STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-08813

vs.

Referee Decision No. 13-80608U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition, pursuant to Section 443.151(4)(c), Florida Statutes, of an appeal of the decision of a reemployment assistance appeals referee. By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record. A decision of an appeals referee cannot be overturned by the Commission if the referee's material findings are supported by competent, substantial evidence and the decision comports with the legal standards established by the Florida Legislature. The Commission cannot reweigh the evidence or consider additional evidence that a party could have reasonably been expected to present to the referee during the hearing. Additionally, it is the responsibility of the appeals referee to judge the credibility of the witnesses and to resolve conflicts in evidence, including testimonial evidence. Absent extraordinary circumstances, the Commission cannot substitute its judgment and overturn a referee's conflict resolution.

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 worked for the employer from March 18, 2013, until July 11, 2013, as a custom protection officer. The employer has a policy against sleeping on the job and gross inattention on the job. The claimant was aware of the policy. A client of the employer requested a security guard at a location because the client received threats from outside persons. The employer assigned the claimant to the location to make sure the persons did not return to carry out

> the threats. On July 9, 2013, the receptionist took a picture of the claimant. The claimant had his head back against the wall and his eyes were closed. The client cancelled the contract with the employer. The employer discharged the claimant for gross inattention while on duty.

Based on these findings, the referee held the claimant was discharged for misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee's material findings of fact are supported by competent, substantial evidence and are adopted in this order. In addition, the Commission also accepts the referee's relevant conclusions of law[1] but writes to clarify the reasons for doing so.

Effective May 17, 2013, 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. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; or theft of employer property or property of a customer or invitee of the employer.
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> (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.

[1] The referee's decision contains discussion of case law addressing the circumstances under which insubordination constitutes misconduct. The discussion of insubordination is wholly unrelated to the evidence presented by the parties. However, the Commission finds the referee's error to be harmless.

> (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.
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> (e)1. A violation of an employer's rule, unless the claimant can demonstrate that:
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> a. He or she did not know, and could not reasonably know, of the rule's requirements;
>
> b. The rule is not lawful or not reasonably related to the job environment and performance; or
>
> c. The rule is not fairly or consistently enforced.
>
> 2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The record reflects the employer discharged the claimant, an armed guard, for being grossly inattentive on the job by resting while he was supposed to be protecting the client from two recently terminated employees who posed an active threat. The undisputed evidence reflects the claimant was sitting back in a chair with his arms folded across his chest and his head rested against the wall while his eyes were closed.

While the claimant in this case was not found to be sleeping, the Commission considers gross inattentiveness such as that attributed to the claimant to be somewhat analogous to sleeping on the job and finds it prudent to utilize a comparable analysis. In determining whether sleeping on the job is misconduct, the Commission considers several factors developed over time in the reemployment assistance case law.[2] Those factors include, but are not limited to, the following:

- the nature of the employee's job responsibilities;
- the location in which the employee was found sleeping;
- whether the employer had a rule prohibiting sleeping on the job;
- whether the employer previously warned the employee for sleeping on the job; and
- the existence of any mitigating factors, e.g. sleepiness caused by illness or medication.

See, *e.g.*, *Lusby v. Unemployment Appeals Commission*, 697 So. 2d 567 (Fla. 1st DCA 1997); *Jennings v. Unemployment Appeals Commission*, 689 So. 2d 1193 (Fla. 4th DCA 1997); *Paul v. Jabil Circuit Company*, 627 So. 2d 545 (Fla. 2d DCA 1993); *Phenix Supply Co. v. Florida Industrial Commission*, 115 So. 2d 431 (Fla. 2d DCA 1959). The Commission concludes these factors remain relevant and instructive after the 2011 amendment to the definition of misconduct. In particular, we examine the nature of the claimant's job duties at the time of the unauthorized sleeping or inattentiveness and the harm or potential harm to the employer's or client's interests.

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[2] The courts have not yet issued written opinions analyzing under what circumstances sleeping on the job is misconduct under the statutory definition as amended in 2011 and thereafter. The predecessor definition applied by the courts provided that misconduct included the following:

> (a) Conduct demonstrating *willful or wanton* disregard of an employer's interests and found to be a deliberate violation or disregard of the standards of behavior which the employer has a right to expect of his or her employee; or
> (b) Carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design 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.

§443.036(29), Fla. Stat. (2010) (emphasis added). The degree of requisite mental state is lower under the current version of Section 443.036(30)(a), Florida Statutes, than prior to the 2011 amendments, so that conduct that may not have been deemed disqualifying prior to 2011 may rise to that level today.

Several aggravating factors are present in this case. First, the claimant's occupation is a particularly dangerous one. According to the U.S. Bureau of Labor Statistics, the rate of fatal injuries for security guards is more than double the rate for all workers. *See* USBLS Monthly Labor Review, February 2012: Security Guard Safety, On guard against workplace hazards, p.6.[3] For 2012, among the 51 reported fatal injuries to security guards, 42 were the result of violence. *See* 2012 Census of Fatal Occupational Injuries, Table A-5, p.6.[4]

Furthermore, while the environments in which security guards generally operate are more dangerous than for other occupations, the specific environment to which the claimant was assigned was particularly dangerous. The claimant was assigned to the client who retained the employer to provide armed guard services due to specific threats made by two recently discharged employees. Since the threats were from two former employees who would be familiar with the client's locale, its procedures, and its employees' patterns, the client was particularly vulnerable. By leaning back and closing his eyes, the claimant deliberately reduced his ability to see trouble coming and thus avert it. Despite the claimant's declaration that he remained alert to his surroundings, by his own admission he was not aware he was being photographed during the incident. From this admission, the referee drew the reasonable inference that the claimant chose to be grossly inattentive to his duties.

The claimant's gross inattentiveness on duty jeopardized the personal safety of the client's employees and invitees. The client's interest in safeguarding those individuals is implicit in its decision to retain the employer to respond to the active threat. The client's potential liability could be very high should any of its employees or invitees be harmed as a result of the failure to protect them from the known threat.

Aside from the serious personal safety risks associated with the claimant's conduct, other aggravating factors in this case include the employer's loss of the contract with the client. Not only did the employer lose the contract, but also likely found itself in a far less favorable position for being hired to meet the client's future security needs and could potentially suffer harm to its general reputation. In addition, the claimant admitted he was aware that sleeping or gross inattentiveness on the job was prohibited under the employer's policy.

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[3] Available at http://www.bls.gov/opub/mlr/2012/02/art1full.pdf (last accessed May 12, 2014).
[4] Available at http://www.bls.gov/iif/oshwc/cfoi/cftb0272.pdf (last accessed May 12, 2014).

We further note that the security service industry in Florida is regulated under Chapter 493, Florida Statutes. While the record is silent regarding whether the claimant secured his firearm prior to closing his eyes and folding his arms across his chest to rest, the act of resting on duty by itself may have placed his license at risk. Section 493.6118(1)(f), Florida Statutes, provides for disciplinary action for a person licensed under Chapter 493 for negligence, incompetency, or misconduct in engaging in the licensed activities.

Despite the existence of so many aggravating factors, the claimant did not establish any mitigating factors. The referee rejected his testimony that he was fully attentive while he rested with his eyes closed. Further, while he attempted to minimize the employer's loss of the client contract by noting that the contract was only temporary anyway, the Commission does not find that fact to be mitigating. As noted above, the effect on the employer's reputation and ability to acquire future business from the client was likely not temporary.

Given the number and gravity of the aggravating factors present in this case and the absence of any mitigating factors, the Commission concludes the claimant's actions constitute misconduct under both subsections (a) and (b) of the statutory definition of misconduct. Furthermore, since the claimant violated the employer's rule and understood that gross inattentiveness on the job was prohibited by the employer's policy, his conduct also constitutes misconduct under subsection (e). *See Alvarez v. Reemployment Assistance Appeals Commission*, 121 So. 3d 69 (Fla. 3rd DCA 2013) ("we find nothing obviously disproportional in punishing a security guard for violating a reasonable security regulation"). Accordingly, the referee properly held the claimant disqualified from reemployment assistance benefits.

The Reemployment Assistance Appeals Commission has received the request of the claimant's representative for the approval of a fee for work performed in conjunction with the appeal to the Commission, as required by Section 443.041(2)(a), Florida Statutes. In examining the reasonableness of the fee, the Commission is cognizant that: (1) in the event a claimant prevails at the Commission level, the law contains no provision for the award of a representative's fees to the claimant's representative, by either the opposing party or the State (i.e., a claimant must pay his or her own representative's fee); and (2) the amount of reemployment assistance secured by a claimant may be very small. The legislature specifically gave referees (with respect to the initial appeal) and the Commission (with respect to the higher-level review) the power to review and approve a representative's fees due to a concern that claimants could end up spending more on fees than they could reasonably expect to receive in reemployment assistance.

Upon consideration of the complexity of the issues involved, the services actually rendered to the claimant, and the factors noted above, the Commission approves a fee of $300.00.

The decision of the appeals referee is affirmed. The claimant is disqualified from receipt of 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 5/20/2014, 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: Kimberley Pena
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
Suite 240
215 Market Street
Jacksonville FL 32202-2850

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. **2013-80608U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee **EMPLOYER/Appellant**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3627-0

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 worked for the employer from March 18, 2013, until July 11, 2013, as a custom protection officer. The employer has a policy against sleeping on the job and gross inattention on the job. The claimant was aware of the policy. A client of the employer requested a security guard at a location because the client received threats from outside persons. The employer assigned the claimant to the location to make sure the persons did not return to carry out the threats. On July 9, 2013, the receptionist took a picture of the claimant. The claimant had his head back against the wall and his eyes were closed. The client cancelled the contract with the employer. The employer discharged the claimant for gross inattention while on duty.

Conclusions of Law: As of May 17, 2013, 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. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; theft of employer property or property of a customer or invitee of the employer.

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

a. He or she did not know, and could not reasonably know, of the rule's requirements;

b The rule is not lawful or not reasonably related to the job environment and performance; or

c. The rule is not fairly or consistently enforced.

2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or

invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The claimant's action was a conscious disregard of the employer's interests and a deliberate disregard of the reasonable standards of behavior which the employer expected of him. The claimant's action was also careless and negligent to a degree that manifested culpability and wrongful intent and showed an intentional and substantial disregard of the employer's interest. In Vilar v. Unemployment Appeals Commission, 889 So.2d 933 (Fla. 2d DCA 2004), the court held that although the employee was wrong to disobey her supervisor's instructions to return to her work area, this was an isolated instance of poor judgment and does not constitute misconduct. On the other hand, only one week before the issuance of the Vilar decision, a panel of the Third DCA affirmed the disqualification of a claimant, noting that the claimant was discharged for misconduct "because he obdurately refused contrary to the direct orders of his supervisor, to operate a forklift." Givens v. Unemployment Appeals Commission, 888 So.2d 169 (Fla. 3d DCA 2004). Thus, there is clearly a narrow line between disqualifying insubordination and nondisqualifying "poor judgment." The claimant's actions in this isolated incident were sufficiently egregious to rise to the level of misconduct within the meaning of the reemployment assistance law. Further, the claimant failed to show he was not aware of the employer's rule; the claimant testified he was aware of the rule. The claimant also failed to show the rule was unlawful or unreasonably related to the job environment and performance or that the rule was unfairly or inconsistently enforced. It is concluded the employer discharged the claimant for misconduct connected with work. Therefore, the claimant has improperly been held qualified.

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

The claimant contended he was not sleeping. However, the claimant did not have to be sleeping to violate the employer's policy. The claimant was grossly inattentive; the claimant's eyes were closed and his head was back. Gross inattention is also a violation of the employer's policy. The claimant also contended he was aware of his surroundings and what was happening around him. However, the claimant was not aware the receptionist took his picture. If the claimant did not know that the receptionist took his picture, it is reasonable to assume the claimant was not aware of his surroundings. Therefore, the claimant's contentions are respectfully rejected.

The employer's testimony regarding the photograph the receptionist took of the claimant was hearsay. However, the claimant confirmed his head was back and his eyes were closed, which is what the employer testified he viewed in the photograph. Therefore, the claimant's confirmation of the employer's testimony overcame the hearsay testimony.

Decision: The determination dated August 19, 2013, is reversed and modified to show the claimant is disqualified for the week ended July 13, 2013, plus five weeks and until he earns income of $3,621.

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 D. JONES

mailed to the last known address of each interested party on September 26, 2013.

Appeals Referee

By: K. Martin
K. M. MARTIN, 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.