STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 14-04136

vs.

Referee Decision No. 0023030118-02U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of an appeal of the decision of a reemployment assistance appeals referee pursuant to Section 443.151(4)(c), Florida Statutes. The referee's decision stated that a request for review should specify any and all allegations of error with respect to the referee's decision, and that allegations of error not specifically set forth in the request for review may be considered waived.

The original decision reflects that only the claimant appeared; however, a review of the record reflects the president testified on behalf of the employer. The decision is corrected to reflect the fact that both parties appeared.

Upon appeal of an examiner's determination, a referee schedules a hearing. Parties are advised prior to the hearing that the hearing is their only opportunity to present all of their evidence in support of their case. The appeals referee has the responsibility to develop the hearing record, weigh the evidence, and render a decision supported by competent, substantial evidence. Section 443.151(4)(b)5., Florida Statutes, provides that any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not such evidence would be admissible in a trial in state court. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding Section 120.57(1)(c), Florida Statutes, hearsay evidence may support a finding of fact if the party against

whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record. A decision of an appeals referee cannot be overturned by the Commission if the referee's material findings are supported by competent, substantial evidence and the decision comports with the legal standards established by the Florida Legislature. The Commission cannot reweigh the evidence or consider additional evidence that a party could have reasonably been expected to present to the referee during the hearing. Additionally, it is the responsibility of the appeals referee to judge the credibility of the witnesses and to resolve conflicts in evidence, including testimonial evidence. Absent extraordinary circumstances, the Commission cannot substitute its judgment and overturn a referee's conflict resolution.

Having considered all arguments raised on appeal and having reviewed the hearing record, the Commission concludes no legal basis exists to reopen or supplement the record by the acceptance of any additional evidence sent to the Commission or to remand the case for further proceedings. The Commission concludes 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.

Section 443.101(1), Florida Statutes, provides that an individual shall be disqualified from receipt of benefits for voluntarily leaving work without good cause attributable to the employing unit. Good cause is such cause as "would reasonably impel the average able-bodied qualified worker to give up his or her employment." *Uniweld Products, Inc. v. Industrial Relations Commission*, 277 So. 2d 827 (Fla. 4th DCA 1973).

This case involves the issue of whether the employer was required to pay the claimant an amount to pay for her health benefits. An employee may have good cause to quit due to the employer's failure to pay a particular item of compensation or benefits in two circumstances. First, the claimant will have good cause if the employer and employee agree at the time of hire or thereafter that the claimant will be paid an item of compensation, but the employer subsequently substantially and unilaterally changes that agreement or otherwise fails to comply with it. *See generally San Roman v. Unemployment Appeals Commission*, 711 So. 2d 93, 95 (Fla. 4th DCA 1998); *LeCroy v. Unemployment Appeals Commission*, 654 So. 2d 1054, 1056 (Fla. 1st DCA 1995). Second, the employee will have good cause if the failure

to pay that benefit or compensation was a violation of law or contract. *See*, *e.g.*, *Madison v. Williams Island Country Club, Ltd.*, 606 So. 2d 687 (Fla. 3d DCA 1992) (failure to pay legally required overtime); *Mueller v. Harry Lee Motors*, 334 So. 2d 67 (Fla. 3d DCA 1976) (same). In either event, however, the claimant must attempt to preserve her employment by addressing the issue with the employer. *Lawnco Services, Inc. v. Unemployment Appeals Commission*, 946 So. 2d 586 (Fla. 4th DCA 2006).

As reflected in the referee's findings, the claimant had worked at a naval air station as a groundsperson since April 5, 2006, with a predecessor employer. Effective August 1, 2013, the claimant was hired by the current employer which replaced the prior contractor. While she continued work of the same nature as before, the terms and conditions of her employment changed pursuant to the new employment.

The contract between the employer and the Federal government under which the claimant worked was governed by the Service Contract Act, Public Law 89-286, one of the federal "prevailing wage" statutes. Under that law, a federal contractor providing services must agree as a provision of its contract to pay an hourly rate to its employees of no less than the local "prevailing wage" for similar work. 41 U.S.C. §351(a)(1). Additionally, the employer must provide its employees a specified amount for fringe benefits either in direct expenditures or cash equivalents. 41 U.S.C. §351(a)(2). These amounts are determined by the Department of Labor and included in the contracts.

Prior to August 1, 2013, the claimant had elected not to participate in the prior employer's health benefit plan and had received $3.84 per hour in cash equivalents for benefits. Effective August 1, 2013, however, the current employer provided no cash equivalents. Instead, all payments made by the employer were made to bona fide benefit plans. The employer testified that it was permitted to determine how to pay fringe benefits, and it chose to eliminate cash equivalents and pay all amounts directly into bona fide benefit plans. This is a legally correct position. Pursuant to 29 C.F.R. §4.177(b)(1),

> [a] contractor's obligation to furnish fringe benefits which are stated in a specified cash amount may be discharged by furnishing any combination of "bona fide" fringe benefits costing an equal amount. Thus, if an applicable determination specifies that 20 cents per hour is to be paid into a pension fund, this fringe benefit

> obligation will be deemed to be met if, instead, hospitalization benefits costing not less than 20 cents per hour are provided. The same obligation will be met if hospitalization benefits costing 10 cents an hour and life insurance benefits costing 10 cents an hour are provided.

As a service contractor, the employer was required to offer health benefits, and to require its employees to have health coverage, both of which it did. Employees who chose to obtain their health benefits through the employer had those benefits paid directly. The claimant thus had the option to continue employer-paid health benefits by enrolling in the employer's plan, but chose not to do so. The claimant and other employees were provided this information during the transition in a three-hour briefing on July 28, 2013. The claimant also had additional questions answered by an employer representative subsequently.

If the employees chose not to participate in the employer-sponsored health plan, the benefit cost was deposited into a 401(k) account for the employee. Although the claimant believed at one time, based on an employer statement, that she would have the option of having her benefit payments made to a Health Savings Account, the employer clarified later that any benefit payments not spent on employer-sponsored welfare benefit plans would be deposited in the 401(k) account. Significantly, under the federal rules, as testified to by the employer, such deposits were only required quarterly. 29 C.F.R. §4.175(d)(1). By contrast, cash equivalents are to be paid on the regular payday. 29 C.F.R. §4.177(c)(1). While the claimant cited as one of the reasons for quitting the fact that her account was not set up until mid-October and had not yet been funded, the employer was not required to make deposits prior to December and, additionally, it should be expected that addition of new employees to benefit plans requires some administrative lead time. Accordingly, the referee properly determined that the employer did not fail to comply either with a term or condition of the claimant's employment or Federal law.

The claimant also complained that her supervisor was critical and threatening on a daily basis. The claimant provided few details regarding the behavior, but acknowledged that they were directed to the staff in general. She testified that "nobody seemed to care," but that other long-term employees had left also. The employer's testimony reflected that the claimant did not contact the employer about any of these issues until after she had resigned and the resignation had been accepted. Accordingly, the referee correctly determined that the claimant failed to attempt to preserve her employment by raising any such concerns with the employer.

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 Florida Statutes Section 443.041(2)(a). 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 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.

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

*29989509 *

Docket No.0023 0301 18-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES 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 hired on August 1, 2013, and was separated on October 25, 2013. The employer, employed the claimant as a full-time Grounds Maintenance Person. The claimant had become their employee when the employer, bought out the contract under which the claimant's employer had performed ground maintenance at the Jacksonville, Florida, Naval Air Station (JAX NAS). She had worked for this earlier employer since April 5, 2006. The contract was with

the federal government. Under the contract, the employer paid the claimant $11.50 per hour. The contract allowed the company to offer the claimant health and welfare benefits. They could do this by either paying her health insurance directly for her, or to pay her cash in lieu of benefits. The claimant elected to take the cash and buy her own health insurance. The cash was $3.84 per hour. The new employer decided to no longer offer the cash in lieu of benefits to its employees. The cash was placed in a personal 401(k) account for her. They did this for the other employees, as well. They were allowed to do this under the contract and under the law. There were two laws involved. One was the Service Contract Act, the second one was the Affordable Care Act. The claimant did not like this. She now had to pay for her health insurance out of the $11.50 per hour she was paid. She did not like the way her new on-site supervisor talked to his crew. She did not contact the new employer's Human Resources Department with her concerns. She resigned with one week's notice. It was accepted.

Conclusions of Law: The law provides for disqualification of a claimant who voluntarily left work without good cause attributable to the employing unit. The cause must be one which would reasonably impel an average able-bodied qualified worker to leave employment. The applicable standards are the standards of reasonableness as applied to the average man or woman, and not to the supersensitive. Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827, 829 (Fla. 4th DCA 1973).

The law provides that a claimant who voluntarily left work without good cause as defined in the statute will be disqualified for benefits. "Good cause" includes only cause attributable to the employing unit or illness or disability of the claimant requiring separation from the work. However, a claimant who voluntarily left work to return immediately when called to work by a permanent employing unit that temporarily terminated the claimant's work within the previous 6 calendar months, or to relocate due to a military-connected spouse's permanent change of station, activation, or unit deployment orders, is not subject to this disqualification.

The record shows that the claimant was the moving party in the job separation. The claimant is considered to have voluntarily quit. The burden of proof is on the claimant who voluntarily quit work to show by a preponderance of the evidence that quitting was with good cause. Uniweld Products, Inc., v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). It was shown that the claimant quit due to dissatisfaction with the wages. It was shown that the wages, even under the new employer, were within the terms of hire and within the applicable federal statutes. It was shown that the claimant did not make sufficient efforts to resolve the problems before leaving. Accordingly, it is held that the claimant is subject to disqualification.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Reemployment Assistance Appeals Commission set forth factors to be considered in resolving credibility questions. These include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the hearing officer finds the testimony of the employer's witnesses to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

Decision: The determination dated June 30, 2014, is AFFIRMED.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

This is to certify that a copy of the above decision was distributed to the last known address of each interested party on July 21, 2014.

SEAN DIMON
Appeals Referee

By:

DEMETRIA RIVERS, 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.
