STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 15-00054

vs.

Referee Decision No. 0021919883-04U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission a second time 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.

I.
Procedural Background

The original hearing in this case was held on April 8, 2014. At that hearing, the employer provided 176 pages of exhibits and the testimony of three witnesses regarding its decision to discharge the claimant. The employer introduced certified transcripts of the testimony of two individuals at a *Williams* rule proceeding in circuit court alleging that the claimant had engaged in improper sexual conduct with them (the "*Williams* rule testimony"). The employer also introduced numerous state and local rules or standards it contended were violated by the claimant's alleged conduct described in the *Williams* rule testimony. The employer also introduced evidence that the claimant was given an opportunity to appear before the School Board to respond to the proposed suspension and proposed termination decisions, but failed to do so.

The claimant provided testimony regarding the reasons for his discharge, and the reason he did not appear before the School Board. However, neither the referee nor the claimant's attorney asked him whether he had engaged in the alleged unlawful sexual conduct. Based on the referee's comments, it appears she believed that she could not ask the claimant any questions addressing the specifics of the alleged criminal conduct. As a result, the claimant did not respond to the specific accusations alleged by the two witnesses in the *Williams* rule testimony.

The appeals referee issued a decision dated April 7, 2014. That decision affirmed the determination dated February 26, 2014, and held the claimant was not disqualified from receipt of benefits. The employer appealed the decision to the Reemployment Assistance Appeals Commission. Subsequently, the Commission concluded that the referee was under the mistaken impression that, because the claimant was not convicted of an offense and did not admit guilt or enter a plea of nolo contendere, the employer failed to establish misconduct. By R.A.A.C. Order No. 14-02355 (November 21, 2014), the Commission remanded the case for the referee to reanalyze the case and make findings regarding whether the claimant effectively voluntarily resigned due to a failure to pursue available procedures to challenge the allegations against him. The Commission held that, if the referee concluded that the claimant had not failed to pursue appropriate steps to challenge his separation, the referee was to make findings as to any employer policies allegedly violated and the evidence presented, establish whether the employer made a prima facie showing of misconduct and, if so, whether the claimant presented evidence to explain the propriety of his actions. The Commission held that, if the referee found the record needed to be further developed, any hearing convened would be supplemental and all evidence currently in the record would remain in the record.

As of the date of the remand order, the initial appeals referee was no longer employed by the Department of Economic Opportunity. Therefore, the case was transferred to another referee. The new referee listened to the hearing of April 8, 2014, reviewed the evidence presented, and entered a decision dated December 23, 2014, concluding that the claimant was disqualified for voluntarily relinquishing his employment. The new referee did not conduct a supplemental hearing. The claimant appealed this order to the Commission.

II.
The Decision Below

The referee's findings of fact state as follows:

> The claimant was employed for a school board employer beginning August 19, 1991. The claimant performed the job duties of and the position of teacher. The claimant worked full time. The claimant was arrested on August 10, 2011, on charges of felony sexual battery on a child by a person in family or custodial care with the victim over 12 and under 18 years of age. The claimant reported this arrest to the employer. Subsequently the employer suspended the claimant from his duties with pay effective August 11, 2011, and informed the claimant that this suspension would continue

pending the outcome of the claimant's arrest. The claimant was eventually moved from suspended with pay to a position in the employer's warehouse. This position was one which the claimant would have no student contact. The 2011 arrest charges were dropped and the claimant continued to be relieved from his duties as teacher with pay. Sometime in 2012, the claimant was again arrested and charged with the same charges as in the 2011 arrest. The employer reviewed the deposition taken on September 17, 2012, by the attorney representing the claimant's "victim."

The employer also viewed a video record of the evidentiary hearing that took place on or about October 8, 2013, in a court of law. Based upon the information provided by the deposition and the evidentiary hearing, and the employer's conversation with the "victim," the employer determined there was reasonable suspicion that the claimant committed the acts that led to his arrest. The employer determined that, as a result of the claimant's actions, the claimant was in violation of the employer's Code of Ethics of Business Professionals in Florida-State Board of Education Rule 6B, [Principles] of Professional Conduct of the Education Profession in Florida, [School Board] policies and the employer's policy regarding relationships with student[s]. The employer further determined the claimant's actions represented conduct unbecoming an employee of the [School Board].

On October 16, 2013, the employer informed the claimant that a recommendation will be filed with the School Board at their October 22, 2013, public meeting in that the claimant be suspended without pay effective October 23, 2013, based upon the reasons above. The claimant was further informed that he had a right to appear at this meeting or be represented by another and present any appropriate information concerning his suspension without pay prior to the decision being made by the School Board. The claimant did not attend this meeting on the advice of his attorney and did not send representation to this meeting. The claimant was further advised that the employer would be filing a recommendation with the School Board at their regularly scheduled public hearing to be held on November 19, 2013, that the claimant's employment be terminated based upon the violations listed above. The claimant was advised by the employer in writing that he had 21 days in which to file a request to have an evidentiary hearing regarding the employer's recommendation for

> termination. The claimant did not request an evidentiary hearing and did not attend the School Board meeting on November 19, 2013. On November 19, 2013, the [School Board] accepted and approved the employer's recommendation of the claimant's termination. The effective date of the claimant's termination was November 20, 2013.

Based on these findings, the referee held the claimant voluntarily left work without good cause attributable to the employing unit.

III.
Analysis

Upon review of the record and the arguments on appeal, the Commission concludes that procedural errors occurred which deprived the claimant of a full and fair hearing, and the record was not sufficiently developed; consequently, the case must be remanded for a supplemental hearing and rendition of a new decision which addresses the issues on remand. Our analysis of the issues will outline the specific tasks for the referee in the remand proceeding.

A. *Whether the Claimant Constructively Resigned His Position*

In the Commission's prior remand Order No. 14-02355, the Commission noted the employer's testimony that the claimant had failed to appear before the school board to contest either the proposed suspension or the proposed termination. The referee was instructed to address the issue of whether the claimant had failed to preserve his employment under the doctrine established in *Glenn v. Unemployment Appeals Commission*, 516 So. 2d 88 (Fla. 3rd DCA 1987).

On appeal to the Commission, the claimant requests the Commission to consider newly discovered evidence, contends that he did not resign his employment, and that he elected to pursue a grievance proceeding instead.

The motion to supplement the record with new evidence is **granted** as the claimant has, for reasons that will be addressed below, met the requirements of Florida Administrative Code Rule 73B-22.005. However, because we remand, we leave further consideration of the evidence to the referee.

The bulk of the claimant's request for review on appeal to the Commission takes issue with the referee's conclusion that the claimant resigned his position. The claimant contends that the employer made no argument to that effect, and that the factual record was insufficient for finding the claimant voluntarily resigned. In making this argument, the claimant misconstrues the nature of the issue at hand. In *Glenn*, 516 So. 2d at 89-90, the court held:

> Whenever feasible, an individual is expected to expend reasonable efforts to preserve his employment. The average, prudent person in the claimant's situation would have made a good faith effort to defend himself against a discharge recommendation when afforded that opportunity. In allowing his dismissal to be implemented forthwith because he would not appropriately acknowledge or respond to the disciplinary action report recommendation, the claimant chose not to avail himself of an accessible avenue by which he might have retained his employment. Under those circumstances, it must be concluded that the claimant *voluntarily relinquished his position* without good cause attributable to the employer within the meaning of section 443.101(1)(a), Florida Statutes (emphasis added).

The court's decision in *Glenn* followed a similar case in which an individual chose not to avail himself of a hearing before a board:

> When an employee, in the face of allegations of misconduct, chooses to leave his employment rather than exercise his right to have the allegations determined, such action supports a finding that the employee voluntarily left his job without good cause.

Board of County Commissioners, Citrus County v. Florida Department of Commerce, 370 So. 2d 1209, 1211 (Fla. 2d DCA 1979). Both *Glenn* and *Citrus County* were cases in which an employer had initiated disciplinary investigations or proceedings and in which the employees had an opportunity to defend themselves against the changes, but declined to do so. In asserting that the employer neglected to argue that the claimant had voluntarily resigned, the claimant fails to recognize the distinction between a voluntary resignation, *as a matter of fact,* and a voluntary resignation, *as a matter of law*. Just as the reemployment assistance law recognizes that some resignations may be constructive discharges, *Glenn* and *Citrus County* stand for the proposition that some discharges may be constructive resignations. Since both cases arise out of a doctrine, applying to both discharge and resignation cases, requiring

an employee to attempt to preserve his or her employment where feasible, the employer's failure to specifically raise the issue at the appeals hearing is not fatal, particularly where, as here, the employer offered the testimony of multiple witnesses regarding the opportunity to contest the proposed actions before the school board, which the claimant did not utilize.

On appeal to the Commission, the claimant contends that, in lieu of appearing before the school board or requesting a just cause hearing pursuant to Section 1012.33(6), Florida Statutes, he elected to file a grievance regarding his discharge. Our review of the record reflects that no evidence regarding this election was adduced during the first hearing, although there was a brief mention of the grievance election in the claimant's closing statement. In the face of the employer's evidence, the claimant should have provided testimony on this issue at the evidentiary hearing. Nonetheless, due to the notice issues discussed in the next section, we conclude the claimant cannot be procedurally barred from raising this issue at this time, hence our granting the claimant's motion to consider newly discovered evidence.

In his brief before the Commission, the claimant contends that he was a member of a bargaining group and properly elected, as his method to attempt to preserve his employment, to pursue the grievance process in the applicable collective bargaining agreement. The claimant's argument raises what appears to be an issue of first impression before the Commission: whether a post-deprivation grievance proceeding constitutes an appropriate method of preserving one's employment under the *Glenn/Citrus County* rationale. There are policy reasons for concluding that it does not, as the purpose of the *Glenn* doctrine is to require employees to attempt to prevent unemployment in the first place by contesting a discharge prior to the separation. Relying solely on a post-deprivation grievance proceeding necessarily does not prevent unemployment; it merely provides a remedy after the fact for the successful grievant. As a result, it does not promote the primary policy behind the preservation doctrine, to prevent unemployment and limit the need to rely on the reemployment assistance benefits system.

Nonetheless, we conclude that established state policy dictates a contrary result. It has long been established in Florida that the right to collectively bargain is a fundamental constitutional right of public employees. *See, e.g., Coastal Fla. PBA v. Williams*, 838 So. 2d 543, 548 (Fla. 2003), receding from *Murphy v. Mack*, 358 So. 2d 822 (Fla. 1978). Moreover, in enacting the Public Employees Relations Act ("PERA") to implement this right, the legislature mandated the adoption of a grievance procedure for settlement of disputes. This mandate is limited, however, by the requirement that bargaining group employees elect a single remedy from available options. *See* §447.401, Fla. Stat. As noted by the claimant in his brief, the

claimant's election of a grievance remedy barred his ability to pursue a Section 1012.33(6) proceeding. *See*, *e.g., Taylor v. Public Employees Relations Commission*, 878 So. 2d 421 (Fla. 4th DCA 2004); *Hallandale Prof'l Firefighters, Local 2238 v. City of Hallandale*, 777 So. 2d 435 (Fla. 3d DCA 2001). Moreover, the right to elect the remedy belongs, by statute, to the employee. *PERC v. DeSoto County Teacher Ass'n*, 374 So. 2d 1005, 1015 (Fla. 2d DCA 1979). In order to preserve the scope of the constitutional and statutory collective bargaining rights afforded to public employees, we do not interpret the reemployment assistance law in a manner that would impair an employee's right to elect a grievance procedure as the best method of preserving his employment. Accordingly, we conclude that any *timely* and *proper* election of a grievance proceeding to address his suspension and separation constitutes a proper effort by the claimant to preserve his employment.[1]

While the claimant has proffered information to the Commission tending to show that he had a right to, and timely and properly elected a grievance proceeding, the parties have a right to be heard on this issue. On remand, unless the parties stipulate thereto, the claimant must offer evidence to demonstrate that (1) he was covered by a valid collective bargaining agreement during the relevant timeframe; (2) the collective bargaining agreement contained a grievance procedure that incorporated a right to challenge his suspension and dismissal via grievance; and, (3) the claimant timely and properly initiated grievance proceedings which were pursued, or are being pursued, to their exhaustion. The claimant should submit a copy of the relevant bargaining agreement to the referee and identify the relevant provisions. The employer may also offer evidence as to this issue. The referee must then make appropriate findings and conclusions as to whether the claimant timely and properly elected and pursued a grievance proceeding. If he did, the claimant has made a reasonable effort to preserve his employment.

B. *Notice and the Proper Scope of the Proceeding*

The notice sent prior to the April 8, 2014 evidentiary hearing contained the following statement of the issue for the hearing:

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[1] In so doing, we acknowledge that the claimant may have been able to exercise his right to appear before the school board without waiving his right to grieve his suspension and discharge. However, the issue is not whether the claimant exercised every opportunity to challenge the decisions, but whether his decision was reasonable. An election to grieve a discharge rather than pursue other avenues, assuming the election is timely and proper, is not unreasonable.

> SEPARATION: Whether the claimant was discharged for violation of any criminal law punishable by imprisonment or for any dishonest act or misconduct in connection with the work, pursuant to Section 443.101(1); 443.101(9), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

This notice appears to have resulted from an erroneously narrow view of the issues, given the employer's position before the Department. The employer's fact-finding submission, for example, made clear that the employer contended it discharged the claimant for actions that violated state and local policies and rules. By focusing on the criminal violation either at adjudication or in preparing the notice, the Department may have inadvertently misled the parties as to the full scope of issues raised in the case. Likewise, the decision of the original referee appears to have been based on an overly restrictive view of the issues.

As we indicated in R.A.A.C. Order No. 14-02355, the employer's evidence in this case properly implicated all of Section 443.101(1), Florida Statutes, and Section 443.036(30)(a), (b), (e), and possibly (d), Florida Statutes (2013). It also implicates the issue of constructive resignation as addressed in this order and R.A.A.C. Order No. 14-02355. We reiterate herein that the scope of the proceeding in this case includes more than the issue of whether the claimant engaged in, or was convicted of, criminal conduct.

Because of the limited notice of issue in the prior hearing notice, the parties must be given the opportunity to offer any additional evidence as to the constructive resignation issue as discussed above, and as to the issue of misconduct. In particular, the parties must be given the opportunity to supplement the record with any additional evidence developed during either the criminal proceeding, or the grievance proceeding, that relates to the grounds for termination alleged by the employer.

C. *Misconduct Issues*

In our prior R.A.A.C. Order No. 14-02355, we instructed the referee on remand to properly address the evidence and render a decision as to whether the employer established misconduct under Section 443.101, Florida Statutes, and Section 443.036(30), Florida Statutes (2013). We emphasize on remand that the referee should conduct a supplemental hearing on these issues and enter a decision containing findings and conclusions as to whether the employer established misconduct under these provisions as well as Section 443.101(9), Florida Statutes.

1. *The Section 443.171(8) Issue*

In R.A.A.C. Order No. 14-02355, we commented on the impact of Section 443.171(8), Florida Statutes, on this case. After the issuance of that order, the Commission issued R.A.A.C. Order No. 14-06225 (March 26, 2015) in another case. The latter order addressed the proper handling of a case where an employer offers evidence of misconduct that implicates ongoing criminal proceedings, or otherwise implicates possible criminal conduct by a claimant. This order recognized the practice of many referees not to ask questions regarding allegations at issue in ongoing criminal proceedings. This practice, however, is inconsistent with the reemployment assistance law. Moreover, because of the pervasiveness of this practice, we held that a claimant who invokes his Fifth Amendment privilege from testifying must be advised of this provision, and cautioned regarding the consequences of failing to testify.

Since neither the referee nor the claimant's attorney asked the claimant his response to the specific allegations against him in the *Williams* rule testimony, on remand the referee must advise the claimant of the protections of Section 443.171(8). The referee must then either ask questions of the claimant regarding his response to this testimony, or permit his attorney to do so. As with any testimony, the employer is entitled to cross-examine the claimant on this testimony, but the referee must ensure that the cross-examination is reasonably within the scope of this proceeding. The referee must then make findings of fact and render a credibility determination as to the allegations. The employer has provided a transcript of the testimony of the witnesses; however, to the extent a CD or video recording of the witnesses' testimony in the *Williams* rule hearing is available, it would be appropriate to listen to or view the testimony to facilitate a thorough credibility determination.

2. *Evidentiary Issues Regarding the Williams Rule Testimony*

At the April 8, 2014 evidentiary hearing in this case, and on appeal to the Commission from the December 23, 2014 decision, the claimant raised a number of objections to the *Williams* rule testimony. These objections were not specifically ruled on by the referee, although the transcripts were received into evidence. For benefit of the referee and the parties, we address some of the evidentiary and other issues raised by the offer of this evidence.

The claimant contended that the *Williams* rule testimony was inflammatory, that it was hearsay, and that portions of it had been excluded in the criminal proceeding. None of these objections is meritorious in this proceeding.

With respect to the issue of hearsay, the *Williams* rule testimony appears to be admissible under the "former testimony" exception in Section 90.803(22), Florida Statutes. Even if it is not, it is clearly admissible under the "residual" exception of the reemployment assistance law:

> c. 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 s.120.57(1)(c), hearsay evidence may support a finding of fact if:*
> *(I) The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and*
> *(II) 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.*

§443.151(4)(b)5.c.(I)-(II), Fla. Stat. (emphasis added). Because the testimony was taken under oath in a court proceeding where the claimant's counsel had the opportunity to cross-examine the witnesses, and the testimony was transcribed by a court reporter, the testimony meets the statutory requirements for admission into evidence as "competent" hearsay, capable of supporting a material finding of fact.

Moreover, the fact that some of the testimony was ruled inadmissible in the criminal trial does not impact its admissibility in this case. The evidentiary standard for the reemployment assistance law is broader than that which governs proceedings in court:

> b. 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.

§443.151(4)(b)5.b., Fla. Stat. A *Williams* rule proceeding is designed to determine whether similar act evidence is admissible in a criminal proceeding, pursuant to the limitations of Section 90.404(2), Florida Statutes. *See Gosciminski v. State*, 132 So. 3d 678, 694-95 (Fla. 2013). However, given the specific evidentiary standard above, Section 90.404(2) is not applicable in reemployment assistance proceedings. Thus, there is no absolute bar on propensity evidence. We note, however, that it is not

clear whether the employer is offering the testimony of witness Q. W. for propensity, or rather contends that the testimony of *each* witness directly establishes a violation of some of its rules.[2] In any event, the exclusion of portions of the evidence in the criminal prosecution does not automatically preclude its use in this case.

Further, as to the argument that the evidence is inflammatory, there is no doubt the accusations are serious. However, the employer's testimony regarding the reason for the discharge in this case makes the *Williams* rule testimony essential to the misconduct issues in this case. It must be properly considered and analyzed by the referee in making findings and reaching conclusions.

Finally, we note that three pages of the employer's composite exhibit appear to be missing from the exhibit file in CONNECT. Pages 18-19 are missing, and either page 9 or 10. The referee should determine whether these pages were intentionally excluded, and if not, then repair the record by supplementing or replacing the exhibit file in CONNECT.

IV.
Conclusion

In summary, we remand for a supplemental hearing on the issues identified in this order. On remand, the referee should do the following:

(1) Review the hearing recording and exhibits from the prior hearing, and determine if the record of the employer's exhibit needs to be repaired;

(2) Issue a new notice of hearing containing the proper statement of the issue of separation;

(3) At the supplemental hearing, inquire of the parties as to whether any additional evidence regarding the outcome of the criminal proceeding or the arbitration is to be admitted;

(4) Permit the claimant and employer to stipulate or offer evidence as to whether the claimant has initiated and prosecuted a timely and proper grievance proceeding pursuant to a valid collective bargaining agreement;

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[2] On remand, the employer should clarify whether the testimony of each of the witnesses is being offered to show a rule violation, or whether the testimony of the non-student witness (Q. W.) is being offered merely to show motive or propensity in order to support the evidence offered by M. M.

(5) Permit the employer to offer any additional evidence relating to its prima facie case of misconduct, and specifically clarify the purpose of the offered *Williams* rule testimony from witness Q. W.;

(6) Advise the claimant of his rights pursuant to Section 443.171(8), Florida Statutes, and either inquire or permit the claimant's attorney to inquire as to his specific responses to the allegations against him in the *Williams* rule testimony, and if the claimant declines to so testify, advise him of the consequences of such refusal; and

(7) Permit the claimant to offer any additional evidence relating to his defense of the misconduct issues.

Because of the complexity of the issues in this case, and the fact that the original referee is no longer with the Department, we recommend that the Department assign this case to a supervisor or senior referee.

The Commission notes that the claimant's Notice of Appeal was filed by a representative for the claimant. Section 443.041, Florida Statutes, provides that a representative for any individual claiming benefits in any proceeding before the Commission shall not receive a fee for such services unless the amount of the fee is approved by the Commission. The claimant's representative shall provide the amount, if any, the claimant has agreed to pay for services, the hourly rate charged or other method used to compute the proposed fee, and the nature and extent of the services rendered, not later than fifteen (15) days from the date of this Order.

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 7/17/2015, 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: Kady Ross
Deputy Clerk

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

*36289295 *

Docket No.0021 9198 83-04 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES

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), (13); 443.036(29), 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.

Case History: The original hearing was held on April 8, 2014. The appeals referee, Melissa Dembicer, issued a decision dated April 17, 2014. This decision affirmed the determination dated February 26, 2014. The employer/appellant appealed the decision to the Reemployment Assistance Appeals Commission. Subsequently, the Commission remanded the case to the referee with instructions that the referee render a new decision in compliance with the specific directives outlined in the R.A.A.C. Order No. 14 02355.

As of the date of this remand order the appeals referee Melissa Dembicer was no longer employed by the Department. Therefore the case was transferred to another referee, Scott Dougher. Before issuing the decision below, this referee thoroughly read the R.A.A.C. order, all the file documents, the submitted evidence and the listened to the recording of the hearing held on April 8, 2014. The current referee has weighed and considered all evidence testimony in the hearing record.

Findings of Fact: The claimant was employed for a school board employer beginning August 19, 1991. The claimant performed the job duties of and the position of teacher. The claimant worked full time. The claimant was arrested on August 10, 2011, on charges of felony sexual battery on a child by a person in family or custodial care with the victim over 12 and under 18 years of age. The claimant reported this arrest to the employer. Subsequently, the employer suspended the claimant from his duties with pay effective August 11, 2011, and informed the claimant that this suspension would continue pending the outcome of the claimant's arrest. The claimant was eventually moved from suspended with pay to a position in the employer's warehouse. This position was one which the claimant would have no student contact. The 2011 arrest charges were dropped and the claimant continued to be relieved from his duties as a teacher with pay. Sometime in 2012, the claimant was again arrested and charged with the same charges as in the 2011 arrest. The employer reviewed the deposition taken on September 17, 2012, by the attorney representing the claimant's "victim."

The employer also viewed a video record of the evidentiary hearing that took place on or about October 8, 2013, in a court of law. Based upon the information provided by the deposition and the evidentiary hearing, and the employer's conversation with the "victim," the employer determined there was reasonable suspicion that the claimant committed the acts that lead to his arrest. The employer determined that, as a result of the claimant's actions, the claimant was in violation of the employer's Code of Ethics of Business Professionals in Florida State Board of Education Rule 6B, Principals of Professional Conduct of the Education Profession in Florida, School Board policies and the employer's policy regarding relationships with student. The employer further determined the claimant's actions represented conduct unbecoming an employee of the School Board.

On October 16, 2013, the employer informed the claimant that a recommendation will be filed with the School Board at their October 22, 2013, public meeting in that the claimant be suspended without pay effective October 23, 2013, based upon the reasons above. The claimant was further informed that he had a right to appear at this meeting or be represented by another and present any appropriate information concerning his suspension without pay prior to the decision being made by

the School Board. The claimant did not attend this meeting on the advice of his attorney and did not send representation to this meeting. The claimant was further advised that the employer would be filing a recommendation with the School Board at their regularly scheduled public meeting to be on November 19, 2013, that the claimant's employment be terminated based upon the violations listed above. The claimant was advised by the employer in writing that he had 21 days in which to file a request to have an evidentiary hearing regarding the employer's recommendation for termination. The claimant did not request an evidentiary hearing and did not attend the School Board meeting on November 19, 2013. On November 19, 2013, the School Board of accepted and approved the employer's recommendation of the claimant's termination. The effective date of the claimant's termination was November 20, 2013.

Conclusions of Law: The Reemployment Assistance law provides that a claimant who has voluntarily left work without good cause or has been discharged by the employing unit for misconduct connected with the work shall be disqualified from receiving benefits.

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 Reemployment Assistance statute 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 record and evidence in this case show that the claimant voluntarily quit the job when he failed to exercise his due process right to attend his pre suspension and pre termination meetings.

The record and evidence in this case show that the employer had reasonable suspicion that the claimant had committed acts that offended and were contrary to the employer's policies and expectations of a School Board employee. The employer spoke with the claimant's "victim," reviewed a deposition taken by the "victim's" attorney, and attended an evidentiary hearing where sworn testimony was given regarding the claimant's actions. The employer has shown that it had a well founded basis to believe the "victim's" allegations were believable and that the employer had a reasonable suspicion the claimant had violated the employer's policy. The claimant was informed that the employer was going to recommend the claimant be suspended without pay and would be recommending termination. The claimant was further informed that he had certain due process rights and was informed as to how to exercise those rights. The record shows the claimant made no marked effort to attend the School Board meetings to address, dispute, prevent or even stay the meeting process. Consideration was given to the claimant's testimony that he did not attend the meeting on the advice of his attorney. However, the claimant's attorney could have attend the

meeting. The claimant was not represented by any representative at these meetings. It is well established in employment law that whenever feasible, an individual is expected to expend reasonable efforts to preserve his employment. See, Glenn v. Florida Unemployment Appeals Commission, 516 $o, 2d BB (Fla. 3d DCA 1987.) The facts in the claimant's case support the conclusion that the claimant chose not to participate in the employer's meetings, chose not to exercise his due process rights in regards to his suspension or pre termination hearings. At the time the claimant was informed of these hearings he was a 12 year employee, was familiar with the employer's due process procedures and had legal counsel. See, Board of County Commissioners, Citrus County v. Florida Department of Commerce, 370 So. 2d 1209 (Fla. 2d DCA 1979); Quick v, North Central Florida Community Mental Health Center, 316 So. 2d 301 (Fla. 1 st DCA 1975). The claimant in this case has shown to have more experience with legal processes as it related to his employment then the average prudent person as the claimant has an attorney, has been involved in ongoing legal issues and has continuously worked for this employer in a non student contact role since his initial arrest in 2011. The claimant did not make a good faith effort to attend the meetings in the very least by other representation. The claimant knew or should have known that his failure to attend these meetings and to otherwise defend his employment would end in his discharge of employment.

The claimant's case is distinguishable from the facts in the case of LeDew v. Unemployment Appeals Commission, 456 So. 2d 12Lg (Fla. 1stDCA 1984.) Although the claimant was told by the employer that termination would be recommended to the Board, the claimant was made aware that the meeting was an opportunity to defend his employment. The claimant was on paid leave from his regular teaching duties since 2011. Undoubtingly, the claimant was in a serious situation with the employer and the law, however the employer did afford the claimant a process in which he could have been heard and could have the opportunity to defend and preserve his employment. The claimant did not attend the meetings and did not participate in his due process right to preserve his employment. Accordingly the claimant relinquished his employment. The claimant did not show that his failure attend the pre determination meetings would have been futile. The record cannot support a conclusion that the claimant's participation in the pre suspension meeting or pre termination meeting would have been futile.

An individual who leaves work voluntarily, as the claimant did, carries the burden to show that the leaving was with good cause attributable to the employer, in order to qualify for Reemployment Assistance benefits. That burden has not been met in this case.

The claimant has failed to show that the employer violated the agreement of hire, or that the separation was attributable to the employer. Moreover, the claimant has not shown that working conditions were so harsh as to require separation from employment. The claimant quit the job by his failure to participate in the employer's due process meeting and provisions. Therefore, it is concluded that the claimant is disqualified from the receipt of benefits.

Decision: The determination of the claims adjudicator dated February 26, 2014, is REVERSED. The claimant is disqualified from the receipt of benefits from the week ending November 23, 2013, 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/mailed to the last known address of each interested party on December 23, 2014.

SCOTT DOUGHER
Appeals Referee

By: 

DREXELL CARTER, 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 distribution/mailed 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 distribución/fecha de envìo 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 distribisyon/postaj. 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.
