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FLORIDA DEPARTMENT of ECONOMIC OPPORTUNITY

STATE OF FLORIDA ★ REEMPLOYMENT ASSISTANCE APPEALS COMMISSION ★ RAAC

APPEALS QUARTERLY

Common Evidence Issues in RA Cases

This edition of the newsletter discusses important Commission precedent regarding evidentiary issues in appeals hearings, and contains an analytical framework to address the admission and weighing of documentary evidence. Until five years ago, the evidentiary standard in RA appeals hearings mirrored that of administrative hearings held under Chapter 120. However, a 2011 amendment to the RA law's evidentiary standard added what has become known as the "residual exception" for hearsay, and significantly broadened the scope of potentially competent evidence for RA hearings. The most significant aspect of this unique provision is that hearsay need not fall under an exception in the Florida Evidence Code to support a material finding of fact, so long as the hearsay was available to the other party at least a day prior to the hearing, and the referee concludes that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

In general, all relevant, authenticated documentary evidence is admissible. Thus, the relevant question is not whether authenticated evidence is admissible, but rather for what purpose it is admissible. Hearsay that falls within a hearsay exception in the Florida Evidence Code or Chapter 443's residual exception is competent evidence that may support a finding of fact. Evidence that does not fall within a hearsay exception, though not considered competent evidence that by itself can support a finding of fact, is still admissible. It may, however, be used only as corroborative or supporting evidence, and cannot support a material finding of fact by itself.

Because the residual exception was added to the statute for the purpose of permitting documentary evidence to be used as competent evidence – whether or not it is admissible under a hearsay exception in the Florida Evidence Code – rejection of such evidence based on an absolute preference for oral testimony is improper. A referee who simply disregards a piece of evidence because the declarant does not testify has abused his or her discretion.

While this edition of the newsletter primarily concerns tangible evidence and its associated hearsay issues, we have also included discussion of the closely-related best evidence rule to emphasize that it is not strictly applicable in RA hearings to exclude evidence.

The precedential RAAC orders summarized in this edition address many aspects of evidentiary analysis, including several hearsay exceptions in the Florida Evidence Code. This edition also features a checklist to guide one through the basic analytical framework for evidence in RA hearings.

In This Issue:

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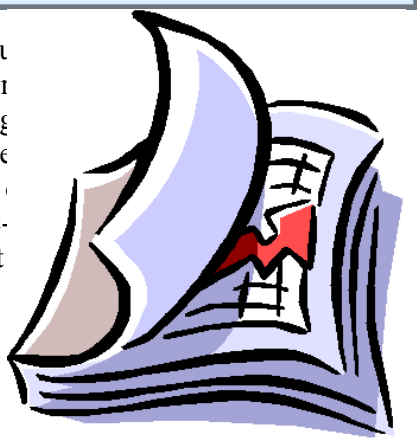
R.A.A.C. Order No. 13-04687
(August 21, 2013) – oral testimony regarding video evidence
The employer fired the claimant, a restaurant employee, for allegedly giving away free food. The owner was not present at the time, but observed the incident on a surveillance video tape. Because the employer's testimony regarding the alleged misconduct was based solely on his observation of the video tape, the referee rejected the testimony as hearsay, and held the claimant discharged for reasons other than misconduct.

The Commission remanded the case for further consideration, holding that the referee's conclusion that the testimony was hearsay was erroneous. Because the owners' testimony contained no second-hand statements, his testimony was not hearsay. Instead, the testimony implicated the best evidence rule. Citing the statutory language permitting evidence of the kind relied upon by reasonably prudent persons in the conduct of their affairs, the Commission held that the best evidence rule should not be strictly applied to hearings in most circumstances. Instead, when a party offers "secondary" evidence, the referee should develop the record regarding a number of points that bear on the weight to be given the evidence, such as the (1) why the party offering it did not produce the primary evidence for hearing; (2) the steps that party took, if any, to attempt to produce the primary evidence; and (3) whether the opposing party ever had access to the primary evidence. The referee should then evaluate factors such (1) whether or not the primary evidence was in the possession or control, at the time of the hearing, of the party offering secondary evidence of it; (2) whether the primary evidence is unavailable through no fault of the offering party; (3) whether the primary evidence was available to the opposing party at any point; and, most significantly, (4) the cost, difficulty, or other burden on the offering party to produce the primary evidence, or the merits of any other justification as to why the primary evidence was not produced. After developing the record and considering these factors, the referee then gives the evidence such weight as the referee feels it deserves.

R.A.A.C. Order No. 13-05159
(October 8, 2013) - accidents reports; public records and reports hearsay exception

The claimant, a driver for a fuel distributor, was discharged pursuant to the employer's policy that provided for termination of an employee who causes a vehicular accident. To prove the claimant caused the accident, the employer submitted a copy of a Florida Highway Patrol Officer's Traffic Crash Report ("accident report"); however, the referee discredited this evidence as wholly inadmissible hearsay. The Commission held that the referee improperly excluded the accident report and remanded the case for the referee to reevaluate the evidence under the Florida Evidence Code's public records and reports hearsay exception, the RA program law's residual exception, and as corroborating evidence.

Under the Florida Evidence Code and case law, an accident report is prepared by statutory mandate and is therefore self-authenticating when signed. It is admissible under the public records and reports exception to the hearsay rule. Under this exception, a law enforcement officer's observations contained in an official report are admissible and competent to support a finding of fact.



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based on statements made by the claimant, the other driver, and three independent witnesses, and thus constitute hearsay within hearsay, those statements must still be evaluated under other hearsay exceptions. The claimant's own statements in the accident report are statutorily privileged and thus were not admissible. However, the statements of the three independent witnesses were held to be admissible under the residual hearsay exception. The Commission reasoned that statements from independent witnesses who had no stake in the outcome, who provided their statements to an officer in the course of an investigation under the potential of criminal penalty for lying, and whose statements were taken and memorialized by an officer trained to do so, were trustworthy and probative. The Commission also held that the statement from the other driver who did have a stake in the outcome may be considered as evidence corroborating the three independent witnesses' statements.

R.A.A.C. Order No. 13-05435
(October 7, 2013) - drug testing documents; hearsay within hearsay; authentication
The claimant was discharged pursuant to the employer's policy for failing to submit to a random drug test. The claimant did not appear at the evidentiary hearing; however, the referee held the claimant not disqualified

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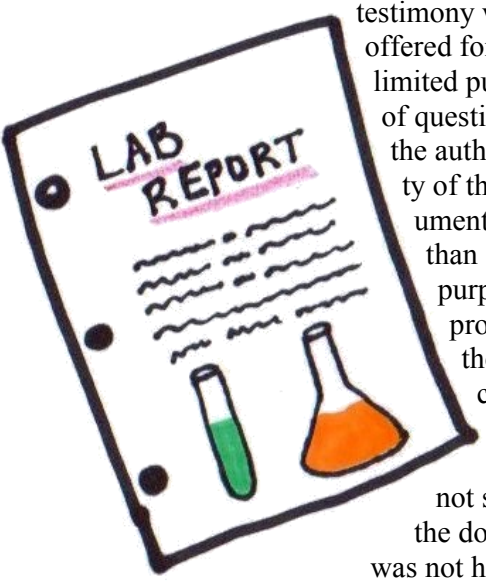
from benefits based on a "shy bladder" defense. The Commission reversed because the shy bladder defense was supported only by inadmissible hearsay.

Three documents contained evidence related to the claimant's inability to produce a urine sample. First, a sample collection form apparently completed by a testing facility technician contained a hearsay-within-hearsay statement by the claimant that he was unable to give a sample. Second, a letter from the laboratory's medical review officer requesting a medical opinion substantiating the claimant's "shy bladder" claim merely restated the claimant's hearsay-within-hearsay statement made at the facility. The third and crucial document was a form letter ostensibly completed by a doctor and indicated the claimant had a medical reason for his failure to give a sample. However, the employer found that two signatures of the doctor did not match and thus questioned the validity of the document. The referee incorrectly rejected as hearsay testimony from an employer witness that, when they contacted the doctor to verify the document's validity, they were informed that the claimant had not seen the doctor. To the extent this testimony was offered for the limited purpose of questioning the authenticity of the document rather than for the purpose of proving the claimant had not seen the doctor, it was not hearsay.



Prior to being accepted into evidence, any document must be authenticated through testimony establishing what the document is and how it was created or received. Authentication of a document cannot be performed by a person who contests its validity. Moreover, even if authenticated, the document was not admissible to support a factual finding because it did not fall within any hearsay exceptions in the Florida Evidence Code and it could not be admitted under the residual exception because it lacked trustworthiness. With this document not admissible in evidence, the record established only that the claimant violated the employer's policy requiring employees to submit to random drug testing by failing, without good cause, to provide a sample.

R.A.A.C. Order No. 13-05485
(October 7, 2013) – identification of non-testifying witnesses

The claimant was discharged for alleged insubordination. The employer provided documentary evidence consisting of written statements from two non-testifying employees who were involved in the incidents leading to the claimant's discharge, but the names and other identifying information in the statements were redacted. Generally, statements or other documents that do not identify the persons making the assertions are not sufficient to be admitted under any of the exceptions to the hearsay rules and, therefore, are not sufficient to form the basis for a factual finding. However, at the hearing the employer's witness identified the authors, and it appeared the claimant knew in advance who wrote the statements. Redaction of the documents was therefore apparently "cured." The referee moved the documents into evidence and marked them as exhibits; however, the documents were or contained hearsay, and the referee's decision did not include any analysis of the documents' admissibility and competence under the hearsay rules. Therefore, the Commission remanded the case for further proceedings and rendition of a decision containing a hearsay analysis of the written witness statements.

R.A.A.C. Order No. 13-05686
(August 14, 2013) – routine business practice

The referee held the claimant discharged for reasons other than misconduct when his assignment with a temporary help or employee leasing firm ended and he was not given another assignment. The referee's holding rested upon the conclusion that the employer's witness did not provide competent testimony to establish the claimant was notified at hire of the requirement to report back to the employer for reassignment upon completion of the assignment and that failure to do so could jeopardize the claimant's entitlement to benefits. The Commission concluded the referee erroneously discredited as hearsay the witness's testimony without first asking foundational questions to determine whether the testimony could be considered as evidence of a routine business practice to create an inference that the employer acted in accordance with that practice on a particular occasion, and remanded the case for further consideration.

R.A.A.C. Order No. 13-06172
(October 30, 2013) – documentary proof of positive drug test under the residual exception

The referee held the employer did not establish misconduct through its allegations that the claimant tested positive for marijuana in a random drug test. The Commission held that the referee correctly concluded the employer did not provide the documenta-

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tion required to establish a rebuttable presumption of drug use under Section 443.101(11), Florida Statutes, because the employer provided for the hearing only a summary of the test result and did not provide the chain of custody document.

The Commission further explained that it is possible to establish a violation of a drug-free workplace policy solely by documentary evidence under the residual hearsay exception, even without meeting all of the requirements to establish the statutory presumption of drug use. The Commission concluded that because the drug testing was conducted by an outside laboratory, and no witness from the laboratory testified, it was imperative that a complete chain of custody document and results of the test be provided in order to establish reliable and probative hearsay evidence sufficient to be self-authenticating and admissible under the residual exception. Since this documentation was not provided for the hearing, the referee correctly determined the employer failed to prove a violation of its drug-free workplace policy.

R.A.A.C. Order No. 14-00075 (August 27, 2014) – employer's investigative report; sworn statements of non-testifying witnesses

The claimant was employed as a municipal public safety officer and was discharged for alleged insubordination for failing to timely write a report as ordered. The employer presented documentary evidence including transcripts and summaries of statements made under oath during an internal affairs investigation by non-testifying witnesses. Without referring to any of the employer's exhibits, the referee held the employer did not present competent evidence to meet its burden of proving misconduct. The Commission remanded the case for the referee to evaluate the admissibility and competency of the employer's documentary evidence under the hearsay exceptions in the Florida Evidence Code and under the residual exception, emphasizing that an absolute preference for oral testimony over probative documentary evidence is unjustified and referees do not have the authority to simply disregard a piece of evidence because the declarant does not testify.
In this order, the Commission's order laid out the steps necessary to evaluate the admission and consideration of documentary evidence contained in the Checklist in this issue.

R.A.A.C. Order No. 14-00447 (June 24, 2014) – mediation privilege and the parol evidence rule

The claimant voluntarily quit employment pursuant to a mediated workers' compensation settlement agreement that was not submitted for the hearing. The referee held the claimant voluntarily quit without good cause. At the hearing, the claimant presented testimony regarding the terms of the agreement as well as oral assurances made by the employer during the mediation conference regarding the claimant's entitlement to reemployment assistance benefits following the job separation. If proven, the employer's assurances could constitute good cause attributable to the employer.

However, the Commission concluded the record was inadequate to determine whether the parol evidence rule precluded the testimony offered by the claimant. Under the substantive law of contracts, evidence of oral communications cannot be used to alter the terms of a complete or "integrated" agreement. Additionally, the mediation privilege may have barred the claimant's testimony. The Commission remanded the case for the claimant to submit the complete settlement agreement so that the referee could determine whether the proffered testimony was admissible to explain ambiguous provisions of the written agreement. Additional discussion of the parol evidence rule and mediation privilege are contained in the Chairman's Evidence Column for the December 2015 issue of the Appeals Quarterly.

R.A.A.C. Order No. 14-05924 (April 24, 2015) – excited utterance; competent versus corroborative hearsay; direct versus circumstantial evidence; drawing of inferences

The claimant was discharged for violating the employer's sexual harassment policy by his conduct towards a female subordinate. In holding that the employer did not prove misconduct, the referee characterized the employer's evidence as not competent. The employer, however, offered extensive direct, circumstantial, and hearsay evidence supporting its contention that the claimant engaged in sexual harassment, including testimony regarding observation of a security video, and testimony regarding statements made to the employer by both the claimant and the subordinate he was accused of harassing.

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Since the referee apparently did not consider this evidence, the case was remanded.

Some of the employer's hearsay evidence was admissible to support a finding of fact, while portions were only supporting. Hearsay that falls within a hearsay exception in the Florida Evidence Code or the RA law's residual exception may directly support a factual finding. Such evidence is referred to as "competent" hearsay because it is competent to support a finding. Hearsay that does not fall within an exception may still be introduced, but it may only be used to corroborate, supplement or explain other evidence, and thus is "corroborating" hearsay.

The statements the claimant allegedly made to either manager were competent evidence because they were admissions and were a sufficient basis to establish misconduct, particularly when supplemented by additional evidence. In addition, the subordinate's statements to the general manager should have been evaluated under the "excited utterance" hearsay exception. An "excited utterance" is "a statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Finally, the Commission held that on remand, after considering all relevant evidence, weighing it appropriately, and drawing reasonable inferences, the referee should determine whether it was more likely than not that the claimant committed the acts of which he was accused. If the employer's testimony was believed, then certain circumstantial inferences would reasonably be drawn from it that contradicted the claimant's version of events. Circumstantial evidence is not inherently inferior to direct evidence. Thus, circumstantial evidence is sufficient to prove facts under the preponderance of the evidence standard used in reemployment assistance appeals proceedings, and the referee was required to weigh this evidence against the claimant's testimony.

R.A.A.C. Order No. 14-06225 (March 26, 2015) – summary of law enforcement investigative report; public record and reports hearsay exception; hearsay within hearsay

The claimant was a softball coach at a state college. Her annual contract was not renewed due to allegations of misappropriation of funds from student-athletes, and a police investigation led to her arrest. To establish the claimant's culpability for the alleged misappropriation, the employer introduced the narrative police report summarizing the results of the investigation that that led to the claimant's arrest. In concluding the employer failed to establish the claimant was culpable, the referee held that the narrative was not competent evidence to support a finding of fact since it was an excerpt from a larger document.

The Commission held that because the employer offered the entire narrative report from the investigation, along with a witness's explanation of the relevant procedures that the claimant allegedly violated, the evidence was sufficient to establish a prima facie case of misconduct. Pursuant to the Florida Evidence Code's public records and reports hearsay exception, an investigative report, accident report, or arrest report prepared by a law enforcement officer is competent, admissible evidence. Although the employer omitted significant amounts of supporting evidence that was attached to the narrative in the full report, including financial documents, photographs, and witness statements, the document offered was a complete recounting of the evidence and was admissible. Furthermore, since the document contained the electronic equivalent of a signature, the document was self-authenticating.

While the statements of the witnesses referenced in the report were hearsay within hearsay, they fell within the scope of the residual exception. Under the residual exception, recorded hearsay is competent evidence if it was previously provided and meets a standard of trustworthiness. A police report generally merits particular trustworthiness because it is prepared by an individual with no financial interest in the outcome of the hearing, and whose training and job duties require accurate memorialization of statements by others. Accordingly, the referee erred in concluding the summary was not sufficiently probative. The case was remanded for further consideration.

R.A.A.C. Order No. 15-00054 (July 17, 2015) - propensity evidence; former testimony exception

The claimant was employed by a school board as a teacher, and was arrested on charges of felony sexual battery on a minor. The employer decided there were reasonable grounds to believe that the claimant committed the alleged acts, violating

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various state and local rules or standards, and consequently discharged the claimant.

At the RA hearing, the employer introduced certified transcripts of the testimony of two individuals given at a Williams rule proceeding, which is a proceeding designed to determine whether "similar act evidence" is admissible in a criminal trial. The transcripts contained the two individuals' testimony that the claimant had also engaged in improper sexual conduct with them (the "Williams rule testimony"). Based in part on this evidence, the referee held the claimant disqualified. On appeal to the Commission 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. The Commission concluded that none of these evidentiary objections were meritorious in the reemployment assistance proceeding.

Regarding the claimant's contention that the Williams rule testimony was hearsay, the Commission determined that the testimony was admissible under the Florida Evidence Code's "former testimony" exception, and that it was also clearly admissible under the RA law's residual exception. 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 taken down and transcribed by a court reporter. The testimony therefore met the statutory requirements for admission into evidence as "competent" hearsay, capable of supporting a material finding of fact.

The fact that some of the testimony was ruled inadmissible in the criminal trial did not impact its admissibility in the RA case, since the evidentiary standard for RA proceedings is more liberal than that which governs proceedings in court. Accordingly, the Commission held that there was no absolute bar on propensity evidence in RA proceedings.

As to the argument that the evidence was inflammatory, the Commission acknowledged that the accusations were serious, but because of the employer's stated grounds for the discharge, the Williams rule testimony was pertinent to the misconduct issue.

R.A.A.C. Order No. 15-02331 (July 10, 2015) – admissions exception

The claimant was employed as a delivery driver and was discharged for violating the employer's policy that prohibits unprofessional or inappropriate behavior toward coworkers and the employer's customers. The employer's transportation manager provided testimony regarding three incidents that led to two prior warnings and the claimant's discharge, but this testimony was based on what others reported to the manager. Since no written reports or witness statements were provided for the hearing, the claimant did not have a reasonable opportunity to review the employer's evidence prior to the hearing. Therefore, the manager's hearsay testimony did not satisfy the requirements of the residual hearsay exception.

However, the record reflected that the claimant may have admitted to the transportation manager that he engaged in the alleged misconduct. The referee asked the transportation manager if the claimant admitted "to his actions" without specifically asking the transportation manager what the claimant said or admitted. In addition, the claimant was not questioned regarding whether he admitted the conduct alleged by his co-workers. If the claimant made such admissions to the employer's witness, any testimony recounting them by the employer's witness would fall within a hearsay exception for admissions and could support a material finding of fact. Since the referee failed to develop the record sufficiently to enable the Commission to determine if, in fact, the claimant made such admissions, the case was remanded for further record development.

Additionally, in its order the Commission noted that the referee made the potentially misleading statement to the parties that all hearsay evidence is admissible at reemployment assistance appeals hearings. Though technically true, the referee's statement may have led the parties to believe that hearsay testimony not otherwise admissible under a hearsay exception can support a material finding of fact by itself, which is not true under the statute.

Analyzing Evidence in RA Law – A Checklist

☐ **NOTICE** – For documents, confirm evidence was properly provided to all parties, either by the referee as an attachment to the notice of hearing or by proper advance transmittal by the offering party to the referee and other party;

☐ **AUTHENTICATION** – For documents, determine whether the evidence can be authenticated, i.e., whether a witness can explain with personal knowledge what the document is and how it was created or obtained;

☐ **HEARSAY?** – Identify whether the evidence is in fact hearsay, that is, it contains assertions of fact offered to prove the facts, or, alternatively, is tangible non-hearsay evidence that is admissible and competent without any further showing;

☐ **EVIDENCE CODE EXCEPTIONS** – If hearsay, determine whether one of the statutory exceptions in the Florida Evidence Code applies; if so, it should be admitted and deemed competent;

☐ **RESIDUAL EXCEPTION** – If the evidence does not fall within any exceptions in the Florida Evidence Code, then the referee should determine whether the residual exception applies, including whether the party against whom any documents are being offered had a reasonable opportunity to review such evidence prior to the hearing, and whether the hearsay evidence is trustworthy and probative and the interests of justice would best be served by its admission as competent evidence;

☐ **CONFLICTS** – If the evidence meets the statutory requirements for its acceptance as competent evidence, then the evidence must be weighed in light of any conflicting evidence that may have been presented by the opposing party.

☐ **USE AS NON-COMPETENT HEARSAY** – If the evidence is hearsay that does not meet one of the statutory exceptions, it should still be admitted to corroborate, supplement, or explain other evidence, but will not be competent to serve as the sole basis for a material finding of fact.

RAAC Outreach Initiative

Chairman Frank E. Brown spoke to the Escambia– Santa Rosa County Bar Association on April 8, 2016, as part of RAAC's ongoing outreach initiative. The chairman discussed recent changes in Reemployment Assistance law, explained how RA law impacts other legal practices, and answered participants' questions. This presentation is just one of several that the chairman has performed over the last few months and will continue to perform during the summer. We are now scheduling outreach events for Fall 2016. If you are interested in having a RAAC representative present to your organization, please email Lesley.Blanton@raac.myflorida.com for more information.

The Florida Bar Labor and Employment Law Section hosted a CLE on April 1, 2016, entitled ***Practicing Before State Labor and Employment Agencies.*** It featured panels from the Florida Commission on Human Relations, Division of Administrative Hearings, Public Employees Relations Commission, Department of Economic Opportunity, Reemployment Assistance Appeals Commission, and the First District Court of Appeals. Each agency discussed their case load, processes, and best practices tips. The course was a full-day event worth a maximum of eight CLE credits. Did you miss this event? CDs and DVDs are now available! Click here for more information.

The RAAC panel addressed questions from the audience.

Emily Eineman, Office of Appeals Bureau Chief, presented on behalf of DEO.

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