STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-06898

vs.

Referee Decision No. 13-56076U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

I.
Introduction

This cause comes before the Commission for disposition of the employer's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision which held the claimant not disqualified from receipt of benefits.

Pursuant to the appeal filed in this case, the Reemployment Assistance Appeals Commission has conducted a complete review of the evidentiary hearing record and decision of the appeals referee. *See* §443.151(4)(c), Fla. Stat. By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record.

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

II.
The Proceedings Below

The referee's findings of fact recite as follows:

> In August 2004, the claimant was hired to work for the [County] School Board, as a full-time teacher. The employer's standards of conduct informed the employees that the school board may dismiss an employee for actions which brought the school system into disrepute for non-compliance with the employer's policies or state

laws. The standards of conduct informed the employees that it was their obligation to make reasonable efforts to protect the students from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety. The employees were not to intentionally expose a student to unnecessary embarrassment or disparagement. The claimant received the employer's policy and standards of conduct, at the time of hire. In 2002, the claimant received training for safe crisis management holds. The claimant received training again in 2006. The employees were required to be recertified in safe crisis management holds each year. The claimant had requested to be recertified and he was told that only the ESE Behavioral Health Assistants would be recertified. Throughout the claimant's employment, he was required to break up fights. When the claimant broke up fights, he had to hold the students back, or hold them apart. The claimant was not recertified when he was breaking up fights and he was not discharged for holding the students.

On April 3, 2013, the claimant took his students outside on the field. There were several students on the field. The students were sixth, seventh, and eighth graders. The claimant was with his students about 50 yards away from a student that was in time out. The student was in the middle of the field in time out and he was sitting with his butt on the back of a chair with his feet in the seat. The ESE Behavioral Health Assistant was on the outside of the fence and she was assigned to work one on one with the student. The student was yelling at the other children, "You're gay and your dad is gay." The student continued yelling and cursing. The claimant's students were disrupted by the student in time out. The claimant asked the ESE Behavioral Health Assistant if everything was okay and she responded, "Yes." The student in time out continued cursing, "Fuck you, fuck this. Hey, your dad is gay." The claimant told the student in time out, "Hey, you're supposed to be sitting in the chair." The student in time out got out of the chair and kicked it two to three feet away. The student in time out then picked up the chair and sat down. One minute later, the student in time out was yelling, "fuck you" to the students in his class. The claimant testified that the coach of the student in time out was at least a football field's length away from the student in time out. The claimant walked toward the student in time out and he asked the ESE Behavioral Health Assistant if

everything was okay. The ESE Behavioral Health Assistant said something to the student in time out. The student in time out got up and threw the chair 25 feet. The claimant tried to radio the student's coach and got no response. The claimant tried to radio the office and got no response. The student picked up his coach's gradebook and threw it into the air. The student rapidly walked off toward the gym. The claimant yelled out at the student's coach and pointed at the student. The claimant told the other coach what happened and the claimant went to gather his class. The claimant sent his group of students to the sidewalk and the other coach was still gathering his students. The claimant was walking backwards and the student approached the claimant asking, "Coach, you like MF, don't you?" The student had MF on his arm, written in black marker and it is a symbol for Shaggy from Scooby Doo. The claimant told the student, "I'm going to tell you exactly what I told you yesterday, I'm not going to cheer for MF." (The student told the claimant and the other coach the previous school day, that he knew about the cars in the area that had spray paint.) The student asked the claimant, "You like it, don't you?" The claimant told the student, "No." The student was walking fast and getting farther away from the ESE Behavioral Health Assistant. The student told the claimant, "Come on, I hate this fucking school. I hate every teacher in it." The claimant told the student, "You may hate this school, but you can't use that language." The student kept using profanity. Halfway down the sidewalk, the claimant told the student, "I need you to stop using profanity." The student told the claimant, "Fuck this, fuck you." When the student got to the door, he slammed his left hand on the gym door and he snatched the right side of the door open with his right hand. When the door opened, the claimant saw 50 to 70 kids sitting on the floor in the hall. The claimant put his left hand on the student's lower left forearm that was by his hip and the claimant's right arm was across the student's right arm across the student's chest and the claimant's right hand was on the student's left shoulder. The student's right hand was on his chest. The student told the claimant, "What the fuck can you do." The claimant told the student, "You don't know what I can do." The claimant pulled the student away from the door, by taking two steps back, to keep the student from going into the crowded hall with the other students. The student was struggling against the claimant and he almost fell. The claimant prevented the student from falling. The claimant turned the student around and held

him against the railing by the portable building. The claimant got the student to calm down after a few seconds. Once the student calmed down, the claimant told the student to go stand by the wall. The claimant did not want the student to be embarrassed by the other students that were approaching. The student's coach came up and the claimant was telling the other coach what had happened. The claimant left the student with his coach. The claimant did not see a scratch on the student and the student's neck was not red. The assistant superintendant questioned the claimant about the incident because the student complained about the claimant holding him. The claimant gave the assistant superintendant his statement.

On April 3, 2013, the claimant was suspended, pending investigation. The claimant was charged with child abuse, aggravated assault and child abuse without great harm. When the claimant found out that there was a warrant for his arrest, the claimant turned himself into the police department. The claimant was incarcerated for five days. The claimant went before the judge on June 4, 2013. The claimant pled not guilty, and he was not convicted. On May 17, 2013, the claimant was discharged because the assistant superintendant believed that the claimant violated the employer's standards of conduct when he restrained the student.

Based upon the above findings, the referee held the claimant was discharged for reasons other than misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee's findings are, with one exception noted below, supported by competent and substantial evidence and therefore accepted as modified.

Based on these findings, the referee concluded, after a lengthy explanation of her analysis, that the employer failed to demonstrate disqualifying misconduct under any of the subparagraphs in Section 443.036 (30), Florida Statutes. Section 443.036(30), Florida Statutes, states that misconduct connected with work, "irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other":

> (a) Conduct demonstrating a conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.
>
> (b) Carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.
>
> (c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.
>
> (d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.
>
> (e) A violation of an employer's rule, unless the claimant can demonstrate that:
>
> 1. He or she did not know, and could not reasonably know, of the rule's requirements;
> 2. The rule is not lawful or not reasonably related to the job environment and performance; or
> 3. The rule is not fairly or consistently enforced.

The record reflects the employer discharged the claimant for allegedly violating the employer's policy when he restrained a student. The employer argues that the claimant verbally threatened a student and held him utilizing an improper chokehold resulting in minor injuries to the student. The claimant testified during the hearing that he did not verbally threaten the student. The claimant's testimony

reflects he held the student in a safe restraint procedure he was taught previously in order to safeguard that student as well as other students from the student's behavior. The claimant denied causing any injury to the student. The referee resolved material conflicts in evidence in favor of the claimant and concluded the claimant was discharged for reasons other than misconduct.

III.
Issues on Appeal

On appeal to the Commission, the employer makes three primary arguments. First, the employer contends that the referee's conclusions are not supported by competent, substantial evidence. Second, the employer contends that the claimant's conduct constituted misconduct under the reemployment assistance law. Third, the employer contends that the claimant should be disqualified for violating a criminal law.

IV.
Analysis

A. The referee's findings, with one exception, are supported by competent substantial evidence and must be accepted.

On appeal to the Commission, the employer alleges the referee improperly ignored its evidence and arguments in favor of the testimony and other evidence of the claimant. The employer argues the referee's credibility determination was erroneous because it was based on evidence not in the record. Specifically, the referee stated in her conclusions that the employer's witness was in high-heeled shoes and was far enough behind the claimant and the student that she could not have understood what was said. While the employer is correct that the record contains no evidence that the employer's witness was wearing high heeled shoes on the date of the incident, the claimant was consistent in testifying that the employer's witness was ten to 15 feet from him and the student during the incident in question. The referee's statement that the employer's witness wore high heeled shoes amounted only to harmless error.

The referee also found that, when the claimant broke up fights, he had to hold the students back, or hold them apart and that the claimant was not recertified when he was breaking up fights and that he was not discharged for holding the students. The employer argues on appeal that there is no evidence in the record that the claimant previously "restrained" students. While the claimant did not testify directly that he "restrained" students, he did affirm that he had previously touched a student to physically move the student away. The referee could reasonably define the claimant's action as "restraining" a student.

It is the responsibility of the appeals referee to judge the credibility of the witnesses and to resolve conflicts in evidence, including testimonial evidence. A referee is considered to abuse his or her discretion in resolving conflicts in evidence if the party found to be more credible presented inconsistent or conflicting testimony. *See Evans v. Unemployment Appeals Commission*, 42 So. 3d 931 (Fla. 5th DCA 2010). The record does not show the claimant presented inconsistent or conflicting testimony. The Commission cannot substitute its judgment for that of the referee in matters of conflict resolution. Accordingly, with the one exception noted above, the referee's findings are sustained.

B. Based on the findings, the employer failed to establish misconduct under Section 443.036 (30), Florida Statutes.

On appeal, the employer argues that the claimant should be disqualified for his "physically aggressive conduct and threatening statements." The employer cites cases such as *Anderson v. Florida Unemployment Appeals Commission*, 517 So. 2d 754 (Fla. 2d DCA 1987); *General Asphalt Co., Inc. v. Harris*, 563 So. 2d 803 (Fla. 3d DCA 1990); and *Davis v. Unemployment Appeals Commission*, 425 So. 2d 198 (Fla. 5th DCA 1983) to argue that, since the student did not provoke or strike the first blow, the claimant's alleged attack of the student was not justified and is misconduct. Based upon the accepted evidence, however, the claimant did not fight or attack the student, but instead restrained the student in a safe method previously taught to him. Since the claimant in the instant case was attempting to restrain the student in an effort to safeguard the student and others, the above-cited cases are inapplicable. Thus, the employer's arguments fail because they rely on a view of the facts different from those found by the referee. On review by the Commission, we are not empowered to "reweigh the evidence" to adopt a different view of the facts than the referee, where the referee's findings are supported by competent, substantial evidence. *See Studor Incorporated v. Duren*, 635 So. 2d 141 (Fla. 2d

DCA 1994) and *Wall v. Unemployment Appeals Commission*, 682 So. 2d 1187 (Fla. 4th DCA 1996). While there is no doubt that the testimony and other evidence presented by the employer would have been sufficient, if believed, to establish misconduct, the referee's rejection of this evidence in her findings largely precludes the arguments raised by the employer on this issue.

The accepted facts in the instant case are more similar to *Daniels v. Unemployment Appeals Commission*, 531 So. 2d 1047 (Fla. 2d DCA 1988). In *Daniels*, the claimant was assisting an elderly patient using a commode when she saw another patient wandering unescorted in the hallway. She left the patient on the commode and escorted the other patient back to her room. While Daniels was in the hallway, the patient on the commode fell and injured herself. The court found that Daniels was faced with a choice between two competing policies, one prohibiting her from leaving her patient unattended and another requiring her to return the other patient to her room. The court concluded that she may have exercised poor judgment in the choice she made, but her actions did not constitute misconduct.

Similarly, in *Rogers v. Unemployment Appeals Commission*, 597 So. 2d 382 (Fla. 2d DCA 1992), a school teacher who left a class full of preschool children unattended to search for a missing child was held not disqualified for benefits. The court could find no evidence in the record that the teacher willfully violated any of the policies of the school or intentionally disregarded the employer's interests and found that the teacher's actions, at worst, evinced bad judgment, not misconduct. In the instant case, the claimant was faced with the policy which required him to safeguard and protect students and another policy prohibiting him from restraining a student unless currently licensed to do so. Although the claimant may have technically violated the employer's rule when he restrained the student, the record establishes that policy was not "fairly enforced," since the claimant violated the rule in an attempt to safeguard and protect the student and others and was discharged as a result of his actions. Accordingly, the claimant's actions cannot be considered misconduct under subparagraph (e) of Section 443.036, Florida Statutes.

Additionally, the record does not reflect the claimant's actions in restraining the student demonstrated a conscious disregard of the employer's interests or that his actions amounted to a deliberate violation or disregard of the reasonable standards of behavior which the employer expected of him, or that he was careless or negligent to a degree or recurrence that manifests culpability or wrongful intent, or that his actions showed an intentional and substantial disregard of the employer's interests or of his duties and obligations to the employer. The record, therefore, does not reflect the claimant's actions amounted to misconduct connected with work within the meaning of subparagraphs (a) or (b) of the statute.

C. Based on the findings, the employer failed to establish misconduct under Section 443.101(9)(a), Florida Statutes.

On appeal, the appellant further argues the claimant should be held disqualified from receiving benefits based on Section 443.101(9)(a), Florida Statutes, which states:

> If the Department of Economic Opportunity or the Reemployment Assistance Appeals Commission finds that the individual was terminated from work for violation of any criminal law, under any jurisdiction, which was in connection with his or her work, and the individual was convicted, or entered a plea of guilty or nolo contendere, the individual is not entitled to reemployment assistance benefits for up to 52 weeks, pursuant to rules adopted by the department, and until he or she has earned income of at least 17 times his or her weekly benefit amount. If, before an adjudication of guilt, an admission of guilt, or a plea of nolo contendere, the employer proves by competent substantial evidence to the department that the arrest was due to a crime against the employer or the employer's business, customers, or invitees, the individual is not entitled to reemployment assistance benefits.

This provision allows an employer to establish disqualification by two methods. First, the employer may demonstrate that the claimant was discharged for an act which constituted a violation of a criminal law in connection with his work, and that the individual has been convicted, or entered a plea of guilty or no contest. Alternatively, the employer may prove in the appeals hearing, under the civil burden of proof, that the claimant committed the act(s) that would constitute a crime. Although the employer appears to contend that it need merely prove that the claimant was *arrested* for such a crime, this is not the proper interpretation of the statutory provision. The Commission has previously concluded that the statute is properly interpreted as argued by the claimant on page 9 of the appellee's brief, in that proof of the act, not merely proof of the arrest, is required. *See* U.A.C. Order No. 09-20222 (March 16, 2010). This interpretation is consistent with the traditional requirement of proof of culpability inherent in the disqualification provisions of the reemployment assistance law.

While the record reflects the claimant was arrested, there is no evidence that he was convicted, or entered a plea of guilty or *nolo contendere*. Further, since the referee found the claimant's testimony to be more credible than the employer's evidence, the employer failed to prove by competent substantial evidence to the

Department that the arrest was due to a crime committed against the employer or the employer's business, customers, or invitees. In order to find the claimant was discharged for misconduct under Section 443.101(9)(a), Florida Statutes, the Commission would have to reject the referee's credibility determination and as stated previously, the Commission has no grounds for taking such action. The referee's findings are supported by competent, substantial evidence. Her conclusion that the claimant was discharged for reasons other than misconduct connected with work is in accord with the law and is affirmed.

The referee's decision is affirmed. The claimant is not disqualified from receipt of benefits as a result of this claim. If otherwise eligible, the claimant is entitled to 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
2/21/2014 ,
the above Order was filed in the office of the Clerk of the Reemployment Assistance Appeals Commission, and a copy mailed to the last known address of each interested party.
By: Kady Thomas
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
MSC 350WD CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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IMPORTANTE:	Para recibir ayuda gratuita con traducciones, puede llamar al 1-800-204-2418. Por favor hágalo lo antes posible, ya que el tiempo para apelar es limitado.
ENPÒTAN:	Pou yon intèpret asisté ou gratis, nou gendwa rélé 1-800-204-2418. Sil vou plè pa pràn àmpil tàn, paské tàn limité pou ou ranpli apèl la.

Docket No. **2013-56076U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee **EMPLOYER/Appellant**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3565-0

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: In August 2004, the claimant was hired to work for the County School Board, as a full-time teacher. The employer's standards of conduct informed the employees that the school board may dismiss an employee for actions which brought the school system into disrepute for non-compliance with the employer's policies or state laws. The standards of conduct informed the employees that it was their obligation to make reasonable efforts to protect the students from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety. The employees were not to intentionally expose a student to unnecessary embarrassment or disparagement. The

claimant received the employer's policy and standards of conduct, at the time of hire. In 2002, the claimant, the claimant received training for safe crisis management holds. The claimant received training again in 2006. The employees were required to be recertified in safe crisis management holds each year. The claimant had requested to be recertified and he was told that only the ESE Behavioral Health Assistants would be recertified. Throughout the claimant's employment, he was required to break up fights. When the claimant broke up fights, he had to hold the students back, or hold them apart. The claimant was not recertified when he was breaking up fights and he was not discharged for holding the students.

On April 3, 2013, the claimant took his students outside on the field. There were several students on the field. The students were sixth, seventh and eighth graders. The claimant was with his students about fifty yards away from a student that was in time out. The student was in the middle of the field in time out and he was sitting with his butt on the back of a chair with his feet in the seat. The ESE Behavioral Health Assistant was on the outside of the fence and she was assigned to work one on one with the student. The student was yelling at the other children, "You're gay and your dad is gay." The student continued yelling and cursing. The claimant's students were disrupted by the student in time out. The claimant asked the ESE Behavioral Health Assistant if everything was okay and she responded, "Yes." The student in time out continued cursing, "Fuck you, fuck this. Hey, your dad is gay." The claimant told the student in time out, "Hey, you're supposed to be sitting in the chair." The student in time out got out of the chair and kicked it two to three feet away. The student in time out then picked up the chair and sat down. One minute later, the student in time out was yelling, "fuck you" to the students in his class. The claimant testified that the coach of the student in time out was at least a football fields length away from the student in time out. The claimant walked toward the student in time out and he asked the ESE Behavioral Health Assistant if everything was okay. The ESE Behavioral Health Assistant said something to the student in time out. The student in time out got up and threw the chair twenty-five feet. The claimant tried to radio the student's coach and got no response. The claimant tried to radio the office and got no response. The student picked up his coach's gradebook and threw it into the air. The student rapidly walked off toward the gym. The claimant yelled out at the student's coach and pointed at the student. The claimant told the other coach what happened and the claimant went to gather his class. The claimant sent his group of students to the sidewalk and the other coach was still gathering his students. The claimant was walking backwards and the student approached the claimant asking, "Coach, you like MF don't you?" The

student had MF on his arm, written in black marker and it is a symbol for Shaggy from Scooby Doo. The claimant told the student, "I'm going to tell you exactly what I told you yesterday, I'm not going to cheer for MF." (The student told the claimant and the other coach the previous school day, that he knew about the cars in the area that had spray paint.) The student asked the claimant, "You like it don't you?" The claimant told the student, "No." The student was walking fast and getting farther away from the ESE Behavioral Health Assistant. The student told the claimant, "Come on, I hate this fucking school. I hate every teacher in it." The claimant told the student, "You may hate this school, but you can't use that language." The student kept using profanity. Halfway down the sidewalk, the claimant told the student, "I need you to stop using profanity." The student told the claimant, "Fuck this, fuck you." When the student got to the door, he slammed his left hand on the gym door and he snatched the right side of the door open with his right hand. When the door opened, the claimant saw fifty to seventy kids sitting on the floor in the hall. The claimant put his left hand on the student's lower left forearm that was by his hip and the claimant's right arm was across the student's right arm across the student's chest and the claimant's right hand was on the student's left shoulder. The student's right hand was on his chest. The student told the claimant, "What the fuck can you do." The claimant told the student, "You don't know what I can do." The claimant pulled the student away from the door, by taking two steps back, to keep the student from going into the crowded hall with the other students. The student was struggling against the claimant and he almost fell. The claimant prevented the student from falling. The claimant turned the student around and held him against the railing by the portable building. The claimant got the student to calm down after a few seconds. Once the student calmed down, the claimant told the student to go stand by the wall. The claimant did not want the student to be embarrassed by the other students that were approaching. The student's coach came up and the claimant was telling the other coach what had happened. The claimant left the student with his coach. The claimant did not see a scratch on the student and the student's

neck was not red. The assistant superintendant questioned the claimant about the incident because the student complained about the claimant holding him. The claimant gave the assistant superintendant his statement.

On April 3, 2013, the claimant was suspended, pending investigation. The claimant was charged with child abuse, aggravated assault and child abuse without great harm. When the claimant found out that there was a warrant for his arrest, the claimant turned himself into the police department. The claimant was incarcerated for five days. The claimant went before the judge on June 4, 2013. The claimant pled not guilty and he was not convicted. On May 17, 2013, the claimant was discharged because the assistant superintendant believed that the claimant violated the employer's standards of conduct when he restrained the student.

Conclusions of Law: As of June 27, 2011, the Reemployment Assistance Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed in pari materia with each other:

(a) Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.

(b) Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.

(c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

(d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

(e) A violation of an employer's rule, unless the claimant can demonstrate that:

1. He or she did not know, and could not reasonably know, of the rules requirements;
2. The rule is not lawful or not reasonably related to the job environment and performance; or
3. The rule is not fairly or consistently enforced.

The record shows that the claimant was discharged because the assistant superintendant believed that the claimant violated the employer's standards of conduct. The claimant believed that he was following the employer's standards of conduct and that he was protecting the other students. The claimant's actions did not demonstrate a conscious disregard of the employer's interests and is not found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of their employees. Although the claimant was charged for abusing a student, he pled not guilty and there is no testimony or evidence to show that he has been convicted. The employer presented evidence. The policy and standards of conduct are found to be trustworthy and probative. The summary and documents prepared by the assistant superintendent are not found to be trustworthy or probative because she did not witness the incident. Her testimony was based on reports from others and is hearsay. The ESE Behavioral Health Assistant's statement is not found to be trustworthy or probative because the claimant rebutted her testimony and conflict was resolved in favor of the claimant. The burden of proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). Since the claimant's conduct did not demonstrate misconduct under Florida Statutes 443.036(30)(a)(b)(c)(d)or (e), the claimant is qualified for receipt of benefits.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The ESE Behavioral Health Assistant alleged that she was monitoring the student on the day of the incident. The student was in time out and he was cursing at other students. The ESE Behavioral Health Assistant told the student to calm down and he continued to curse and yell. The claimant told the student that he needed to behave and the student continued cursing. The student threw a chair across the field and began walking toward the gym. The student picked up the second coach's gradebook and threw it up in the air. The claimant followed the student and the claimant was walking backwards in front of the student. The ESE Behavioral Health Assistant testified that the claimant told the student, "If I find paint on my car, I'll find you and put you in the hospital. You don't know what I'm capable of." The student told the claimant, "shut the fuck up" and he tried to open the door. The ESE Behavioral Health Assistant testified that when the student tried to open the door, the claimant put his arm around the student's neck and pulled him away from the door and held him over the rail by the portable. The ESE Behavioral Health Assistant testified that she tried to calm the student down. The claimant released the student and the student's coach walked up. Then, the ESE Behavioral Health Assistant walked to the office for help. The ESE Behavioral Health Assistant testified that the student's elbow was scratched and his neck was red. The claimant contended that there were several students on the field. The claimant was with his students, fifty yards away from the student in time out. The student was in the middle of the field in time out and he was sitting with his butt on the back of a chair with his feet in the seat. The ESE Behavioral Health Assistant was on the outside of the fence. The student was yelling at the other students, "You're gay and your dad is gay." The student continued yelling and cursing. The claimant's students were disrupted by the student in time out. The claimant asked the ESE Behavioral Health Assistant if everything was okay and she responded, "Yes." The student in time out continued cursing, "Fuck you, fuck this.

Hey, your dad is gay." The claimant told the student in time out, "Hey, you're supposed to be sitting in the chair." The student in time out got out of the chair and kicked it two to three feet away. The student in time out then picked up the chair and sat down. One minute later, the student in time out was yelling, "fuck you" to the students in his class. The claimant testified that the coach of the student in time out was at least a football field's length away from the student in time out. The claimant walked toward the student in time out and he asked the ESE Behavioral Health Assistant if everything was okay. The ESE Behavioral Health Assistant said something to the student in time out. The student in time out got up and threw the chair twenty-five feet. The claimant tried to radio the student's coach and got no response. The claimant tried to radio the office and got no response. The student picked up his coach's gradebook and threw it into the air. The student rapidly walked off toward the gym. The claimant yelled out at the student's coach and pointed at the student. The claimant told the other coach what happened and the claimant went to gather his class. The claimant sent his group of students to the sidewalk and the other coach was still gathering his students. The claimant was walking backwards and the student approached the claimant asking, "Coach, you like MF don't you?" The student had MF on his arm, written in black marker. The symbol is for Shaggy from Scooby Doo. The claimant told the student, "I'm going to tell you exactly what I told you yesterday, I'm not going to cheer for MF." (The student told the claimant and the other coach the previous school day that he knew about the cars in the area that had spray paint.) The student asked the claimant, "You like it don't you?" The claimant told the student, "No." The student was walking fast and getting farther away from the ESE Behavioral Health Assistant. The student told the claimant, "Come on, I hate this fucking school. I hate every teacher in it." The claimant told the student, "You may hate this school, but you can't use that language." The student kept using profanity. Halfway down the sidewalk, the claimant told the student, "I need you to stop using profanity." The student told the claimant, "Fuck this, fuck you." The student slammed his left hand on the

left gym door and he snatched the right side of the door open with his right hand. When the door opened, the claimant saw fifty to seventy kids sitting on the floor in the hall.

The claimant had been trained in the safe crisis management hold, to restrain students and prevent them from harming themselves or others. The claimant put his left hand on the student's lower left forearm that was down by the student's hip and the claimant's right arm was across the student's right arm across the student's chest, because his right hand was on his chest and the claimant's right hand was on the student's left shoulder. The student told the claimant, "What the fuck can you do?" The claimant told the student, "You don't know what I can do." The claimant pulled the student away from the door by taking two steps back to keep the student from going into the crowded hall with the other students. The student was struggling against the claimant and he almost fell. The claimant prevented the student from falling. The claimant turned the student around and held him against the railing by the portable building. The claimant got the student to calm down after a few seconds. Once the student calmed down, the claimant told the student to stand by the wall. The claimant did not want the student to be embarrassed by the other students that were approaching with the coach. The student's coach came up and the claimant was telling the other coach what had happened. The claimant left the student with his coach. The claimant did not see a scratch on the student and the student's neck was not red. The claimant testified that he never told the student, "If I find paint on my car, I'll find you and put you in the hospital. You don't know what I'm capable of." The claimant testified that the ESE Behavioral Health Assistant was wearing high heel shoes and she was far enough behind them that she could not have understand what was said. The claimant contended that the previous school day, the student was telling him and the other coach that he knew about the spray paint on the cars. The claimant and the other coach told him that he should not be talking about that. The previous school day, the other coach told the claimant that he noticed that the graffiti on the student's shoes was the same graffiti that was on the bathroom walls. The claimant testified that was what he was talking with the student about as he was walking up the sidewalk and that he never said

the word "hospital" with the student. The assistant superintendant testified that although the claimant was trained in safe crisis management hold, he was required to be recertified each year and that since he had not been recertified, he was not permitted to use a safe crisis management hold on the students. The assistant superintendent testified that only the ESE Behavioral Health Assistanst had current certification to use the safe crisis management hold on the students. However, the claimant frequently broke up student fights in which he had to hold and restrain the students. The claimant was not discharged when he held students to break up fights.

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 claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

Decision: The determination dated June 12, 2013, is AFFIRMED. The claimant is qualified for receipt of benefits.

This is to certify that a copy of the above decision was mailed to the last known address of each interested party on July 19, 2013.

ROSEMARY RIGGINS
Appeals Referee

By: 
YVETTE HARVEY, 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 below 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 https://iap.floridajobs.org/ or by writing to the address at the top of this decision. The date the confirmation number is generated will be the filing date of a request for reopening on the Appeals 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 https://iap.floridajobs.org/ o escribiendo a la dirección en la parte superior de esta decisión. La fecha en que se genera el número de confirmación será la fecha de registro de una solicitud de reapertura realizada en el Sitio Web de la Oficina de Apelaciones.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Desempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org/.** Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y el número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

ENPÒTAN – DWA DAPÈL: Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat nou poste sa a ba ou. Si 20^{yèm} jou a se yon samdi, yon dimanch oswa yon jou konje, jan sa defini lan F.A.C. 73B-21.004, depo an kapab fèt jou aprè a, si se pa yon samdi, yon dimanch oswa yon jou konje. Si desizyon an diskalifye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

Yon pati ki te gen yon rezon valab pou li pat asiste seyans lan gen dwa mande pou yo ouvri ka a ankò; fòk yo bay rezon yo pat ka vini an epi fè demann nan sou sitwèb sa a, https://iap.floridajobs.org/ oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat yo pwodui nimewo konfimasyon an se va dat yo prezante demann nan pou reouvri kòz la sou Sitwèb Apèl la.

Yon pati ki te asiste seyans la epi ki pat satisfè desizyon yo te pran an gen dwa mande yon revizyon nan men Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org/.** Si ou voye l pa lapòs, dat ki sou tenb la ap dat ou depoze apèl la. Si ou depoze apèl la sou yon sitwèb, ou fakse li, bay li men nan lamen, oswa voye li pa yon sèvis mesajri ki pa Sèvis Lapòs Lèzetazini (*United States Postal Service*), oswa voye li pa Entènèt, dat ki sou resi a se va dat depo a. Pou evite reta, mete nimewo rejis la (*docket number*) avèk nimewo sekirite sosyal moun k ap fè demann lan. Yon pati k ap mande revizyon dwe presize nenpòt ki alegasyon erè nan kad desizyon abit la, epi bay baz reyèl oubyen legal pou apiye alegasyon sa yo. Yo p ap pran an konsiderasyon alegasyon erè ki pa byen presize nan demann pou revizyon an.