This case comes before the Commission for consideration of an appeal of the decision of a reemployment assistance appeals referee. The referee’s decision advised that a request for review should specify any and all contentions of error with respect to the referee’s decision, and that contentions of error not specifically raised in the request for review may be considered waived. The Commission has jurisdiction pursuant to Section 443.151(4)(c), Florida Statutes.

The Commission’s review is generally limited to the issues before the referee and the evidence and other pertinent information contained in the official record. Parties are advised prior to the appeals hearing before the referee that the hearing is their only opportunity to present evidence in support of their position in the case. The referee has the responsibility to develop the hearing record, weigh the evidence, judge the credibility of the witnesses, resolve conflicts in the evidence, and render a decision supported by competent and substantial evidence. The Commission reviews the evidentiary and administrative record and the referee’s decision to determine whether the referee followed the proper procedures, adequately developed the evidentiary record, made appropriate and properly supported findings, and properly applied the reemployment assistance law established by the Florida Legislature. The Commission cannot reweigh the evidence and the inferences to be drawn from it. Further, absent extraordinary circumstances, the Commission cannot give credit to testimony contrary to that accepted as true by the referee.

Having considered all arguments raised on appeal and having reviewed the hearing record, the Commission concludes that the referee sufficiently followed the proper procedures and the case does not require reopening or remanding for further proceedings. The referee’s findings that “The employer’s written code of conduct,
known to the claimant, mandates the termination of any employee convicted of any crime, whether on duty or not” is corrected to reflect the employer’s personnel rules provide for the discharge of an employee who has been “convicted of a felony, or of a misdemeanor involving moral turpitude.” The findings are otherwise supported by competent, substantial evidence.

Analysis

The employer discharged the claimant after she was charged with, and ultimately pled guilty to, crimes relating to public assistance fraud. There was no evidence that she committed the crimes during her work hours, and the employer was not the victim of the crimes.

The employer began disciplinary proceedings after learning of the arrests. The claimant was charged with violations of Personnel Rules 7(I) (Conduct Unbecoming) and 7(L) (Violation of Department Rules). At the time, the claimant was not charged with a violation of Rule 7(G), presumably because the criminal charges had not yet been resolved. Subsequently, the employer discharged the claimant by letter dated August 17, 2016, citing the same rules. The employer did not identify Section 7(G) during disciplinary proceedings below, even though the claimant had pled guilty prior to the final discipline being imposed. The employer did, however, reference her plea to those charges in the Disciplinary Action Report.

Effective May 17, 2013, Section 443.036(29), Florida Statutes, 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 (emphasis added).

This case raises two broad issues. First, did the employer establish that it discharged the claimant for a violation of any “rules” within the meaning of Section 443.036(29)(e), Florida Statutes, and if so, which ones; and second, can the claimant establish any of the defenses to the “rule” violation?

There is no question that the Personnel Rules Section 7 meet the requirements for “rules” within the meaning of subparagraph (e). The employer has established that the claimant’s actions would reasonably be understood to constitute “conduct unbecoming an employee of the County, whether on or off duty” within the meaning of Rule 7(I).1 “Conduct unbecoming” rules are inherently vague, but this does not defeat their effectiveness where the rule would give reasonable notice that particular behavior is grounds for discipline. See R.A.A.C. Order No. 13-06171 at pg. 5 (February 12, 2014) (citing Jones v. City of Hialeah, 294 So. 2d 686, 688 (Fla. 3d DCA 1974)).2 In this case, the claimant had adequate notice because the specific conduct that the Rule 7(I) violation is based on was also identified in the rules under 7(G). See generally St. Petersburg v. Pinellas County Police Benevolent Association, 414 So. 2d 293 (Fla. 2d DCA 1982) (holding “improper conduct” rule gave sufficient notice to satisfy due process as to police officer’s off-duty drunken driving, damage to property, and leaving the scene of an accident).

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1 Our review of the record does not reveal adequate proof that the claimant violated Transportation and Public Works Department rules, as Rule 112.19 requires a felony conviction for automatic discharge. Accordingly, we give no further consideration to Personnel Rule 7(L).
As to the broad issue of whether any of the defenses to a rule violation apply here, our discussion above resolves any concern as to the defense of whether the claimant knew or should have known of the rules’ requirements. However, we must also give consideration as to the defense of whether “The rule is . . . not reasonably related to the job environment and performance.” More specifically, can the employer’s rule be applied to disqualify the claimant from receipt of benefits for off-duty, non-work-related criminal behavior?

The cases before us make clear that governments, particularly local governments, regularly adopt rules that make employees subject to dismissal for particular types of off-duty conduct. In some cases, off-duty conduct may bear directly on the fitness of the employee to work in particular positions. However, even when that connection does not exist, local governments sometimes apply these rules to off-duty criminal conduct due to public accountability concerns. In other words, does a local government wish to employ individuals, using tax dollars, who engage in criminal acts that may undermine public confidence in that government? The County Code [§2-42(22)] answers that question from the point of view of the county.

We conclude that in the specific facts of this case, the rule is reasonably applied to the job. It is unfortunate that the claimant, a fourteen-year employee who according to her monetary determination earned almost $45,000 as a bus driver during her base year despite being suspended for one month of it, chose to engage in public benefits fraud. Because of the nature of her actions, we will not second-guess the public employer’s judgment that taxpayers should not be expected to retain an individual as an employee under these circumstances, and that doing so could undermine the public’s confidence in their local government. Accordingly, we hold that the referee’s ultimate decision is legally correct.
The referee's decision, as corrected above, is affirmed.

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

3/31/2017

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: Benjamin Bonnell
Deputy Clerk
Docket No.0029 4474 47-04

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

CLAIMANT/Appellant

EMPLOYER/Appellee

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 dèpèn enpòtan lan fen desizyon sa a.

Issues Involved:

SEPARATION: Whether the claimant was discharged for violation of any criminal law punishable by imprisonment or for any dishonest act or misconduct in connection with the work, pursuant to Section 443.101(1); 443.101(9), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

FINDINGS OF FACT: The claimant worked for the employer from December 17, 2002 until August 17, 2016. The claimant was employed full time as a bus driver. The employer’s written code of conduct, known to the claimant, mandates the termination of any employee convicted of any crime, whether on duty or not. Between January 7, 2013 and April 30, 2015 the claimant made false statements in writing related to her financial condition to the Food Assistance Benefits/Department of Children and Families with fraudulent intent of obtaining credit, goods and other property. Consequently, the claimant was arrested on 3rddegree public assistance fraud and charged on February 4, 2016. The felony charge was amended by the State Attorney of the Eleventh Judicial Circuit Court on April 29, 2016 to add three additional related misdemeanor
charges. The claimant pled guilty to the three misdemeanor counts and was placed on three years' probation. The claimant did report her arrest as required within three business days, the criminal activities of the claimant were deemed by the employer, pursuant to its written policy, to be conduct unbecoming a county employee and violative of [the employer's] personnel policy, and she was dismissed on August 17, 2017 following and internal review.

CONCLUSIONS OF LAW: The Reemployment Assistance Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed in pari materia with each other:

(a) Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.

(b) Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.

(c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

(d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

(e) A violation of an employer's rule, unless the claimant can demonstrate that:

1. He or she did not know, and could not reasonably know, of the rules' requirements;
2. The rule is not lawful or not reasonably related to the job environment and performance; or
3. The rule is not fairly or consistently enforced.

The claimant was discharged for misconduct connected with the work. The claimant did not deny her activities as presented by the employer's witness. The actions of the claimant were in gross violation of the reasonable standards of conduct expected of an employee.

There is a conflict in the testimony of the parties. The claimant testified that she should not have been fired because her activities were confined to off duty hours. The employer's superintendent for bus transportation testified that the employer's written policy clearly applies to off duty criminal activities of any employee. 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 employer's witness to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer. The claimant is disqualified for benefits.

DECISION: The September 21, 2016 determination finding the claimant disqualified for benefits 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/mailed to the last known address of each interested party on November 1, 2016.

C. NEUFFER III
Appeals Referee

By:

CLAUDETTE SILVERA, 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 the last five digits of the 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.

There is no cost to have a case reviewed by the Commission, nor is a party required to be represented by an attorney or other representative to have a case reviewed. The Reemployment Assistance Appeals Commission has not been fully integrated into the Department’s CONNECT system. While correspondence can be mailed or faxed to the Commission, no correspondence can be submitted to the Commission via the CONNECT system. All parties to an appeal before the Commission must maintain a current mailing address with the Commission. A party who changes his/her mailing address in the CONNECT system must also provide the updated address to the Commission, in writing. All correspondence sent by the Commission, including its final order, will be mailed to the parties at their mailing address on record with the Commission.
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 ineligible 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 los últimos cinco dígitos del 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 estos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

No hay ningún costo para tener un caso revisado por la Comisión, ni es requerido que una parte sea representada por un abogado u otro representante para poder tener un caso revisado. La Comisión de Apelación de Asistencia de Reempleo no ha sido plenamente integrado en el sistema CONNECT del Departamento. Mientras que la correspondencia puede ser enviada por correo o por fax a la Comisión, ninguna correspondencia puede ser sometida a la Comisión a través del sistema CONNECT. Todas las partes en una apelación ante la Comisión deben mantener una dirección de correo actual con la Comisión. La parte que cambie su dirección de correo en el sistema CONNECT también debe proporcionar la dirección actualizada a la Comisión, por escrito. Toda la correspondencia enviada por la Comisión, incluida su orden final, será enviada a las partes en su dirección de correo en el registro con la Comisión.

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 pe man anplis epi y ap détèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt détéminasyon, 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 Komisyón Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); [https://raaciap.floridajobs.org](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 senk dénye chif nimewo sekirite sosyal demandè a sosyal demandè a sekirite. Yon pati pou mande revizyon ta dwe presize nepòt 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.
This document contains important information, dates, or eligibility status regarding your Reemployment Assistance claim. It is important for you to understand this document. This document is available in Spanish and Creole. If you do not read or understand Spanish, English, or Creole, call 1-800-681-8102 for free translation assistance regarding your Reemployment Assistance claim.