STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-03507

vs.

Referee Decision No. 0008634383-04U

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.

I.
Procedural History

This is the second time this case has been before the Commission. In Referee Decision No. 2013-47743U (September 27, 2013), the appeals referee held the claimant disqualified from receipt of benefits because he was discharged for misconduct connected with work. Specifically, the referee concluded that the claimant's actions in divulging to a clinic owner a "tip" he received from a confidential informant showed a "clear disregard for the employer and the claimant's responsibilities to the employer."[1] The claimant then appealed the referee's decision to the Commission. In R.A.A.C. Order No. 13-09055 (March 7, 2014), the Commission vacated the referee's decision and remanded the case for further development of the record. While we concluded that the claimant's actions did not constitute misconduct under Section 443.036(30)(a) & (b), Florida Statutes (2012), we remanded the case back to the referee to further develop the record to determine whether the claimant's actions constituted misconduct under Section 443.036(30)(e), Florida Statutes (2012), for violation of an employer rule and, if so, whether the claimant could establish any of the affirmative defenses to a finding of misconduct under that subparagraph. Pursuant to our remand order, the referee conducted further proceedings and issued

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[1] While the referee did not specifically state under which provision of the reemployment assistance law he was holding the claimant's actions amounted to misconduct, it was clear he was relying on subparagraph (a) of Section 443.036(30), Florida Statutes (2012), for this conclusion.

Referee Decision No. 0008634383-04U (June 18, 2014), holding the claimant was discharged for reasons other than misconduct because it was not established the claimant violated an employer rule. Specifically, the referee concluded that the employer had failed to provide the relevant rules for the record, and thus the referee did not adduce evidence regarding affirmative defenses.

The employer timely appealed this decision to the Commission. Additionally, in its request for review, the employer presented a copy of an order of the Circuit Court of the 20th Judicial Circuit, Case No. 14-CA-000168 (Fla. 20th Jud. Cir. July 1, 2014) (hereinafter the "Certiorari Order"). The Certiorari Order was not entered until a month after the scheduled remand hearing and almost two weeks after the referee's decision; therefore, it was not available to provide to the referee below. In the Certiorari Order, the Circuit Court upheld the Sheriff's Office Civil Service Board's Final Order (the "Final Order") entered on December 26, 2013, which affirmed the claimant's dismissal on the grounds[2] that the claimant violated Sheriff's Office's policies 26.1.2.4.67 ("conduct unbecoming of an officer") and 26.1.2.4.44 ("communicating criminal information").[3]

While the employer did not specifically request consideration of the Certiorari Order pursuant to Florida Administrative Code Rule 73B-22.005, the Commission's "newly discovered evidence rule," we concluded, on its face, that the Certiorari Order satisfied both the materiality and unavailability requirements of the rule. The Certiorari Order is evidence which was not yet in existence at the time of the hearing; consequently, it could not have been discovered prior to the hearing. Furthermore, the Certiorari Order is material to these proceedings because, as discussed below, the court upheld the Civil Service Board's decision that the claimant violated the employer's rules which, if binding, would satisfy the employer's *prima facie* requirement of showing misconduct under Section 443.036(30)(e), Florida Statutes (2012). Additionally, although the employer did not specifically request judicial notice of the Certiorari Order, it appeared to fall within the scope of authorities for which judicial notice is mandatory. *See* §90.201(1), Fla. Stat. (2014).

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[2] The Final Order could have been more explicit that the Civil Service Board was specifically concluding that the claimant violated these rules. However, a contextual reading of the Final Order, particularly conclusions of law numbers 9 and 10, leaves no doubt that the Civil Service Board affirmed the Sheriff's Office's termination of the claimant on this basis, which the Circuit Court also recognized.

[3] The Commission notes there was a labeling inconsistency between the Civil Service Board Final Order and the Certiorari Order. It appears the proper numeration of the Sheriff's Office policies is policy 26.1.2.4.67 for the "conduct unbecoming of an officer" policy and 26.1.2.4.44 for the "communicating criminal information" policy.

As a result of the employer's submission of the Certiorari Order, the Commission issued a Show Cause order on January 27, 2015, giving notice of its intent to take administrative notice of the Certiorari Order, and allowing the parties the opportunity to present their positions as to the Commission taking such action. The parties were further given the opportunity to state their positions as to whether, under the doctrine of collateral estoppel, the Commission must conclude that the claimant violated policies 26.1.2.4.67 and 26.1.2.4.44. The parties both provided timely responses to the Order. Upon consideration of the parties' responses, the Commission takes administrative notice of the Certiorari Order.

II.
Analysis

A. Did the Referee Correctly Conclude that the Employer Failed to Provide the Relevant Policy Language for the Record?

We have held in numerous cases that an employer contending that a claimant has violated an employer "rule" should submit the relevant language as evidence in the case. *See*, *e.g.*, R.A.A.C. Order No. 13-04349 (August 29, 2013). This is particularly true when the rule or policy at issue is complex. *Id*. However, we have never limited the submission of rule language in documentary evidence to any particular form. While employers typically submit an excerpt from an employee handbook or policy manual, we have previously held that the rule language was sufficiently submitted where it was included in a written warning or termination document. So long as the employer submits the complete language of the rule in an authenticated document, the employer has met its burden of production of the relevant evidence.

In the decision below, the referee incorrectly concluded that the employer failed to provide the relevant rule language. While the employer did not submit an excerpt of a policy manual, the employer introduced, and the referee admitted, two documents containing the relevant language of the rules. Both the Internal Affairs Report and the Final Order contain what appear to be the complete language of the relevant rules at issue. Thus, we vacate the referee's decision as legally erroneous.

B. Does Collateral Estoppel Require the Commission to Conclude that the Claimant Violated the Two Employer Rules at Issue?

The general requirements for collateral estoppel in Florida are that "the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 374 (Fla. 1977). While this doctrine is regularly applied by courts to judgments of other courts, we note that there is inconsistency among the district courts as to when or if the doctrine should be applied to decisions of administrative tribunals. *Cf. Glidden v. Unemployment Appeals Commission*, 917 So. 2d 1035, 1036-37 (Fla. 1st DCA 2006), *Newberry v. Florida Department of Law Enforcement*, 585 So. 2d 500, 501 (Fla. 3d DCA 1991), *Dept. of Health & Rehabilitative Services v. Vernon*, 379 So. 2d 683, 684-85 (Fla. 2d DCA 1980), and *Todd v. Carroll*, 347 So. 2d 618, 619 (Fla. 4th DCA 1977) with *United States Fidelity & Guaranty Co. v. Odoms*, 444 So. 2d 78 (Fla. 5th DCA 1984). While *Vernon* turns on the basic principle that a decision of a tribunal applying a different legal standard should not collaterally estop a separate tribunal, *Glidden*, *Newberry* and *Todd* appear to establish an absolute rule barring application of collateral estoppel even if it would otherwise be appropriate. For this reason, the Commission has traditionally not applied binding effect to other administrative orders, including the Final Order in this case. However, the Circuit Court's Certiorari Order not only constitutes a judicial affirmance of the Final Order, but it does so in a detailed written decision which leaves no doubt as to the specific holdings of the court. Under these circumstances, we consider the most applicable precedent to be *School Board of Seminole County v. Unemployment Appeals Commission*, 522 So. 2d 556, 557 (Fla. 5th DCA 1988). In that case, the Fifth District Court of Appeal held that the administrative order of the School Board regarding the claimant's discharge, which made specific factual findings after an evidentiary hearing, and which had been affirmed on direct appeal to the Fifth District, was collaterally binding on the Unemployment Appeals Commission as to specific facts that were relevant to the claimant's claim for unemployment compensation benefits. The court concluded that the School Board's finding that the claimant had engaged in sexual improprieties with a student was binding on the Commission, and constituted misconduct per se. We recognize that the Fifth District holds a minority view regarding administrative collateral estoppel, but in *School Board of Seminole County* the court specifically observed that "this court's prior decision is the prior final adjudication of the issues between the parties, not merely the administrative order of the school board." *Id.* We conclude, both as a matter of the law of collateral estoppel, and as a matter of respect for judicial orders, that a judicial affirmance of an administrative order should be given collateral effect, where specific findings or rulings of the administrative tribunal are either explicitly or necessarily affirmed by the court, and are properly applicable to issues arising in the reemployment assistance case. We

recognize, as did the Second District in *Vernon*, that differing legal standards between the matters decided by two different agencies may make collateral estoppel inapplicable, but this principle simply requires careful application of the doctrine. We also recognize that, while *School Board of Seminole County* involved application of estoppel to a factual finding, and the Certiorari Order addresses a mixed question of fact and law, we see no basis under the doctrine to distinguish between pure issues of fact and mixed issues of fact and law.

Finally we acknowledge, as correctly argued by the claimant in his thorough briefing, that the Circuit Court's review was neither *de novo* nor plenary, as it was governed by the standard of *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982) and its progeny. Nonetheless, the *Vaillant* standards do not differ that greatly from plenary review of an administrative order on direct appeal, and the Circuit Court's order reflects a thorough review under that standard. Thus, we respectfully reject the suggestion that the judicial affirmance should not be given collaterally binding effect.

Accordingly, we conclude that, under the doctrine of collateral estoppel, the claimant violated policies 26.1.2.4.67 and 26.1.2.4.44 as decided in the Final Order and upheld in the Certiorari Order. However, this conclusion is not dispositive of the issue of whether the claimant's actions amount to disqualifying misconduct under Section 443.036(30)(e), Florida Statutes (2012).

Section 443.036(30), Florida Statutes (2012), 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.
>
> (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) 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 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.

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 Commission*, 106 So. 3d 63, 66 (Fla. 1st DCA 2013).

In light of the court's conclusions in the Certiorari Order, it has been established that the claimant violated the employer's rules; consequently, the employer has satisfied its *prima facie* showing of misconduct under Section 443.036(30)(e), Florida Statutes (2012). The record, however, has not been sufficiently developed in order for us to determine whether the claimant can avail himself of any of the affirmative defenses under subparagraph (e). We note that the referee reserved the issue of the affirmative defenses and did not take evidence on this issue; accordingly, we must remand this case for the referee to hold a supplemental hearing to develop the record as outlined above and render a new decision that contains accurate and specific findings of fact regarding the affirmative defenses and a proper analysis of those facts, along with an appropriate credibility determination in accordance with Florida Administrative Code Rule 73B-20.025(3)(d).

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 2/27/2015, the above Order was filed in the office of the Clerk of the Reemployment Assistance Appeals Commission, and a copy mailed to the last known address of each interested party.

By: Juanita Williams
Deputy Clerk

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

*28640750 *

Docket No.0008 6343 83-04 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES Employer Representative

Claimant Representative

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.

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

Findings of Fact: The claimant was a narcotics detective with a county sheriff's office. The claimant was recorded on a Federal wire tap speaking to the owner of a pain management clinic about a tip the department got from an informant alleging that the clinic was taking tips or cash gratuities for drugs. The claimant was suspended and discharged after an investigation.

Conclusions of Law: The law provides that a claimant who was discharged for misconduct connected with the work will be disqualified for benefits.

"Misconduct," 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 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 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) 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 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.

The case was remanded with instructions form the reviewing authority to consider the claimant's actions as the basis for finding misconduct pursuant to subsection (e) of the statute. The record is absent a copy of the rule at issue. The claimant asserted no intentional wrong doing. Without a clear showing of precisely what sort of information could not be shared disclosed the referee cannot apply that portion o f the statute addressing a rule violation to find misconduct.

The claimant was represented by counsel at his hearing. The claimant's attorney should provide a schedule of fees for approval by the referee in writing within ten days of the issuance of this decision.

Decision: The determination dated May 20, 2013, is REVERSED.

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 June 18, 2014

BARTH BENNITT
Appeals Referee

Paulette A. Allison

By:

PAULETTE ALLISON, 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.
