STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-06848

vs.

Referee Decision No. 13-54719U

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 and charged the employer's account.

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.

The referee's findings of fact state as follows:

> The claimant was employed as a senior game advisor from October 15, 2010, to April 27, 2013. The claimant was aware of the employer's policies and procedures. Customer information could not be given to other individuals. He did not receive any warnings or reprimands during his employment. The claimant waited on a customer that traded a game system with the employer. The claimant believed it was stolen from a friend of his that worked in the restaurant next door. The claimant gave the

> customer information to his friend so he could call the police. His friend confronted the customer and the customer filed a complaint against the claimant for releasing his personal information. The claimant was discharged on April 27, 2013, for violating the employer's policy and releasing customer information.

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 referee's decision is not supported by competent and substantial evidence and, therefore, is not in accord with the law; accordingly, it is reversed.

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.
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> (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 claimant in this case acknowledged violating the employer's known policy prohibiting employees from releasing personal customer information to outside parties. The claimant made the conscious decision to release the customer's personal information to an outside party, an acquaintance, because the claimant suspected the customer stole his acquaintance's game system. After the acquaintance showed up at the customer's residence, the customer filed a complaint against the *employer*[1] for the release of his personal information. The claimant testified he was using his best judgment in responding to what he believed was a customer's attempt to trade in stolen property to the employer. The referee concluded that, while the claimant violated the employer's policy, his actions constituted poor judgment and were not misconduct under the applicable law.

Subparagraph (e) of the definition of misconduct "expresses the legislative intent that a claimant may be disqualified from benefits where it is established he or she committed a 'violation of an employer's rule.'" *Crespo v. Florida Reemployment Assistance Appeals Commission*, 128 So. 3d 49 (Fla. 3d DCA 2012). Once the employer has shown a violation, the claimant bears the burden to establish one of the three defenses. *Crespo*, *supra*; *Critical Intervention Servs. v. Reemployment Assistance Appeals Commission*, 106 So. 3d 63, 66 (Fla. 1st DCA 2013). In this case, the employer established a prima facie case of misconduct within the meaning of subparagraph (e) upon presenting evidence the claimant violated its rule, which the referee acknowledged in his conclusions. The burden of proof then shifted to the claimant to show the existence of one of the defenses as enumerated in subparagraph (e). The claimant, who acknowledged he was aware of the policy, did not assert the rule was not lawful or reasonably related to the job environment or that the employer did not consistently enforce the rule. Moreover, the claimant was aware he was violating the rule and there is no evidence or argument that the claimant violated the rule due to factors outside of his control.

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[1] The referee's findings reflect that the customer filed a complaint against the *claimant*, but the record reflects the customer actually filed a complaint against the *employer*.

It is well established that under the reemployment assistance law prior to enactment of Chapter 2011-235, Laws of Florida, an isolated instance of poor judgment would not typically constitute misconduct under subparagraphs (a) and (b) of the statutory definition. *Bagenstos v. Unemployment Appeals Commission*, 927 So. 2d 153, 157 (Fla. 4th DCA 2006); *Forte v. Unemployment Appeals Commission*, 899 So. 2d 1159, 1160 (Fla. 3d DCA 2005); *Smith v. Unemployment Appeals Commission*, 891 So. 2d 650, 652 (Fla. 2d DCA 2005); *McKnight v. Unemployment Appeals Commission*, 713 So. 2d 1080, 1081 (Fla. 1st DCA 1998). Prior to 2011, courts held that in some circumstances an isolated instance of failing to follow an employer policy or rule would constitute poor judgment rather than misconduct. *Bagenstos*, *supra* (employee failed to follow conflict resolution policy after he was provoked by customer); *Anderson v. Unemployment Appeals Commission*, 822 So. 2d 563, 567-68 (Fla. 5th DCA 2002) (employee unintentionally violated county policy); *Philemy v. Dept of H.R.S.*, 731 So. 2d 64, 66 (Fla. 3d DCA 1999) (negligent failure to comply with policy).[2] However, as noted by more recent precedent, the amendment of the definition of misconduct in 2011 has made a violation of policy subject to disqualification in situations where it would not have been so prior to the amendment. *Alvarez v. Unemployment Appeals Commission*, 121 So. 3d 69 (Fla. 3d DCA 2013). The "poor judgment" doctrine is not incorporated in the new subparagraph (e). If such considerations exist in (e), they do so only in the "fair enforcement" defense.

In applying the fair enforcement defense to *negligent* violations of an employer rule, the Commission has weighed the degree of culpability of the claimant versus the importance of the rule and the impact on the employer of the employee's violation of it. *See* R.A.A.C. Order No. 13-04567 (August 7, 2013). However, this case involved a *deliberate* violation of the rule. In fact, the claimant here had been counseled only one week previously for violation of the privacy policy.[3] Given the facts discussed above, the Commission leaves for a later day the issue of whether its weighing process for negligent violations should be extended to intentional violations: the Commission holds that there is no basis to conclude here that the policy was unfairly enforced. In the absence of a defense to an acknowledged violation of subparagraph (e), the referee's conclusion cannot be sustained.

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[2] The Commission notes that typically "poor judgment" implies an unwise or mistaken choice in difficult or uncertain circumstances, such as those in the cited cases. By contrast, where an employer directs an employee to take, or refrain from taking, a specific action in specific circumstances, and the employee knowingly decides without justification not to follow that direction, the only "judgment" the employee is exercising is the judgment to violate the employer's rule. Removing uncertainty in employee behavior is part of the reason employers adopt such policies.

[3] The claimant did not agree that he was "reprimanded" for his action of calling a customer for a gaming event, but did acknowledge that there were emails sent to him about it.

The decision of the appeals referee is reversed. The claimant is disqualified from receipt of benefits for the week ending April 27, 2013, the five succeeding weeks, and until he becomes reemployed and earns $1989. As a result of this decision of the Commission, benefits received by the claimant for which the claimant is not entitled may be considered an overpayment subject to recovery, with the specific amount of the overpayment to be calculated by the Department and set forth in a separate overpayment determination.

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 11/7/2013, 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
MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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. **2013-54719U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant **EMPLOYER/Appellee**

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.

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

Findings of Fact: The claimant was employed as a senior game advisor from October 15, 2010, to April 27, 2013. The claimant was aware of the employer's policies and procedures. Customer information could not be given to other individuals. He did not receive any warnings or reprimands during his employment. The claimant waited on a customer that traded a game system with the employer. The claimant believed it was stolen from

a friend of his that worked in the restaurant next door. The claimant gave the customer information to his friend so he could call the police. His friend confronted the customer and the customer filed a complaint against the claimant for releasing his personal information. The claimant was discharged on April 27, 2013, for violating the employer's policy and releasing customer information.

Conclusions of Law: As of June 27, 2011, the Reemployment Assistance Law of Florida defines misconduct connected with work as, but 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 reflects the claimant was discharged on April 27, 2013, for violating the employer's policy and releasing customer information. 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). The record reflects the claimant was aware of the employer's policies and procedures. The record reflects the claimant did give customer information to his friend so his friend could call the police. He did violate the employer's rule. The claimant did show poor judgment by releasing the information and violating the rule. However he was not trying to harm the employer. He was attempting to correct a situation where an item was stolen from his friend. It is therefore concluded that single isolated incident in almost three years of employment does not rise to the level of misconduct connected with work. He did not display conduct that demonstrated a conscious disregard of the employer's interests. He did not willfully damage the employer's property that resulted in damage of more than $50. He did not steal the employer's property or property of a customer or invitee of the employer. He was not found to be in deliberate violation or disregard of the reasonable standards of behavior which the employer expects. There was no 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. There was no 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. There was not 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.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Unemployment 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 May 28, 2013, holding the claimant disqualified from receipt of benefits and non-charging the employer's account is REVERSED. If otherwise eligible, the claimant is qualified to receive benefits. The employer's account is properly charged with benefits paid in connection with this claim.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

This is to certify that a copy of the above decision was mailed to the last known address of each interested party on July 17, 2013.

D SEAN BURNS
Appeals Referee

By: Sharene M. Price
SHARENE M. PRICE, 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.