STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 15-02267

vs.

Referee Decision No. 0024964811-05U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of an appeal of the decision of a reemployment assistance appeals referee pursuant to Section 443.151(4)(c), Florida Statutes. The referee's decision stated that a request for review should specify any and all allegations of error with respect to the referee's decision, and that allegations of error not specifically set forth in the request for review may be considered waived.

Upon appeal of an examiner's determination, a referee schedules a hearing. Parties are advised prior to the hearing that the hearing is their only opportunity to present all of their evidence in support of their case. The appeals referee has responsibility to develop the hearing record, weigh the evidence, resolve conflicts in the evidence, and render a decision supported by competent, substantial evidence. Section 443.151(4)(b)5., Florida Statutes, provides that any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not such evidence would be admissible in a trial in state court. 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 Section 120.57(1)(c), Florida Statutes, hearsay evidence may support a finding of fact if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and 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 Commission's review is generally limited to the evidence and issues before the referee and contained in the official record. A decision of an appeals referee cannot be overturned by the Commission if the referee's material findings are supported by competent, substantial evidence and the decision comports with the legal standards established by the Florida Legislature. The Commission cannot reweigh the evidence or consider additional evidence that a party could have reasonably been expected to present to the referee during the hearing. Additionally, it is the responsibility of the appeals referee to judge the credibility of the witnesses and to resolve conflicts in evidence, including testimonial evidence. Absent extraordinary circumstances, the Commission cannot substitute its judgment and overturn a referee's conflict resolution.

Having considered all arguments raised on appeal and having reviewed the hearing record, the Commission concludes no basis exists to reopen or remand the case for further proceedings. The Commission concludes the record adequately supports the referee's material findings, such as they are, and they are adopted. However, contrary to the referee's conclusions, the document provided to the employer by the Food and Drug Administration referring to an illegal sale of tobacco products to a minor, although not admissible as a business record, was admissible as a public record pursuant to Section 90.803(8), Florida Statutes, as well as the residual exception in Section 443.151(4)(b)5.c.(I)-(II), Florida Statutes. Based on the referee's analysis, it appears that she erroneously concluded that the evidence was not trustworthy because it did not contain what she deemed to be sufficient information to prove a material fact. The trustworthiness of a document is determined by the apparent reliability of the information considering the sources it is derived from. Whether the evidence in the document is sufficient to prove an ultimate issue is not the test for admissibility. We also conclude that the evidence in this case was sufficient to establish that the individual identified as the person who sold the product to the inspector was the claimant.

Because the record evidence is insufficient to support a reasonable inference that the claimant knowingly sold tobacco products to a minor, whether the employer proved that the claimant was discharged for misconduct depends upon whether the claimant violated its rules regarding sales of tobacco products. While the evidence was sufficient to establish that the claimant sold tobacco products to a minor, it was not sufficient to establish that the claimant violated the employer's verification policy that required the claimant to check identification for anyone appearing under the age of 30. As we have noted in prior cases, such policies inherently require the employee to exercise a degree of judgment as to whom to "card." *See* R.A.A.C. Order No. 13-05642 (September 26, 2013) (affirming non-disqualification of individual for failing to request identification of a customer who the claimant believed looked over the employer's age threshold). It is also well known that government agencies regulating such sales intentionally select

individuals to perform such inspections who look older than they are. The evidence in this case contains no information at all on the appearance of the individual to whom the claimant sold tobacco products, and no evidence to support an inference that the claimant could not or did not believe the individual to be 30 years of age or older. For these reasons, we affirm the referee's decision that the employer failed to establish a prima facie case of misconduct.

The referee's decision is affirmed. The claimant is not disqualified from receipt of benefits as a result of this claim.

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

7/31/2015 ,

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: Mary Griffin
Deputy Clerk

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

*41385227 *

Docket No.0024 9648 11-05 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

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

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.

NONAPPEARANCE: A hearing was scheduled in this matter for March 23, 2015 at 2:00 p.m.. The employer was aware of the scheduled hearing but did not appear at the hearing because it did not receive a call for the hearing. The hearing officer attempted to contact the

employer but the number never rang. The employer was not having any issues with its phone line at the time of the scheduled hearing. The employer's agent, Equifax, submitted a request to reopen to the Department on April 1, 2015.

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 reflects that the employer did not appear at the March 23, 2015 hearing because it did not receive a call for the hearing. The employer's reason for failing to appear is considered compelling. The employer exercised due diligence in requesting re-opening within twenty days of the decision. The employer has established good cause for its nonappearance and is entitled to a hearing on the merits of the case.

FINDINGS OF FACT: The claimant worked for the employer, , from July 14, 2014 to December 4, 2014. At the time of separation the claimant was a store clerk. The employer has a policy regarding tobacco sales which states that employees must ask for ID from customers buying tobacco products to ensure that the customer is of legal age to purchase the products. The policy further states that failing to follow the policy guidelines will result in disciplinary action, up to and including termination. On November 30, 2014, the claimant allegedly sold a tobacco product to a minor. The claimant's supervisor received a letter in December 2014 which stated that an FDA inspector "reported that a minor was able to enter your establishment and purchase a regulated tobacco product." The supervisor then turned the letter over to her manager. The claimant was subsequently discharged on or about December 4, 2014 for selling a tobacco product to a minor.

CONCLUSIONS OF LAW: The Reemployment Assistance Law of Florida defines "misconduct," irrespective of whether the misconduct occurs at the workplace or during working hours, as, but not limited to the following, which may not be construed in pari materia with each other:

c. 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.

f. 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.

g. 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:

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. In cases of discharge, the burden is on the employer to establish that the discharge was for misconduct connected with work. 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 in the instant case established that it has a policy which prohibits the sale of tobacco products to underage customers and requires employees to check IDs to ensure that the customer is of legal age to buy the products.

The employer asserted that the claimant was discharged on or about December 4, 2014 for selling tobacco to a minor on November 30, 2014. The employer presented testimony and evidence regarding the events that led to the claimant's discharge; however, that testimony and evidence was primarily hearsay. Hearsay evidence is an oral or written assertion made outside the hearing, which is offered into evidence to prove the truth of the matter asserted. See Fla. Stat. § 90.801. 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. See Fla. Stat. § 120.57. Notwithstanding Section 120.57(1)(c), hearsay evidence may support a finding of fact if:

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

II. b. 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 hearing officer does not find it to be in the interests of justice to admit this hearsay. Although the employer presented a copy of the violation notice it received which stated that the claimant had sold a tobacco product to a minor, that document, standing alone, is not sufficient to establish that the claimant violated the employer's policy or otherwise engaged in misconduct. The notice is vague concerning the specifics of the alleged incident, and without reliable information concerning the specific incident and how it was observed or initially reported, the hearing officer does not find the document, standing alone, to be trustworthy. Discounting the hearsay evidence, there remains no competent substantial evidence to prove that the claimant was discharged for misconduct connected with work pursuant to Florida Statutes Section 443.036(29)(a) or (e). The employer has not established by competent substantial evidence that the claimant sold tobacco to a minor. The claimant is therefore qualified for receipt of benefits. The hearing officer lacks jurisdiction to address the employer's chargeability. That issue, if not already determined, will be addressed in a separate decision by an adjudicator.

DECISION: The determination dated January 29, 2015, qualifying the claimant, if **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/mailed to the last known address of each interested party on April 29, 2015.

K. WORTNER
Appeals Referee

By: Kristi Snyder

Kristi Snyder, 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.
