STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 14-02387

vs.

Referee Decision No. 0021342523-02U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the claimant's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision holding the claimant 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.

On appeal to the Commission, evidence was submitted which had not been previously presented to the referee. The parties were advised prior to the hearing that the hearing was their only opportunity to present all of their evidence in support of their case. Florida Administrative Code Rule 73B-22.005 provides that the Commission can consider newly discovered evidence only upon a showing that it is material to the outcome of the case *and* could not have been discovered prior to the hearing by an exercise of due diligence. The Commission did not consider the additional evidence because it does not meet the requirements of the rule.

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

For reasons hereinafter noted, the referee's decision in this case and in another case pending before the Commission involving the listed employer (R.A.A.C. Case No. 14-04344, wherein M. O. is the claimant) must be vacated and the causes remanded for *de novo* hearings before a new referee.

The records in both cases reflect the claimant in this case, L. G., and the claimant in Case No. 14-04344, M. O., were employed by the employer. This claimant was a family advocate and M. O. was the site supervisor. The records further reflect the claimants were both discharged by the employer on the same day for allegedly failing in their duties to report suspected child abuse. It is undisputed that each claimant met with a parent on December 16, 2013, and individually spoke with her. The employer concluded that information relayed by the parent to the claimants should have resulted in each of the claimants calling the Department of Children and Families' (hereinafter "DCF") abuse hotline in accordance with their duties as mandatory reporters, as codified in Section 39.201, Florida Statutes. After each claimant filed a claim for reemployment assistance benefits, determinations were issued which held each claimant qualified for receipt of benefits because they were discharged for reasons other than misconduct connected with work. The employer appealed both determinations and separate hearings were held before separate appeals referees. Following this claimant's hearing, the referee reversed the initial determination and held L. G. disqualified from receipt of benefits because she was discharged for misconduct connected with work. Following the hearing held in M. O.'s case, however, the appeals referee affirmed the initial determination and held M. O. not disqualified from receipt of benefits.

In *Ruberte v. Florida Unemployment Appeals Commission*, 885 So. 2d 976 (Fla. 3d DCA 2004), the court directed the Commission to take corrective measures regarding disparate treatment of cases involving similar facts and issues to avoid such "Alice-in-Wonderland" results. *See also Davis v. Florida Unemployment Appeals Commission*, 472 So. 2d 800 (Fla. 3d DCA 1985). While the facts in these cases are such that there is no necessity that both cases reach the same result, consistency in development of the record and application of the law is required. Consequently, each of these cases must be heard by the same referee. The hearings, however, must not be combined and, in each case, the referee must only reach legal conclusions that are based upon the competent, substantial evidence applicable to each individual claimant.

Sections 39.201(1)(a) and 39.201(2)(a), Florida Statutes (2013), require that any person who knows, or has reasonable cause to suspect that a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare . . . shall report such knowledge or suspicion immediately to DCF's central abuse hotline. "Even if an incident of child abuse is determined to have already been reported to the abuse registry, the statute requires the incident to be reported to the abuse registry again." *Barber v. Florida*, 592 So. 2d 330, 335 (Fla. 2d DCA 1992) (affirming the criminal conviction of a mandatory reporter for failure to report abuse). The *Barber* court noted that the defendant failed to report an allegation of abuse because the allegation had previously been

investigated and was found to be unsupported. The court, however, affirmed her criminal conviction noting that "reports of the same incident of abuse from different sources tend to show the gravity of the situation." *Id.* Consequently, neither claimant can be exculpated by asserting a defense that the abuse had been reported or that someone else was directed to report the suspected abuse.

The Commission is mindful that the failure of a mandatory reporter to report suspected child abuse is a third-degree felony. §39.205(1), Fla. Stat. (2013). Those who work with children are routinely required to attend trainings and continuing education classes in order to keep abreast of the requirements imposed by the Department of Children and Families and the State of Florida and the reasonable standards of care required by their positions.

Whether one has "reasonable cause" to suspect abuse can only be determined by considering the information that was known by the mandatory reporter. To that end, one must first determine the training a mandatory reporter received in order to enable him or her to detect possible abuse. One must then consider the facts known by the mandatory reporter when he or she decided whether to file a report.

Pursuant to Florida Administrative Code Rule 73B-20.024(3)(b) referees are charged with examining or cross-examining witnesses as is necessary to properly develop the record. On remand, the referee is directed to explicitly question the parties regarding the training provided to each claimant, including the dates of the training, the substance of the training, and who conducted the training. The records reflect both claimants were long-term employees of this employer. Consequently, the filing of any prior reports of suspected abuse or their participation in the disciplinary process of other employees who did not report suspected abuse is also relevant.

The parties must then be questioned regarding what information each claimant received on December 16, 2013, that should have purportedly led them to call DCF's abuse hotline. Depending on the responses provided, the claimants may need to be questioned regarding any prior information they received from the parent or child(ren) in question that should have given them reasonable cause to suspect abuse.

We highlight that different evidence may be presented regarding the training provided to and information received by each claimant, which could possibly lead to different outcomes for each claimant. In weighing the evidence in each case, the referee must expressly resolve conflicts in evidence and explain when unrebutted evidence has been deemed implausible. *See* Fla. Admin. Code R. 73B-20.025(3)(d). *See also Meditek Therapy, Inc. v. Vat-Tech, Inc.*, 658 So. 2d 644, 646 (Fla. 2d DCA 1995).

If the record reflects the employees were sufficiently trained on what should lead one to reasonably suspect abuse or if logic dictates that a reasonable person would otherwise suspect abuse under the totality of the circumstances, a finding of misconduct would be supported. Furthermore, a finding of misconduct could also be reached if a claimant suspected abuse, but reached an unreasonable legal conclusion that the suspicion need not be immediately reported.

In addition to the foregoing, we emphasize that the referee must not yield control of the proceedings to the parties' representatives. Rather, the referee must maintain order, allowing the witnesses to present their testimony without interruption and ensuring that both parties can properly examine each witness without inappropriate interruptions from witnesses or representatives.

Finally, we note that the current records contain the names of minors who were the possible victims of sexual abuse. It is clear that all parties know which parent and children were involved in these incidents. Consequently, in order to protect the minors discussed in these cases, the parent and children must be referred to by their initials and all documents should be redacted accordingly in future proceedings.

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 10/31/2014, 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

*25846918 *

Docket No.0021 3425 23-02 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.

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.

Findings of Fact: The claimant was employed as a family advocate for the employer, a child and family welfare agency, from 1993 until January 10, 2014. The claimant's last day of service for the

employer was December 20, 2013. The claimant was a state mandated reporter for suspected or confirmed child abuse or neglect. The claimant was aware that she was a mandated reporter.

On December 16, 2013, the claimant had a conversation with a client/parent. The claimant had been working with this family for a long time. The claimant was aware that approximately 4 years prior, the stepfather of the parent's daughters had been investigated for alleged sexual abuse. The investigation against the stepfather was dropped. In the conversation on December 16, the parent informed the claimant that she was having difficulty with her older daughter's behavior. The parent also spoke with the claimant about her worries over her younger daughter going to the stepfather's house bathed, and returning re-bathed by the stepfather. The claimant asked if the mother suspected any abuse. The mother did not suspect any further abuse, but expressed that it was something she had worried about at some point.

Prior to speaking with the claimant on December 16, 2013, the parent spoke separately to the claimant's supervisor. While the claimant and the parent spoke, the supervisor began to fill out a Specialist Referral Form (Exhibit 3), and created the phrases "suspected child molestation" and "Mom has been advised to contact 1-800-Child Abuse" on the form. After those phrases were created, the claimant wrote her own information on the paper regarding sending the parent for counselling in regards to her difficulties with her older daughter, and signed the form.

The agency regional manager became aware of Exhibit 3 on December 19, 2013, and launched an investigation. The manager spoke to the claimant and claimant's supervisor about Exhibit 3 and the conversations that occurred on December 16, 2013. The claimant admitted to not reporting a suspicion of abuse in response to the parent's concerns about the stepfather's actions with bathing the younger daughter. The claimant was placed on paid suspension pending further investigation. The claimant and claimant's supervisor were discharged on January 10, 2014 for failing to report suspected child abuse.

Conclusions of Law: As of May 17, 2013, the Reemployment Assistance Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed in pari 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. 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.

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. 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.

The record reflects that the claimant was discharged for allegedly failing to report suspected child abuse, in violation of policy. Subparagraph (b) states that "carelessness or negligence to a degree…that manifests culpability" can constitute misconduct. It is clear that the claimant did not leave her conversation with the mother involved with a suspicion that child abuse was occurring. However, given the circumstances and facts involved in the conversation on December 16, 2013, and the claimant's knowledge of the stepfather's history of alleged sexual abuse of children, it is reasoned that a professional with twenty years of experience should have left the conversation with a suspicion of possible abuse, whether or not the mother suspected abuse.

Furthermore, it seems unreasonable that the claimant would create the written information on Exhibit 3 without seeing the phrases "suspected child molestation" and "Mom has been advised to contact 1-800-Child Abuse" directly above the sentences she printed. Accordingly, it is reasoned that the claimant's failure to suspect any possibility of abuse after leaving the conversation with the mother, and after signing Exhibit 3, and further failure to report the possibility of child abuse, constitutes "carelessness or negligence to a degree…that manifests culpability," and therefore misconduct connected with work. The claimant is disqualified for the receipt of benefits.

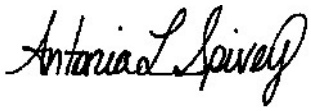
The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. In Order Number 2003-10946 (December 9, 2003), the Commission set forth factors to be considered in resolving credibility questions. These factors include the 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 February 20, 2014 is REVERSED. The claimant is disqualified for the receipt of benefits from January 5, 2014, and for the five following weeks, and until the claimant earns $4,675.

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 April 15, 2014

JOHN CARPENTER
Appeals Referee

By: 

ANTONIA SPIVEY (WATSON), 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.
