

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-04961

vs.

Referee Decision No. 0023220370-03U

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 and charged the employer's account.

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 issue before the Commission is whether the claimant was discharged by the employer for misconduct connected with work as provided in Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

The claimant worked full time as an armed security officer for [the employer] from June 2013 to May 28, 2014. The employer has a policy that armed security officers must carry and secure their firearms inside their holsters unless it is being used for a life-threatening emergency. The claimant was aware of the policy. The employer has a rule that removal of a firearm without using it for a life-threatening emergency will result in immediate termination, even on the first offense. Three weeks prior to the separation, the claimant removed his firearm so that he could sit to use the restroom at the hospital where he was assigned to work. The claimant placed the firearm on the towel rack. Someone

pulled the fire alarm, and the claimant immediately left the restroom. A few minutes later, the claimant realized that he left his firearm in the restroom; and he went back to get the firearm. The firearm was gone. A volunteer found the firearm and turned it in at the lobby. The claimant and a supervisor went to the lobby after receiving a call about a firearm. The claimant responded, "That's my firearm." The claimant retrieved his firearm and went to the camera room to explain to his supervisors about how he left the firearm in the restroom. The claimant's supervisor told the claimant not to worry about it since something [sic] happened. Subsequently, the COO became aware of the firearm incident and contacted the operations manager, asking if the employer had a weapons policy. The operations manager told the COO that removal of a firearm from the holster is grounds for immediate termination. The COO instructed the operations manager to discharge the claimant. The COO discharged the claimant's supervisor. The operations manager contacted the claimant on May 28, 2014, and informed him that he was suspended pending termination from the review committee. The claimant filed a Florida reemployment assistance claim. Subsequently, the claimant became advised by the Department that he was discharged by the employer.

Based on these findings, the referee held the claimant was discharged for reasons other than misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee's decision is not supported by competent, substantial evidence, and, further, is not in accord with the law; accordingly, it is reversed.

Section 443.036(30), Florida Statutes (2013), states that misconduct connected with work, "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 a 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.

(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.

At the hearing before the appeals referee, the claimant testified that he removed his firearm from its holster, left the restroom after the fire alarm went off at the hospital where he was working and forgot he left the firearm in the restroom. The referee held the discharge was for reasons other than misconduct because the employer did not present the specific policy at the hearing, the claimant denied reading the policy, and the claimant's actions, while careless, were not intentional. While the claimant might not have intentionally left his firearm in the restroom, this cannot insulate him from culpability for his actions because a firearm, an inherently dangerous instrument, requires a higher degree of care be exercised regarding its safekeeping than an ordinary work item, and he *intentionally* removed the firearm from its holster, an act that violated the employer's rule by itself. Furthermore, negligent or inadvertent violations of an employer's rule may still subject an employee to disqualification. When evaluating cases involving negligent

or inadvertent rule violations, the Commission weighs the nature and purpose of the employer's rule that was violated against the degree of culpability on the part of the claimant in violating the rule. *See, e.g.*, R.A.A.C. Order No. 13-07369 (November 6, 2013); R.A.A.C. Order No. 13-04567 (August 7, 2013). In particular, in examining the nature and purpose of the rule, the Commission examines the harm or potential harm the rule is designed to prevent, and the impact of a violation or potential violation on the employer, the claimant, coworkers, customers or clients, or the public at-large. *Id.* In this case, the factors led strongly to the conclusion that the rule was fairly enforced. The claimant testified that he removed his firearm from its holster because it was easier for him than removing the holster when he needed to use the restroom. Regardless of the reason the claimant removed his firearm from its holster, which in this case was only for personal convenience, he was required to keep his firearm holstered *and in his immediate possession* to prevent accidents, theft or loss of the weapon (which is precisely what occurred in this case), and could, ultimately, have resulted in a death or serious injury. The claimant was clearly negligent in leaving his firearm in the restroom, even given the possibly exigent situation, and the potential harm was great.

The employer's policy required that armed security officers must carry and secure their firearms inside their holsters unless it is being used for a life-threatening emergency to prevent accidents. The employer's rule, therefore, was lawful and reasonably related to the job environment and performance.

Although at one point in her decision, the referee concluded that the claimant had not read or received the employer's policy, the referee found the claimant was aware of the policy and noted in her conclusions that he had received the policy. While the claimant denied reading the specific policy, he admitted to receiving the employee manual containing the policy, as the referee noted; therefore, he either knew or reasonably should have known of the policy. A claimant's failure to read an employer handbook does not absolve that individual of the responsibility of doing so and abiding by the employer's policies. The claimant's acknowledgment of receipt of the handbook constitutes constructive acknowledgment of receipt of the policy involving his firearm. Additionally, while the referee noted that the employer did not present the specific policy for the hearing, the policy was not so inherently complicated that the actual document needed to be presented into evidence or read into the record. In any event, the claimant admitted that he was aware of the policy, and the referee made a finding to that effect. The claimant's actions can, therefore, properly be analyzed in the context of a rule violation. Since the policy was lawful and reasonable, and there was no evidence that it was unfairly or inconsistently enforced, the claimant's actions constitute misconduct under subparagraph (e).

The Commission further concludes that the claimant's removal of his firearm, for his convenience while using the restroom and then leaving the firearm in the restroom after a fire alarm went off, was carelessness or negligence of such a degree that it showed an intentional and substantial disregard of the employer's interests or of his duties and obligations to his employer under Section 443.036(30)(b), regardless of whether his actions are viewed as a mistake or an isolated occurrence. Accordingly, the Commission concludes the discharge was for misconduct connected with work as that term is used within the meaning of the reemployment assistance compensation law.

The decision of the appeals referee is reversed. The claimant is disqualified from receipt of benefits for the week ending May 31, 2014, the five succeeding weeks, and until he becomes reemployed and earns \$4,675. As a result of this decision of the Commission, benefits received by the claimant for which the claimant is not entitled may be considered an overpayment subject to recovery, with the specific amount of the overpayment to be calculated by the Department and set forth in a separate overpayment determination.

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
1/27/2015,
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



*32479658 *

Docket No.0023 2203 70-03

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

CLAIMANT/Appellant

EMPLOYER/Appellee

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.

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

CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant will be charged to the employment record of the employer, pursuant to Sections 443.101(9); 443.131(3)(a), Florida Statutes; Rules 73B-10.026; 11.018, Florida Administrative Code. (If charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

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.

CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant will be charged to the employment record of the employer, pursuant to Sections 443.101(9); 443.131(3)(a), Florida Statutes; Rules 73B-10.026; 11.018, Florida Administrative Code. (If charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

Jurisdictional Issue: The Department issued a *Notice of Telephone Hearing*, to the claimant that was scheduled for August 18, 2014. The claimant did not appear because he did not hear his cell phone ring due to the poor reception in his home. The claimant checked his phone around 10:30AM and saw two missed calls. The claimant contacted the Department the same day and was advised to file a reopen request. The next day, the claimant filed an online appeal reopen request.

A case will be re-opened for a hearing on the merits 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 shows that the claimant did not appear for the August 18, 2014 due to not hearing the phone ring. The claimant filed a hearing reopen request on August 19, 2014. The claimant provided good cause for missing the first hearing; therefore, the hearing officer has jurisdiction to proceed with an additional hearing.

Findings of Fact: The claimant worked full time as an armed security officer for from June 2013 to May 28, 2014. The employer has a policy that armed security officers must carry and secure their firearms inside their holsters unless it is being used for a life-threatening emergency. The claimant was aware of the policy. The employer has a rule that removal of a firearm without using it for a life-threatening emergency will result in immediate termination, even on the first offense. Three weeks prior to the separation, the claimant removed his firearm so that he could sit to use the restroom at the hospital where he was assigned to work. The claimant placed the firearm on the towel rack. Someone pulled the fire alarm, and the claimant immediately left the restroom. A few minutes later, the claimant realized that he left his firearm in the restroom; and he went back to get the firearm. The firearm was gone. A volunteer found the firearm and turned it in at the lobby. The claimant and a supervisor went to the lobby after receiving a call about a firearm. The claimant responded, "That's my firearm." The claimant retrieved his firearm and went to the camera room to explain to his supervisors about how he left the firearm in the restroom. The claimant's supervisor told the claimant not to worry about it since something happened. Subsequently, the COO became aware of the firearm incident and contacted the operations manager, asking if the employer had a weapons policy. The operations manager told the COO that removal of a firearm from the holster is grounds for immediate termination. The COO instructed the operations manager to discharge the claimant. The COO discharged the claimant's supervisor. The operations manager contacted the claimant on May 28, 2014, and informed him that he was suspended pending termination from the review committee. The claimant filed a Florida reemployment assistance claim. Subsequently, the claimant became advised by the Department that he was discharged by the employer.

Conclusions of Law: As of May 17, 2013, 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 material 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 behaviour which the employer expects of his or her employee. Such conduct may include, but is not limited to, wilful 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 approved absence.
- d. A wilful 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;

supervisor. The claimant's immediate supervisor did not reprimand the claimant for the incident. In fact, the claimant's supervisor did not report the incident at all. The COO found out about the incident a few weeks later and instructed the operations manager to discharge the claimant. Ultimately it was the claimant's supervisor's responsibility to report the incident to the COO so a proper disposition or disciplinary action would have occurred in a timely manner. The supervisor erred in not reporting the incident. Some consideration was given to the employer's witness' testimony that the employer's policy advised that removal of a firearm from the holster was a terminable offense, even on the first infraction; however, that specific language in the employee manual was not provided for the hearing. Furthermore, the claimant rebutted that he neither read nor received such a policy. While the claimant's actions in leaving the firearm in the restroom may be considered to be careless, the employer's witness failed to establish that it was intentional. Careless and negligent acts which may justify termination but are neither willful, wanton nor deliberate are not misconduct under the statutes. See *Williams v. Unemployment Appeals Commission*, 484 So.2d 89 (Fla. 5th DCA 1986). Therefore, the claimant was discharged for reasons other than misconduct under the statutes. Accordingly, the claimant is not disqualified from receiving benefits.

The law provides that benefits will not be charged to the employment record of a contributing employer who furnishes required notice to the Department when the claimant was discharged for misconduct connected with the work.

The record shows that the claimant was discharged for reasons other than misconduct connected with his work. Accordingly, benefits paid in connection with this claim will be charged to the employer.

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 set forth factors to be considered in resolving credibility questions. 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 July 28, 2013 is REVERSED. The claimant is qualified to receive benefits beginning July 6, 2014. Benefits paid in connection with this claim will be charged to the employer.

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 September 12, 2014.

Selena Neal
Appeals Referee

By: 

DESYREE JONES, 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 envío 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 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 definitiv sòs 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 mesajè lòt pase Etazini Sèvis nan Etazini Nimewo, oswa soumèt sou Entènèt la, dat yo te resevwa ap dat li ranpli aplikasyon. Pou evite reta, mete nimewo rejis la ak nimewo sosyal demandè a sekirite. Yon pati pou mande revizyon ta dwe presize nenpòt ak tout akizasyon nan erè ki gen rapò ak desizyon abit la, yo epi bay sipò reyèl ak / oswa legal pou defi sa yo. Alegasyon sou erè pa espesyalman tabli nan demann nan pou revizyon yo kapab konsidere yo egzante.

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