STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 14-01455

vs.

Referee Decision No. 0008946537-02U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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 Commission notes that the employer's sole witness had no firsthand knowledge of the events leading to the claimant's discharge and, therefore, provided strictly hearsay testimony. The Commission further notes that, although the referee's decision contains no analysis of the competency of the employer's evidence, the record reflects the employer provided documentary evidence sufficient to satisfy the requirements of the business record exception of Section 90.803(6), Florida Statutes, and the residual hearsay exception provided in Section 443.151(4)(b)5.c., Florida Statutes. We conclude, however, that the referee's omission of a hearsay analysis is harmless error because the employer's documents were properly admissible, and because the decision is supported by the claimant's own testimony.

At the hearing before the appeals referee, the claimant acknowledged that, prior to August 23, 2013, she was instructed to read the "mini-Miranda" and other disclosures verbatim and that she was notified she could be personally sued by the debtor/customers for failing to do so. The claimant further acknowledged failing to recite the "recording" disclosure and the "mini-Miranda" verbatim as required in a telephone call on August 23, 2013, and acknowledged being suspended and placed on notice that her job was in jeopardy as a result of the regulatory compliance violation. The claimant's testimony reflects that she subsequently failed to read the

"FOTI" message verbatim, as required, during the September 4, 2013, incident for which she was discharged. The claimant's own testimony, therefore, reflects she was discharged for violating known policies of the employer less than two weeks after being disciplined and placed on notice that her job was in jeopardy for the same rule violation.

There are two rules at issue in this case. First, the employer, a debt collector governed by the Fair Debt Collection Practices Act (15 U.S.C. §1692 et seq.; 12 C.F.R. Part 1006) and related laws and regulations, developed specific call procedures including scripts for its employees to use to ensure strict compliance with the relevant laws. Second, the employer utilizes a progressive discipline policy that provides for increasing discipline for individuals who fail to comply with these call procedures. While the Commission has previously held that a routine, multistep work procedure is not generally a "rule" within the meaning of the Section 443.036(30)(e), Florida Statutes, *see* R.A.A.C. Order No. 13-05379 (November 5, 2013),[1] we conclude that a procedure mandated by governmental regulation and for which an employer thus requires strict compliance rises to the level of significance necessary to establish a "rule." Furthermore, a progressive discipline policy may constitute a "rule" where (1) the policy indicates what conduct is subject to discipline under the rule (which it can do by reference to other rules or standards); (2) it indicates the range of disciplinary actions for each offense; and (3) it ensures that an employee is disciplined only for actions for which the employee can be held culpable. We conclude that both of the employer's policies in this case are "rules" within the meaning of the reemployment assistance law.

The documentary evidence and the claimant's own testimony, show that while the claimant did not intentionally violate the employer's rules, she failed, after prior errors and warnings, to read from the scripts and instead recited them from memory. This evidence supports the referee's findings and the ultimate conclusion that the claimant should be disqualified under subparagraphs (a), (b), and (e) of Section 443.036(30), Florida Statutes. Thus, the Commission concludes that the record adequately supports the referee's material findings, and the referee's conclusion is a correct application of the pertinent laws to the material facts of the case.

The Reemployment Assistance Appeals Commission has received the request of the claimant's representative for the approval of a fee for work performed in conjunction with the appeal to the Commission, as required by Section 443.041(2)(a), Florida Statutes. In examining the reasonableness of the fee, the Commission is cognizant that: (1) in the event a claimant prevails at the Commission level, the law

[1] Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-05379.pdf.

contains no provision for the award of a representative's fees to the claimant's representative, by either the opposing party or the State (i.e., a claimant must pay his or her own representative's fee); and (2) the amount of reemployment assistance secured by a claimant may be very small. The legislature specifically gave referees (with respect to the initial appeal) and the Commission (with respect to the higher-level review) the power to review and approve a representative's fees due to a concern that claimants could end up spending more on fees than they could reasonably expect to receive in reemployment assistance.

Upon consideration of the complexity of the issues involved, the services actually rendered to the claimant, and the factors noted above, the Commission approves a fee of $650.

The referee's decision is affirmed. The claimant is disqualified from receipt of benefits. The employer's account is relieved of charges in connection with 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

8/22/2014 ,

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: Ebony Porter
Deputy Clerk

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

*24363768 *

Docket No.0008 9465 37-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES Employer

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.

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); 443.036(30), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

Finding of Facts: The claimant began her employment as a collector on May 7, 2012. The claimant was aware of the employer's progressive discipline policy. The claimant was aware of the employer's mini miranda script for calls, and she was aware of the foti script for messages. The claimant was aware that she was required to identify the agency when making outbound calls to customers. The claimant was aware that she was required to disclose non obligation disclosure for messages or calls to someone other than the customer. On February 9, 2013, the employer gave the claimant a written warnig for not verifying a middle initial to the caller and for failing to disclose the non obligation disclosure to the non customer. The claimant's team leader advised the claimant that she she had permission to notify the customer of DSA representation. The claimant did not remember using the word "urgent" during the call. The claimant chose not to inform the employer that the team leader gave her permission for the actions, because she decided that the employer was "intimidating." The claimant did not address HR about her concerns of intimidation. On March 3, 2013, the employer gave the claimant a written warning for not siting her name with the mini miranda. The claimant was aware of the rule. The claimant signed the warning on March 13, 2013; however, the warning stated the violation took place on March 3, 2012, and the employer informed the claimant that the next violation would result in a $2.00 hourly reduction or a 2 point merit reduction. On May 20, 2013, the employer gave the claimant a written counseling for failing to state the agency's name during an outbound call. The claimant was aware of the rule, and she did not site the agency's name during an outbound call. The employer reduced the claimant's hourly rate by $1.00, and informed her that the next violation would lead to suspension. Before August 23, 2013, the employer informed employees that they were required to read the mini miranda verbatiam. The claimant was aware of the rule. On August 23, 2013, the claimant did not read the mini miranda verbatiam. The claimant had access to the script. The claimant chose not to read the script. The claimant was suspended for one day. The claimant was aware that she was required to read the foti message verbatiam. On September 4, 2013, the claimant was on a call and did not read the foti mesage verbatiam. The claimant had access to the script and chose not to read it. On September 5, 2013, the claimant was discharged for violating the empoyer's rules.

Conclusions of Law: As of June 27, 2011, 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:

1. 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.
2. 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.
3. 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.
4. 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.
5. A violation of an employer's rule, unless the claimant can demonstrate that:
6. He or she did not know, and could not reasonably know, of the rules requirements;
7. The rule is not lawful or not reasonably related to the job environment and performance; or
8. The rule is not fairly or consistently enforced.

The record shows that the employer is the moving party in this separation. When an employer establishes prima facie evidence of misconduct, the burden shifts to the employee to come forward with proof of the propriety of that conduct. Alterman Transport Lines, Inc. v. Unemployment Appeals Commission, 410 So.2d 568 (Fla. 1st DCA 1982). The burden of proof in an employee discharge matter is initially upon the employer to prove misconduct. See Donnell v. University Community Hosp., 705 So. 2d 1031 (Fla. 2d DCA 1998). When the employer meets that initial burden, the employee is required to demonstrate the propriety of his/her actions. See Sheriff of Monroe County v. Unemployment Appeals Comm'n, 490 So. 2d 961 (Fla. 3d DCA 1986). Consideration was given to the cliamant regarding the written counseling for February 9, 2013, because she testified that the team leader gave her permission for her actions, and consideration has been given to the claimant regarding the March 13, 2013, written counseling, because the dates are conflicting and the employer's representative had no firsthand knowledge about the incident. However, the claimant's actions were a conscious disregard for the mepoyer's best interest when she did ot read the foti mesage and the mini miranda as directed in August and September. The claimant was aware of the rule, the employer informed the claimant of the consequences for failing to adhere to the rule. The claimant has failed to show that her actions were proper; therefore, she should not be qualified for said benefits, and the employer's tax account shoud not be charged ofr said benefits.

The hearing officer was presented with conflicting testimony regarding whether she was aware that the employer could be sued for violating the procedures for the foti mesage and mini miranda. In Order Number 2003 10946 (December 9, 2003), the Commission set forth factors to be considered in resolving credibility questions. These factors 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 to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

Decision: The determination dated Janaury 24, 2014, is REVERSED. The claimant is not qualified for said benefits from September 1, 2013, the following five weeks, and until she earns $3978. The employer's tax account is relieved of charges for said benefits.

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 March 7, 2014

NIKI MARTIN
Appeals Referee

Sherene M. Price

By:

SHERENE PRICE, 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 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 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 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 nou poste sa a ba ou. 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.
