STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-01576

vs.

Referee Decision No. 0020396643-02U

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.

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 referee's findings of fact state as follows:

> The claimant was employed as a loan service specialist for a mortgage company from January 3, 2011, through November 22, 2013. The claimant worked on a full-time schedule at an approximate rate of $80,000.00 annually. On August 26, 2013, the claimant was [questioned] by management regarding charges made on his company travel card during business trips. When questioned, the claimant attributed the charges to food items. Further review determined that the charges were for a belt purchased for $16.23 on August 13, 2013, boxer underwear for $16.23 on August 14, 2013, and chap stick-socks-cold medicine for a total of $22.67 on August 15, 2013. In light of management's inquiry, the claimant contacted his supervisor, who after review of the expense report, advised the claimant to remove the items in question from the expense report and resubmit it. The claimant complied, and resubmitted the expense report absent of the questionable items. The claimant was unaware he could not seek

> reimbursement for the items in question based on three years of prior approval and reimbursement for similar related items. The claimant also attributed his right to reimbursement based on $55.00 per-diem of which purchases under $25.00 not requiring a receipt. The claimant titled the items in question as snack as a general term based on the value under $25.00; not requiring a receipt. The employer further investigated and obtained two more questionable purchases; shoe laces-toothbrush for a fee of $6.46 on March 13, 2013, and cargo shorts for a purchase of $18.35 on March 15, 2013. The claimant continued working through November when he was questioned by the employer's investigator regarding the past transactions in question and the two recently obtained. The claimant was made aware of the code of conduct policy however cited he thought he was entitled to the items in question. The claimant was accused of violation of the code of conduct policy and fraud; by misuse of company credit card and misrepresentation on the expense reports. The claimant had no prior warning regarding violation of company policy. On November 22, 2013, the claimant was discharged for violation of the code of conduct policy and fraud.

Based on these findings, the referee held the claimant was not discharged for misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the record was not developed sufficiently and the legal standards were not properly applied; consequently, the case must be remanded.

Effective May 17, 2013, Section 443.036(30), 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.

Subparagraph (e) "expresses the legislative intent that a claimant may be disqualified from benefits where it is established he or she committed a 'violation of an employer's rule.'" *Crespo v. Florida Reemployment Assistance Appeals Commission*, 128 So. 3d 49 (Fla. 3d DCA 2012). Once the employer has shown a violation, the claimant bears the burden to establish one of the three defenses. *Crespo*, *supra*; *Critical Intervention Servs. v. Reemployment Assistance Appeals Comm.*, 106 So. 3d 63, 66 (Fla. 1st DCA 2013).

The employer's applicable "Travel and Expense Policy" effective February 2013 includes the following language:

> Except as otherwise specifically provided in this Policy, [the employer] will not reimburse non-deductible expenses that include, but are not limited to, those expenses incurred for personal reasons, such as local travel for non-business purposes; travel insurance; membership in airline preferred flyer clubs; personal entertainment (such as movies); and personal materials, such as reading material, hair care, smoking products, toiletries, and clothing. Employees must pay for these and any other personal expenses. In addition, [the employer] will not reimburse employees for house- and pet-sitting.

Because this policy involves use of employer funds for reimbursement, it falls under the definition of a rule. The evidence in this case clearly established that the claimant violated this policy. Thus, the issue in this case is whether the claimant can establish one of the three affirmative defenses. He must show that (1) he did not know, and could not reasonably know, of the rule's 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. While the policy at issue is clearly lawful and reasonably related to the job environment, the referee should analyze whether the policy was fairly and consistently enforced, and whether the claimant could reasonably know of the rule's requirement. The referee's findings regarding the claimant's explanations as to why he believed de minimus items could be lumped together under a per diem is supported by the claimant's testimony. However, if the claimant had obtained prior reimbursement because he had mislabeled the items on his expense reimbursement, thus preventing the employer from discovering or correcting the practice, the past practice does not demonstrate inconsistent enforcement. With respect to fair or inconsistent enforcement, the referee should consider any instructions regarding, or *knowing* approvals of, this past practice by the claimant's supervisors or management, and make specific findings as to these instances. The referee should also make a specific finding as to whether or not the claimant's labeling of items as "snacks" was intentionally deceptive or merely a matter of convenience when the claimant did not keep receipts or remember the specific items purchased.

With respect to whether the claimant knew or should have known the requirements of the rule, we note that the policy at issue was dated February 2013. The claimant acknowledged that he was not totally aware of all the employer's policies, and given what appears to be a number of such policies, that is hardly unlikely. The claimant had been seeking reimbursements for several years prior to

the adoption of the version of the policy offered by the employer in this case. The referee should consider whether any changes had occurred, and whether any changes were specifically brought to the employees' attention. Dropping new versions of extensive policies on an employee's desk or sending in a bulk email without highlighting relevant changes may not be reasonably calculated to advise employees of the rules at issue.

In order to address the affirmative defenses, the referee's decision is vacated and the case is remanded. On remand, the referee is directed to develop the record and render a decision that contains accurate and specific findings of fact regarding the events leading to the claimant's job separation and a proper analysis of those facts as discussed above along with an appropriate credibility determination in accordance with Florida Administrative Code Rule 73B-20.025. Any hearing convened subsequent to this order shall be deemed supplemental, and all evidence currently in the record shall remain in the record.

The decision of the appeals referee is vacated and the case is remanded for further proceedings.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Frank E. Brown, Chairman
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on
10/7/2014 ,
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: Kimberley Pena
Deputy Clerk

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

*24620643 *

Docket No.0020 3966 43-02 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.

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.

Issues Involved: TIMELINESS: Whether an appeal, request for reconsideration, or request to reopen an appeal was filed within twenty days after mailing of the determination or decision to the adversely affected party's address of record or, in the absence of mailing, within twenty days after delivery, pursuant to Sections 443.151(3); 443.151(4)(b)1., Florida Statutes; Rules 73B-10.022(1); 10.022(5); 10.023(1); 11.017(2); 20.002-007, Florida Administrative Code.

Jurisdictional Issues (Timeliness): The employer received the Notice of Approval that was mailed department January 15, 2014. The employer filed and mailed their appeal on February 3, 2014, which was received by the department on February 10, 2014.

The law provides that a determination of a claims adjudicator shall be final unless an adversely affected party files an appeal or request for reconsideration within twenty days after the mailing date of the determination notice to the party's last known address or, in the absence of mailing, within twenty days after the delivery of such notice to the party.

The record reflects that the employer filed their appeal within 20 days of the distribution date. Therefore the employer's appeal must be considered as timely filed and therefore is entitled to a hearing and decision on the merits of the case.

Finding of Facts: The claimant was employed as a loan service specialist for a mortgage company from January 3, 2011, through November 22, 2013. The claimant worked on a full time schedule at an approximate rate of $80,000.00 annually. On August 26, 2013, the claimant was question by management regarding charges made on his company travel card during business trips. When questioned, the claimant attributed the charges to food items. Further review determined that the charges were for a belt purchased for $16.23 on August 13, 2013, boxer underwear for $16.23 on August 14, 2013, and chap stick socks cold medicine for a total of $22.67 on August 15, 2013. In light of management's inquiry, the claimant contacted his supervisor, who after review of the expense report, advised the claimant to remove the items in question from the expense report and resubmit it. The claimant complied, and resubmitted the expense report absent of the questionable items. The claimant was unaware he could not seek reimbursement for the items in question based on three years of prior approval and reimbursement for similar related items. The claimant also attributed his right to reimbursement based on $55.00 per diem of which purchases under $25.00 not requiring a receipt. The claimant titled the items in question as snack as a general term based on the value under $25.00; not requiring a receipt. The employer further investigated and obtained two more questionable purchases; shoe laces toothbrush for a fee of $6.46 on March 13, 2013, and cargo shorts for a purchase of $18.35 on March 15, 2013. The claimant continued working through November when he was questioned by the employer's investigator regarding the past transactions in question and the two recently obtained. The claimant was made aware of the code of conduct policy however cited he thought he was entitled to the items in question. The claimant was accused of violation of the code of conduct policy and fraud; by misuse of company credit card and misrepresentation on the expense reports. The claimant had no prior warning regarding violation of company policy. On November 22, 2013, the claimant was discharged for violation of the code of conduct policy and fraud.

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:

(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 record reflects that the employer was the moving party in the separation. Therefore, the claimant is considered to have been discharged. The burden of proving misconduct is on the employer. 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); TallahasseeHousing Authority v. Unemployment Appeals Commission, 468 So.2d 413 (Fla. 1986). It was shown that the claimant was discharged for violation of the code of conduct policy and fraud. The claimant was unaware he could not seek reimbursement for the items in question based on three years of prior approval and reimbursement for similar related items. The claimant actions were not an intentional disregard of the employer's interests. Consideration has been given to the claimant labeling the items as snack items and or food items on his expense report. The claimant had done so in accordance with past practice without question and with the understanding it fell under $55.00 per diem of which purchases under $25.00 not requiring a receipt. While the employer may have made a valid business decision in discharging the claimant, it has not been shown that the claimant's actions constitute misconduct connected with work. Accordingly, the claimant should not be disqualified from the receipt of unemployment benefits.

The hearing officer was presented with conflicting testimony regarding whether the claimant was asked to return to the customer site off the clock and is charged with resolving these conflicts. The Unemployment Appeals Commission has 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 claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

Decision: The determination dated January 15, 2014, is AFFIRMED. The claimant is qualified for receipt of benefits in connection with this claim.

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 14, 2014

ABDULLAH MUHAMMAD
Appeals Referee

By: Robyn L Deak

ROBYN L. DEAK, 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 20^{yèm} 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.
