STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 15-03721

vs.

Referee Decision No. 0025634848-02U

Employer/Appellant

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.

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.

The Commission's review is generally limited to the evidence and issues before the referee and 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 basis exists to reopen or 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(11), Florida Statutes, provides, in pertinent part:

> (11) If an individual is discharged from employment for drug use as evidenced by a positive, confirmed drug test . . ., test results and chain of custody documentation provided to the employer by a licensed and approved drug-testing laboratory will be self-authenticating and admissible in reemployment assistance hearings, and such evidence will create a rebuttable presumption that the individual used, or was using, controlled substances, subject to the following conditions:
>
> (a) To qualify for the presumption described in this subsection, an employer must have implemented a drug-free workplace program under ss. 440.101 and 440.102, and must submit proof that the employer has qualified for the insurance discounts provided under s. 627.0915, as certified by the insurance carrier or self-insurance unit. In lieu thereof, an employer who does not fit the definition of "employer" in s. 440.102 may qualify for the presumption provided that the employer is in compliance with equivalent or more stringent drug-testing standards established by federal law or regulations.
>
> (b) Only laboratories licensed and approved as provided in s. 440.102(9), or as provided by equivalent or more stringent licensing requirements established by federal law or regulation may perform such tests.

The Commission's review of the hearing record reveals the evidence proffered by the employer fails to satisfy all of the requirements set forth above. The employer did not submit any chain of custody documentation and did not submit proof that the employer has qualified for insurance discounts under Section 627.0915, Florida Statutes. Accordingly, the employer has not met the requirements of Section 443.101(11), Florida Statutes.

The Commission has not limited an employer's proof of violations of a drug testing policy to situations meeting the statutory requirements of Section 443.101(11), Florida Statutes. However, in a case where there is no observation of drug or alcohol use or their indicators, we have held that improper use of drugs or alcohol may only be proven by acceptable testing results, which require (1) use of a state or federally approved testing methodology; (2) submission of drug test results showing a positive test; and (3) provision of chain of custody documentation. In this case, the available record reflects that the employer has met only the second requirement.

The drug test results provided by the employer appear to reflect only testing by oral fluids sampling. As we held in R.A.A.C. Order No. 14-02971 (January 27, 2015),[1] oral fluids testing has not yet been approved by either the federal or state governments for workforce drug-testing programs. Since the issuance of that order, the Federal Substance Abuse and Mental Health Services Administration has issued a notice of proposed changes to the federal guidelines that would authorize oral fluids testing and establish standards for such testing. *See* 80 Fed. Reg. 28054 (July 15, 2015).[2] However, such testing is not yet authorized under federal or Florida law for confirmation testing, a requirement for drug tests to be sufficient to establish misconduct without other evidence.

The employer also did not provide chain of custody documentation consistent with approved methodology, which we require for otherwise hearsay evidence regarding drug tests to be admitted without foundational testimony. *See* R.A.A.C. Order No. 14-02971, *supra*, at 4-5.

Finally, this case raises one other issue with regard to the test results. According to the results provided, the claimant tested positive for THC metabolites on February 4, 2014, and March 12, 2014. Some forms of testing, such as urine testing, can detect marijuana for 30 days or longer after usage. Detection windows for oral fluids testing are believed to be shorter, usually less than a day, but have not been definitively established for various measurement thresholds and metabolites tested.[3] Based on the limited results available in the employer's evidence, the Commission cannot determine that the results of the March test were only indicative of use of marijuana *subsequent* to the February 4, 2014 test.

---

[1] Available at http://www.floridajobs.org/finalorders/raac_finalorders/14-02971.pdf.
[2] Available at https://www.gpo.gov/fdsys/pkg/FR-2015-05-15/pdf/2015-11523.pdf.
[3] Dayong Lee and Marilyn A. Huestis, "Current Knowledge On Cannabinoids In Oral Fluid," DRUG TESTING AND ANALYSIS, V.6, Is. 1, pp. 88-111, Wiley Online Library (August 25, 2013) (review of current scientific literature).

The evidence was insufficient to establish that the claimant was discharged for misconduct. Absent a showing that the discharge was for disqualifying reasons, the employer failed to show that it met the requirements of law for noncharging.

The referee's decision is affirmed.

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

12/30/2015 ,

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: Kimberley Pena
Deputy Clerk

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

*44721757 *

Docket No.0025 6348 48-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES Employer

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:

CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant will be charged to the employment record of the employer, pursuant to Sections 443.101(9); 443.131(3)(a), Florida Statutes; Rules 73B-10.026; 11.018, Florida Administrative Code. (If charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

Findings of Fact: The claimant began working for the employer on May 3, 2008, as a produce clerk. At the time of hire, the claimant acknowledged receiving the employer's policies. The employer had a substance abuse policy which held that

"An associate who voluntarily comes forward and seeks help a first time regarding the use of (or a problem with using) illegal drugs or misusing prescription drugs will be encouraged to make an appointment for an assessment with a provider authorized by the EAP (Employee Assistance Program) department. The associate will not be tested or disciplined for seeking help, but the admission will be recorded by the EAP department for future reference…. An associate who makes a subsequent voluntary admission for drugs will not be tested, but the admission will be treated the same as an unacceptable result." The policy held "The following are considered unacceptable results: positive for drugs or alcohol, diluted or adulterated (tampered), unsuitable, temperature not within range, subsequent (second, third, etc.) voluntary admission for drugs, and involuntary admission of drug or alcohol use." On or around February 6, 2014, the store manager issued a substance abuse counseling form to the claimant for being arrested for possession of marijuana. The form instructed the claimant to contact the EAP department. The claimant enrolled in the EAP program. On or around March 12, 2014, the employer received the drug test results of a random drug test for the claimant which indicated the claimant tested positive for marijuana. The store manager issued a separation notice to the claimant on or around March 18, 2014, which held that the claimant was discharged due to two unacceptable results on random drug tests.

Conclusions of Law: The law provides that benefits will not be charged to the employment record of a contributing employer who furnishes required notice to the Department when the claimant was discharged for misconduct connected with the work.

The record shows the claimant was discharged based on the results of a random drug test after he reported an arrest for possession of marijuana and was driected to contact the EAP department. The law provides that a claimant who was discharged for misconduct connected with the work, consisting of drug use as evidenced by a positive, confirmed drug test, will be disqualified from receiving benefits. Test results and chain of custody documentation provided to the employer by a licensed and approved drug testing laboratory will be self-authenticating and admissible in Reemployment Assistance hearings, and such evidence will create a rebuttable presumption that the individual used, or was using, controlled substances when:

1. the employer has implemented a drug-free workplace program under the Florida Workers' Compensation Program and submits certification from its insurance carrier or self-insurance unit as proof of eligibility for insurance discounts provided under Section 627.0915, Florida Statutes. An employing unit which is not covered under the Workers' Compensation statute may qualify for the presumption if in compliance with equivalent or more stringent drug-testing standards established by federal law or regulation; and

2. the drug test was performed by a laboratory licensed and approved under the Florida Workers' Compensation Program or under equivalent or more stringent drug-testing standards established by federal law or regulation.

The employer provided copies of its substance abuse policy, the substance abuse counseling form, the results of the drug test, and the separation notice for consideration in the hearing. Some of the documents were hearsay. 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:

1. The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and

2. 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.

The appeals referee found the records trustworthy and probative and admitted them as evidence. The documents showed the employer's policy and the results of the drug test, but did not meet the abovementioned criteria to create a rebuttable presumption the claimant used or was using controlled substances. There is not sufficient competent evidence in the record to show the claimant violated the substance abuse policy. Therefore, the employer's account may not be relieved of benefits charges.

Decision: The determination dated June 29, 2015, is AFFIRMED. The employer's account shall be charged.

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 August 6, 2015.

A. HORLICK
Appeals Referee

By: Kristi Snyder

Kristi Snyder, 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.
