STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-06014

vs.

Referee Decision No. 13-41775U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case 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.

Procedural error requires this case to be remanded for further proceedings; accordingly, the Commission does not now address the issue of whether the claimant is eligible/qualified for benefits.

The referee's findings of fact state as follows:

> The claimant began working for the employer on March 29, 2010. The claimant last worked for the employer as an advance clinical technician. The claimant's job duties required that she access patient records where she had prior authorization.
>
> The employer believed that on February 25, 2013, the claimant had, without proper authorization, accessed a patient's medical records. At no time, however, did the claimant access a patient's medical records without proper authorization. The claimant has no history of this alleged conduct while she worked for the employer. The employer discharged the claimant on March 11, 2013, for an alleged unauthorized access of patient records.

Based on these 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 record was not sufficiently developed; consequently, the case must be remanded.

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.

A review of the record reflects that, although the referee's decision properly cites the statutory definition for misconduct as set forth in Section 443.036(30), Florida Statutes, the decision's conclusions of law do not properly evaluate the evidence under all of the relevant subparagraphs of the definition of misconduct set forth above. The referee's conclusions of law state in pertinent part:

> The record and evidence in this case show that the claimant was discharged because the employer believed that the claimant had access of patient records without authorization.
>
> The courts have held that the burden of proof is on the employer to prove, by a preponderance of competent substantial evidence that the claimant engaged in an act, or course of conduct, in violation of the employee's duties and obligations to the employer. That burden has not been met in this case.
>
> The claimant provided competent testimony that she did not access patient records without proper authorization. The employer, at most showed that the claimant's user identification was used to access records, but showed little evidence that the claimant had, in fact, accessed patient records. Furthermore, if the employer had showed that the claimant was the actual source of its findings, the employer admitted that such an occurrence only occurred once during the claimant's tenure.
>
> Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertence or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute. *Tucker v. Florida Department of Commerce*, 366 So. 2d 845 (Fla. 1st DCA 1979). Therefore, to consider the employer's testimony, the claimant's action would only amount to unsatisfactory conduct in an isolated instance, which is not misconduct under the law.
>
> As a result, the referee fails to find that the claimant performed her job duties without authorization. Therefore, it is concluded that the claimant was discharged, but not for misconduct connected with work within the meaning of the law. The claimant is not disqualified from the receipt of benefits.

To establish a violation under subparagraph (e), the employer must present evidence establishing the policy/rule and evidence that the claimant violated it. The employer is not required to establish the claimant violated the rule on more than one occasion. If the employer establishes the claimant violated a rule/policy, the burden shifts to the claimant to establish one of the affirmative defenses set forth in subparagraph (e)1.-3. The claimant has the burden of showing that he/she did not know, and could not reasonably know, of the rule's requirements; the rule is not lawful or not reasonably related to the job environment and performance; or the rule is not fairly or consistently enforced. The Commission has held that subparagraph (e) generally requires that there be some notice to the employee of the potential consequences for the rule violation, or that the rule violation be sufficiently severe that the claimant would reasonably have understood that discipline including termination might result. Proper notice is not limited to the terms of specific rule or policy at issue. An employee can be given notice of the potential consequences of violation of the rule in numerous ways: in a general disciplinary or other policy; by general oral or written notice to the workforce; by specific notice of the consequences to the employee at issue; or by prior warnings or counseling to the employee. In the absence of prior notice or reasonable understanding of the consequences of violation of the rule, the rule might not be fairly or consistently enforced.

No requirement of an intentional violation exists under subparagraph (e). Whether the violation was intentional or not is a factor to be considered in determining whether the rule was consistently or fairly enforced.

> It is not to be implied that the [fact finder] must set out in detail every fact brought out in the evidence. However, his statement of facts should be clear and unambiguous and should be sufficiently definite to enable the reviewing authority to test the validity under the law of the decision resting upon those facts.

Hardy v. City of Tarpon Springs, 81 So. 2d 503, 506 (Fla. 1955).

Although the referee made findings regarding whether the claimant accessed a patient's medical records without authorization, the decision does not address the employer's nursing operations manager's testimony that the claimant acknowledged she may have "left her screen up where she had logged in and maybe someone else accessed the records." The claimant acknowledged at the hearing that she and other employees sometimes left their computers unattended. The record reflects the employer submitted copies of several rules/policies for the hearing, and the documents were entered into evidence. On remand, the referee is directed to develop the record further regarding the specific terms of any of the rules/policies the claimant purportedly violated as well as the claimant's specific conduct that

allegedly violated those terms. The referee must also develop the record further in order to determine whether the claimant's actions may have constituted a deliberate or negligent security breach. Additionally, the referee is directed to develop the record further regarding whether the claimant was given notice or warning that her failure to comply, even inadvertently, with the rules/policies in question, would result in termination, or whether the violation(s) was so serious that claimant should have known of the consequences. The referee is also directed to develop the record further in order to determine whether the rules/policies in question are consistently enforced. Such record development should include, but not be limited to, adducing testimony regarding whether other employees have violated the rules/policies in question and whether they were terminated. A new decision must then be issued that reflects the evidence was properly evaluated against the requirements of all the relevant subparagraphs of Section 443.036(30), Florida Statutes.

Lastly, the record reflects that, although the employer's representative was given an opportunity to cross-examine the claimant regarding her initial testimony, she was not given an opportunity to cross-examine the claimant after the claimant, when addressing the employer's documents, provided additional testimony. When new information is added to the hearing record, the opposing party must be given the opportunity to cross-examine the party offering the new testimony. Pursuant to Florida Administrative Code Rule 73B-20.024(3)(b), the referee is responsible for preserving a party's right to cross-examine opposing witnesses. On remand, the referee is directed to ensure both the claimant and the employer's representative are given the opportunity to question all witnesses.

The claimant is *warned* that the portion of her testimony not subject to cross-examination at the prior hearing will most likely be rejected as incompetent and, as such, given no consideration if she is not available during subsequent hearings. *See Altimeaux v. Ocean Construction, Inc.*, 782 So.2d 922 (Fla. 2d DCA 2001). The referee shall specifically notice the parties of this fact when appropriate.

In order to address the issues raised above, the referee's decision is vacated and the case is remanded. On remand, the referee is directed to develop the record in greater detail and render a decision that contains accurate and specific findings of fact concerning the events that led to the claimant's separation from employment and a proper analysis of those facts along with an appropriate credibility determination made in accordance with Florida Administrative Code Rule 73B-20.025(3)(d). Any hearing convened subsequent to this order shall be deemed supplemental, and all evidence currently in the record shall remain in the record.

The decision of the appeals referee is vacated and the case is remanded for further proceedings.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Frank E. Brown, Chairman
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on 10/7/2013, 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
POST OFFICE BOX 8697
FORT LAUDERDALE FL 33310

IMPORTANT:	For free translation assistance, you may call 1-800-204-2418. Please do not delay, as there is a limited time to appeal.
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. **2013-41775U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee **EMPLOYER/Appellant**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3631-0

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: The claimant began working for the employer on March 29, 2010. The claimant last worked for the employer as an advance clinical technician. The claimant's job duties required that she access patient records where she had prior authorization.

The employer believed that on February 25, 2013, the claimant had, without proper authorization, accessed a patient's medical records. At no time, however, did the claimant access a patient's medical records without proper authorization. The claimant has no history of this alleged conduct while she worked for the employer.
The employer discharged the claimant on March 11, 2013, for an alleged unauthorized access of patient records.

Conclusion 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 and evidence in this case show that the claimant was discharged because the employer believed that the claimant had access of patient records without authorization.

The courts have held that the burden of proof is on the employer to prove, by a preponderance of competent substantial evidence that the claimant engaged in an act, or course of conduct, in violation of the employee's duties and obligations to the employer. That burden has not been met in this case.

The claimant provided competent testimony that she did not access patient records without proper authorization. The employer, at most showed that the claimant's user identification was used to access records, but showed little evidence that the claimant had in fact accessed patient records. Furthermore, if the employer had showed that the claimant was the actual source of its findings, the employer admitted that such an occurrence only occurred once during the claimant's tenure.

Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertence or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute. Tucker v. Florida Department of Commerce, 366 So. 2d 845 (Fla. 1st DCA 1979). Therefore, to consider the employer's testimony, the claimant's action would only amount to unsatisfactory conduct in an isolated instance, which is not misconduct under the law.

As a result, the referee fails to find that the claimant performed her job duties without authorization. Therefore, it is concluded that the claimant was discharged, but not for misconduct connected with work within the meaning of the law. The claimant is not disqualified from the receipt of benefits.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Reemployment Assistance Appeals Commission has set forth factors to be considered in resolving credibility questions. These factors 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 of the claims adjudicator dated April 19, 2013, is **AFFIRMED.**

This is to certify that a copy of the above decision was mailed to the last known address of each interested party on June 21, 2013.

ALIN LOUIS
Appeals Referee

By: _____
HECTOR BERMUDEZ, 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.