] with [the employer] until April 2015. On March 5, 2015, a teller reported witnessing the claimant placing a screw behind the right front tire of the [manager's] car in the [parking] lot. The teller collected a screw and reported what the claimant did to the [manager]. The claimant was placed on an emergency suspension and later discharged after an investigation showed that she violated [the employer's] rules of conduct.

The record reflects the claimant was discharged for allegedly violating the employer's rules of conduct. In the final incident, the claimant allegedly placed a screw under the manager's tire in the employer's parking lot. At the hearing, the employer's witness, the investigator, testified as to his investigation of the incident. An employee told the manager and the investigator that the claimant placed a screw under the manager's tire. The employee removed the screw and showed it to the manager. The investigator's report, which included a short statement by the

employee along with a summary of the investigator's interview of the employee, was entered into evidence. The report also contained a statement from a tire shop employee who wrote that the claimant told him she was being framed for trying to put a screw in someone's tire. She then told the tire shop employee if she had a screwdriver the screw "would have went in."

The referee considered the employer's evidence but held:

> The record reflects that the claimant was discharged. The burden of proving misconduct is on the employer. *Lewis v. Unemployment Appeals Commission*, 498 So. 2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. *De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957); *Tallahassee Housing Authority v. Unemployment Appeals Commission*, 483 So. 2d 413 (Fla. 1986). The employer offered a statement from an eye-witness of the alleged vandalism which asserted the claimant tried to pop a tire. The claimant testified that she did not do this and asserted that later the witness changed his story. The witness statement is hearsay. 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 referee would ask the eye-witness those questions the interviewer seemed to ask in the notes the claimant read into the hearing record. The eye-witness was not present for the hearing and, therefore, could not respond to concerns about precisely what he saw and the conditions under which he made his observations.

> Also the parcel contains a statement from a tire shop employee where the claimant's alleged remarks were clearly construed as an admission. The referee is inclined to view the statement of the tire shop employee as consistent with the claimant's testimony asserting she was innocent and not as an admission of wrongdoing.

Based on this analysis, the referee concluded that misconduct was not shown.

On appeal to the Commission, the employer contests the referee's evaluation of the evidence. In particular, the employer contends that the referee erroneously accepted the claimant's hearsay evidence to impeach the statements offered by the employer. We conclude that the employer's arguments are well-taken. Accordingly, we vacate the decision and remand for a supplemental hearing and additional consideration of the evidence, and rendition of a new decision properly analyzing the evidentiary and legal issues.

Our first concern is that the decision is not sufficiently drafted for the Commission to determine how the referee analyzed the evidence. In any tribunal, consideration of evidence typically occurs in two steps. First, the judge or hearing officer must resolve any issues as to whether evidence should be "admitted" into the record of the case. This is a threshold matter, because evidence that is admitted can serve as the basis for a decision, while evidence that is excluded cannot. Second, after the evidentiary record has been closed, the trier of fact must determine what admitted evidence is more persuasive and credible, and make findings based on that evidence. Of course, in reemployment assistance cases, evidence is not typically "admitted" or "excluded." Instead, the referee must initially determine what evidence is "competent," and then weigh all the competent evidence to determine which is more credible and persuasive. R.A.A.C. Order No. 14-05924 at pgs. 6-7 (April 24, 2015). While the second part of this process – the weighing of the evidence – is a core function of the referee, and for which the referee must be given broad discretion and deference, the first part – determining whether the evidence is "admissible," or in our cases, "competent" – is governed by clear legal standards which the referee must correctly apply. The Commission's role in reviewing evidentiary decisions is thus primarily focused on determining whether the referee's initial determination of competence is consistent with the statutory evidentiary standards of the reemployment assistance law or Florida Evidence Code, and the Commission's and courts' interpretations thereof.

In this case, the referee's analysis of the evidence in the decision is incomplete. It is not clear from the decision in this case whether the referee initially determined the employer's documents were not competent evidence or, alternatively, deemed them competent, but considered them not as persuasive or credible as the claimant's denial.

The documents submitted by the employer include the investigator's report, written statements obtained by the employer, written disciplinary action taken against the claimant, and the employer's zero tolerance policy. While some of the documents offered by the employer are or contain hearsay, they may fall within the statutory exception to the hearsay rule for business records. Section 90.803(6), Florida Statutes, states a business record is:

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

However, the referee did not conduct any inquiry into the documents before admitting them as exhibits. If the employer offered the proper foundation, then the written statements might meet the test for admission under the business record exception to the hearsay rule. If the documentary evidence meets the requirements of the business record exception, acceptance as competent evidence is obligatory. While a lack of trustworthiness may be a basis for exclusion of evidence under this exception, the opposing party bears the burden of showing such lack of trustworthiness. *See Love v. Garcia*, 634 So. 2d 158, 160 (Fla. 1994). The record must reflect a specific reason why the evidence is not deemed trustworthy. In this case, a legitimate consideration for trustworthiness as to the business record exception is whether the documents were prepared as part of a routine disciplinary investigation or whether, by contrast, they were prepared for use in a contested proceeding, including administrative litigation. In the latter case, admission can be

denied under the business record exception, but that would not automatically preclude their consideration under the "residual" exception. At this point, nothing in the record reveals precisely for what purpose(s) the investigator's reports and supporting statements were generated, so it is not clear whether the witness statements meet the business record exception.

If the business record exception is deemed not to be applicable, the inspector's report and witness statements must still be evaluated to determine their competence under the "residual" exception of Section 443.151(4)(b)5.c.(I)-(II), Florida Statutes. In contrast to the business record exception, admission of documents as competent evidence under the residual exception leaves the offering party bearing the burden of establishing circumstances showing trustworthiness of the evidence. Under that exception, however, the fact that the statements were prepared for litigation does not automatically make them untrustworthy. Rather, it is simply a factor to be considered.

While it is not clear whether the referee concluded that employer's evidence was not competent, or merely less persuasive, the referee's decision provided an explanation as to his concerns about the witness statement and interview summary of the employee. That explanation, however, is problematic. The referee elicited testimony from the claimant about a document that she had not sent in to determine whether a continuance would be in order for her to provide the document. The claimant read portions of a document that appeared to be a grievance filing authored by one union representative, containing what appeared to be another union representative's statements regarding questions she had asked the employee and his answers, which purportedly limited his testimony in terms of what he witnessed directly. The claimant's proffer thus contained multiple layers of hearsay. The referee did not take any further action regarding the proffer after receiving it at the hearing.

Impeachment[1] of the employee's written witness statement and the memorialization of his interview by the investigator is governed by Sections 90.806 and 90.614, Florida Statutes. Under Section 90.614(2), evidence of a prior inconsistent statement can be offered by "extrinsic evidence" where the witness does

[1] The proffered evidence could be deemed inconsistent with the short statement the employee wrote that he saw the claimant "[p]lace a screw" under the manager's tire [Comp. Exh. at p. 13] to the extent that statement is interpreted to mean he directly observed her placing a screw under the tire, but it did not appear to be inconsistent with his statement as recapped in the Investigator's Report [Comp. Exh. at pp. 10-11], where he did not claim he actually saw the claimant place a screw, but saw her reaching down by the tire twice and later found the screw there. If the offered statement is not inconsistent, but is merely offered to limit or clarify the witness's testimony, it must meet the requirements for admission as substantive evidence and not merely impeachment.

not admit to making the inconsistent statement. However, where the witness's evidence is a hearsay statement such as occurred in this case and the witness does not testify, there is no requirement that the witness first have the opportunity to admit or deny the prior inconsistent statement. "Evidence of a statement or conduct by the declarant at any time inconsistent with the declarant's hearsay statement is admissible, regardless of whether or not the declarant has been afforded an opportunity to deny or explain it." §90.806(1), Fla. Stat. What is crucial, however, is that impeachment by extrinsic evidence is limited to evidence that is itself properly competent at least for the purposes of impeachment.[2] While testimony by the union representative who asked the questions of the employee could be competent impeachment in this situation, the claimant's proffer could not.

While the referee did not directly state that he was rejecting the employee's statements based on the claimant's proffer, his rejection of the evidence for the reasons given without further explanation leads to a high likelihood that he accepted the assertions of the claimant's proffer, or that he was influenced by the proffer. Under these circumstances, we see no meaningful difference. The referee apparently rejected what was likely to be competent hearsay evidence solely on the basis of non-competent hearsay. This is evidentiary error.

Further, because the referee resolved the case in this way, the claimant was never confronted with a clear opportunity to request a continuance to submit a written statement. The referee would have been under no obligation to grant a further continuance of a case that had already been continued in part to allow the representative to appear, but the referee's handling of the matter may have lulled the claimant into not making such a request.

Because of the procedural errors, we remand the case for a supplemental hearing before a new referee. The new referee is directed to review the entire hearing record, to send CDs of both hearings to the parties, include the exhibits of record as attachments to the supplemental hearing notice, and convene a supplemental hearing for either party to offer any additional relevant evidence. In particular, the employer was not able to offer the testimony of the lead inspector at the last hearing due to his absence for personal reasons, and the claimant shall be

[2] There does not appear to be Florida case law directly on point, but Professor Ehrhardt makes this observation. Charles W. Ehrhardt, FLORIDA EVIDENCE, §614.1, n.13 (2014) (discussing the holding in *Kiwanas Club of Little Havana, Inc. v. de Kalafe*, 723 So. 2d 838, 842 (Fla. 3d DCA 1998)).

given one last chance to either obtain the testimony of the union representative, a written statement from her, or a transcript if the alleged statements by the employee were given in a proceeding.[3] The employer may also call any of the witnesses from whom it provided statements if desired. Either party may submit any copies of the results of any arbitration if such occurred.

In order to address the foregoing issues, the referee's decision is vacated, and this matter is remanded to a new referee for a supplemental hearing and rendition of a new decision. If necessary, the referee's decision should also include an appropriate credibility determination in accordance with Florida Administrative Code Rule 73B-20.025(3)(d)2.

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 2/29/2016, 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

[3] The claimant is advised that a grievance submission that summarizes a party's position is not the same as a witness statement, and may not be competent evidence depending on the circumstances.

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

*45311908 *

Docket No.0025 9189 24-04 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

APPEARANCES Claimant

Employer

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 was a carrier with the until April 2015. On March 5, 2015, a teller reported

witnessing the claimant placing a screw behind the right front tire of the car in the parking lot. The teller collected a screw and reported what the claimant did to the . The claimant was placed on an emergency suspension and later discharged after an investigation showed that she violated the rules of conduct.

Conclusions of Law: The law provides that a claimant who was discharged for misconduct connected with the work will be disqualified for benefits.

“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 beconstrued 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. Such conduct may include, but is not limited to, willful damage to an employer’s property that results in damage of more than $50; 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 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) 1. A violation of an employer's rule, unless the claimant can demonstrate that:

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

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

c. The rule is not fairly or consistently enforced.

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

The record reflects that the claimant was discharged. The burden of proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla.5th DCA 1986). The proof must be by a preponderance of competent substantialevidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee HousingAuthority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). The employer offered a statement from an eye witness of the alleged vandalism which asserted the claimant tried to pop a tire. The claimant testified that she did not do this and asserted that later the witness changed his story. The witness statement is hearsay. Hearsay evidence may be used for the purpose ofsupplementing or explaining other evidence, or to support a finding if it wouldbe 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 referee would ask the eye witness those questions the interviewer seemed to ask in the notes the claimant read into the hearing record. The eye witness was not present for the hearing and therefore could not respond to concerns about precisely what he saw and the conditions under which he made his observations.

Also the parcel contains a statement from a tire shop employee where the claimant's alleged remarks were clearly construed as an admission. The referee is inclined to view the statement of the tire shop employee as consistent with the claimant's testimony asserting she was innocent and not as an admission of wrongdoing.

Misconduct was not shown. The claimant is qualified.

The hearing officer was presented with conflicting testimony regarding material issues off act and is charged with resolving these conflicts. The Reemployment Assistance Appeals Commission set forth factors to be considered in resolving credibilityquestions. These 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 claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

Decision: The determination dated May 19, 2015, is REVERSED.

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 August 26, 2015.

B. BENNITT
Appeals Referee

Paulette A. Allison

By:

PAULETTE ALLISON, 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.
