

**STATE OF FLORIDA**  
**REEMPLOYMENT ASSISTANCE APPEALS COMMISSION**

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 14-03313

vs.

Referee Decision No. 0022633415-02U

Employer/Appellee

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**ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION**

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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 ineligible for benefits and that she received reemployment assistance to which she was not entitled and is liable to repay.

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 issues before the Commission are whether the claimant was totally or partially unemployed within the meaning of Section 443.036(45), Florida Statutes (2013), and whether she received any sum as benefits under the reemployment assistance law to which she is not entitled as provided in Section 443.151(6), Florida Statutes.

The referee's findings of fact state as follows:

The claimant filed a claim for reemployment benefits effective May 2013. The claimant's weekly regular benefit amount is \$275. The [claimant] worked as a teacher for an [educational] institution from August 2012 through May 24, 2013. The claimant received regular benefits from weeks ended June 8, 2013, through June 29, 2013, for a total weekly benefit amount [of] \$1,100. The claimant is under a ten[-]month contract in which the employer withhold[s] a percentage of her wages in order for the claimant to receive

earnings during school breaks or over a 12[-]month period. According to Department records, the claimant received \$536 [in earned income] for the benefit weeks of June 8, 2013, through June 29, 2013, and regular benefits [totaling] \$1,100.

Based on these findings, the referee, in effect, held the claimant ineligible for receipt of benefits for the weeks ending June 8, 2013, through June 29, 2013, and that she received reemployment assistance to which she was not entitled and is liable to repay. Upon review of the record and the arguments on appeal, the Commission concludes a material finding of the referee is not supported by the record evidence and the record was not sufficiently developed; consequently, the case must be remanded.

The referee's findings of fact reflect the claimant was paid \$536 by this employer for the weeks ending June 8 through June 29, 2013. The record reflects, however, that while the claimant acknowledged she received pay during the summer per the employer's policy, the referee did not ask nor did the claimant testify as to the specific amount she was paid each week. This information is material to the case because if the claimant's weekly earnings are less than her weekly benefit amount, she may be eligible for partial benefits. See §443.111(4), Fla. Stat. The referee purportedly relies on "Department records" to make the above-stated finding; however, these records were not identified at the hearing and do not appear in the electronic appeals folder for this case. Therefore, they are not a part of the record in this case. Pursuant to Florida Administrative Code Rule 73B-20.025(2), referee decisions must be based solely upon matters contained in the official record. Accordingly, the referee erred in relying on information outside of the record in making this finding of fact. On remand, the referee is directed to question the claimant regarding the amount she was paid each week for the applicable time period and render a new decision. Aside from this procedural error, however, the Commission concludes the referee's decision is fundamentally correct.

Eligibility for benefits is governed by Sections 443.091 and 443.111, Florida Statutes. Section 443.091(1) provides that "[a]n *unemployed* individual is *eligible* to receive benefits for any week only if the Department of Economic Opportunity finds that" the requirements of subparagraphs (a)-(h) have been met [emphasis added]. Section 443.111(4), Florida Statutes, provides as follows:

#### **WEEKLY BENEFIT FOR UNEMPLOYMENT.—**

- (a) *Total.*—Each *eligible* individual who is *totally unemployed* in any week is paid for the week a benefit equal to her or his weekly benefit amount.

(b) *Partial.*—Each *eligible* individual who is *partially unemployed* in any week is paid for the week a benefit equal to her or his weekly benefit less that part of the earned income, if any, payable to her or him for the week which is in excess of 8 times the federal hourly minimum wage. These benefits, if not a multiple of \$1, are rounded downward to the nearest full dollar amount (emphasis added).

As these provisions indicate, the most fundamental eligibility requirement for receipt of reemployment assistance benefits is that an individual be “unemployed” within the meaning of the statute, either totally or partially.

Unemployment is further defined as follows:

“Unemployment” or “unemployed” means:

(a) *An individual is “totally unemployed” in any week during which he or she does not perform any services and for which earned income is not payable to him or her.* An individual is “partially unemployed” in any week of less than full-time work if the earned income payable to him or her for that week is less than his or her weekly benefit amount. The Department of Economic Opportunity may adopt rules prescribing distinctions in the procedures for unemployed individuals based on total unemployment, part-time unemployment, partial unemployment of individuals attached to their regular jobs, and other forms of short-time work.

§443.036(45), Fla. Stat. (2013). The definition of total unemployment is conjunctive; thus, to be totally unemployed, the individual must show that she meets both requirements of the definition, that is, she does not perform any services in that week, *and* earned income is not payable to her *for* that week. The claimant bears the burden of proving eligibility for benefits. *Florida Industrial Commission v. Ciarlante*, 84 So. 2d 1, 4-5 (Fla. 1955). See also U.A.C. Order Nos. 11-06180 (June 27, 2011); 10-09247 (October 7, 2010). The facts of the case demonstrate that while the claimant did not perform services for the employer in June 2013, earned income was payable to her for those weeks by contract with the employer, because the claimant received equalized earnings over the 12-month calendar year for her work during the ten-month school year. There is no requirement in the definition of unemployment that the earned income that is payable for a week, constitute payment for services rendered *during that week*. Accordingly, the referee properly concluded that the claimant was not eligible during the weeks she was receiving equalized pay from her employer unless, as noted above, the claimant’s weekly pay from her employer was less than her weekly benefit amount.

We are aware of the decision of the First District Court of Appeal in *Bryant v. Unemployment Appeals Commission*, 61 So. 3d 1181 (Fla. 1st DCA 2011). The *Bryant* court incorrectly concluded that the Commission had “disqualified” Bryant because he performed services in one week, and also concluded that the statute “excludes only those persons who work and earn income from the definition of ‘totally unemployed.’” *Id.* at 1183. The *Bryant* court’s conclusion that the requirement of unemployment is a “disqualifying” provision and an “exclusion” is inherently at odds with the Supreme Court decision in *Ciarlante*, which noted that “[i]neligibility and disqualification as used in the act do not mean the same thing and are not intended to be applicable to the same conditions. Eligibility relates to 'a status indispensable to the operation of the act' whereas disqualification refers to a limited deprivation of benefits because of a specific affirmative act.” 84 So. 2d at 4. We think it obvious that *unemployment* is “a status indispensable to the operation of the act”; indeed, it is listed as the fundamental prerequisite for eligibility in Section 443.091(1), Florida Statutes. Because the claimant bears the burden of establishing unemployment, the conjunctive requirements of the definition must both be satisfied by her.

The record in this case also raises another potential issue. The claimant’s testimony in the hearing indicated that she had been employed “off and on” with this employer for six years. She also testified that she had the same issue in this case come up the prior year. However, we have found no indication whether the Department has addressed the issue of whether the ineligibility provisions of Section 443.091(3), Florida Statutes, relating to eligibility of educational personnel for benefits during school break periods, apply to this claimant. The Department is instructed to investigate this issue.

In order to address the foregoing issues, the referee’s decision is vacated and the case is remanded for further proceedings. On remand, the referee is directed to hold a supplemental hearing to develop the record as outlined above and render a new decision that contains accurate and specific findings of fact and a proper analysis of those facts. Any hearing convened subsequent to this order shall be deemed supplemental, and all evidence currently in the record shall remain in the record.

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

1/16/2015

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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



\*29003188 \*

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Docket No.0022 6334 15-02

Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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***CLAIMANT/Appellant***

***EMPLOYER/Appellee***

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APPEARANCES

Claimant

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#### **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:** REEMPLOYMENT ASSISTANCE: Whether the claimant was totally or partially unemployed, pursuant to Sections 443.036(44); 443.111(4), Florida Statutes.

OVERPAYMENT: Whether the claimant received benefits to which the claimant was not entitled, and if so, whether those benefits are subject to being recovered or recouped by the Agency, pursuant to Sections 443.151(6); 443.071(7), 443.1115; 443.1117, Florida Statutes and 20 CFR 615.8.

**Findings of Fact:** The claimant filed a claim for reemployment benefits effective May 2013. The claimant's weekly regular benefit amount is \$275. The worked as a teacher for an education institution from August 2012, through May 24, 2013. The claimant received

regular benefits from weeks ended June 8, 2013, through June 29, 2013, for a total weekly benefit amount \$1,100. The claimant is under a 10 month contract in which the employer withhold a percentage of her wages in order for the claimant to receive earnings during school breaks or over a 12 month period. According to Department records, the claimant received \$536 for the benefit weeks of June 8, 2013, through June 29, 2013 and regular benefits totally \$1,100.

**Conclusions of Law:** The law provides that a claimant who was not entitled to benefits received must repay the overpaid benefits to the Agency. The law does not permit waiver of recovery of overpayments.

The record reflects that the claimant filed for reemployment benefits after she separated from her last employer. The claimant's weekly benefit is \$275. It was shown that the claimant received \$1,100 before disqualification. The evidence shows that the claimant is under a 10 month contract with the employer that will allow the claimant to receive income through school vacation or summer breaks. The claimant opting to accept this agreement resulted in the claimant earning \$536 for the benefit weeks of June 8, 2013, through June 29, 2013 which is in excess of her weekly benefit amount. Thus, the amount of \$1,100 received by the claimant, is considered an overpayment and is subject to recovery or recoupment by the Department.

**Decision:** The determination dated May 29, 2014, determining the claimant was overpaid \$1,100 due to incorrect reporting, is affirmed.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

This is to certify that a copy of the above decision was distributed to the last known address of each interested party on June 26, 2014

**SHANNA JONES**  
Appeals Referee

By:



KIMBERLY MARTIN, Deputy Clerk

**IMPORTANT - APPEAL RIGHTS:** This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the mailing date shown. If the 20<sup>th</sup> 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](http://connect.myflorida.com) or by writing to the address at the top of this decision. The date of the confirmation page will be the filing date of a request for reopening on the Department's Web Site.**

A party who attended the hearing and received an adverse decision may file a request for review to the Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); <https://raaciap.floridajobs.org>. If mailed, the postmark date will be the filing date. If faxed, hand-delivered, delivered by courier service other than the United States Postal Service, or submitted via the Internet, the date of receipt will be the filing date. To avoid delay, include the docket number and claimant's social security number. A party requesting review should specify any and all allegations of error with respect to the referee's decision, and provide factual and/or legal support for these challenges. Allegations of error not specifically set forth in the request for review may be considered waived.

**IMPORTANTE - DERECHOS DE APELACIÓN:** Esta decisión pasará a ser final a menos que una solicitud por escrito para revisión o reapertura se registre dentro de 20 días de calendario después de la fecha marcada en que la decisión fue remitida por correo. Si el vigésimo (20) día es un sábado, un domingo o un feriado definidos en F.A.C. 73B-21.004, el registro de la solicitud se puede realizar en el día siguiente que no sea un sábado, un domingo o un feriado. Si esta decisión descalifica y/o declara al reclamante como inelegible para recibir beneficios que ya fueron recibidos por el reclamante, se le requerirá al reclamante reembolsar 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](http://connect.myflorida.com) o escribiendo a la dirección en la parte superior de esta decisión. La fecha de la página de confirmación será la fecha de presentación de una solicitud de reapertura en la página de Internet del Departamento.**

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); <https://raaciap.floridajobs.org>. Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [docket number] y el número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

**ENPÒTAN - DWA DAPÈL:** Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat nou poste sa a ba ou. Si 20<sup>yém</sup> 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](http://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.

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