STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-04619

vs.

Referee Decision No. 13-33700U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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.

On appeal to the Commission, evidence was submitted which had not been previously presented to the referee. The parties were advised prior to the hearing that the hearing was their only opportunity to present all of their evidence in support of their case. Florida Administrative Code Rule 73B-22.005 provides that the Commission can consider newly discovered evidence only upon a showing that it is material to the outcome of the case *and* could not have been discovered prior to the hearing by an exercise of due diligence. The Commission did not consider the additional evidence because it does not meet the requirements of the rule.

The issue before the Commission is whether the claimant voluntarily left work without good cause attributable to the employing unit or was discharged by the employer for misconduct connected with work within the meaning of Section 443.101(1), Florida Statutes.

The referee made the following findings of fact:

> The claimant was hired by [the employer] on February 13, 2012, as a retail buyer. The claimant was solely responsible for placing product orders and maintaining the product orders in the employer's computer system. The claimant maintained a written log for the order numbers, and would always update the product orders on the computer system within the same day. In mid-2012,

> the executive vice president of the company learned of discrepancies with the amount of product orders compared to the amount of product the employer was receiving. In October 2012 the claimant began to feel overwhelmed with her job duties and workload. The claimant asked for help from her supervisor and the executive president, but she never received any assistance with her job duties. The claimant was instructed by her supervisor and the executive vice president to update the computer system with accurate information on the product orders and ship dates for the orders. The claimant was not instructed to include unapproved product orders in this update. The claimant updated the system, but she did not enter unapproved product orders. The claimant also overlooked an approved product order and forgot to enter it into the system. The claimant was never placed on notice that her job would be in jeopardy because of these discrepancies. The claimant did not manipulate the system, nor refuse to update the system. The employer implemented a new policy on February 27, 2013, regarding product orders. The policy does not describe the punishment for failure to adhere to the policy. The claimant was aware of the policy when it was implemented, but she was not aware of any specific policy before its implementation. The claimant was discharged on March 22, 2013, because the product order information was inaccurate.

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 supported by competent and substantial evidence and, therefore, is in accord with the law; accordingly, it is affirmed.

Section 443.036(30), Florida Statutes (2012), 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.

In the conclusions of law, the referee stated:

The record shows the claimant was discharged. 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 employer witnesses did not provide credible evidence regarding the job separation. The claimant's credible evidence shows she did not intentionally refuse to perform the task assigned to her by the executive president nor did she falsify the employer's information. Additionally, the record shows the claimant was overwhelmed because of her work load. Furthermore, she updated the information using only approved product orders, and was not instructed to include unapproved orders into the update. Therefore, the reason for the claimant's discharge was due to the

> claimant's poor work performance. The claimant completed her job duties to the best of her abilities and complied with all her job orders. At most, the claimant's actions show an isolated incident of poor judgment since the claimant was never placed on warning that her job was in jeopardy. Isolated incidents of poor judgment do not meet the definition of misconduct as outlined under subsection (a) and (b). Subsections (c) and (d) do not apply in this instant case. While the claimant may have violated the policy in this instant case, the policy in question does not provide any information regarding the punishment for failure to adhere to the policy. The claimant's actions were, at most, merely an isolated incident of poor judgment and performance; therefore, termination in this instant case was not a fair enforcement of the policy. Therefore, the claimant has met one of the exceptions outlined under subsection (e). Consequently, the employer has not met its required burden of proving misconduct. Accordingly, the claimant is qualified for benefits.

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 and 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.

Based on the testimony and evidence presented, the Commission concludes there was competent, substantial evidence from which the referee could find the employer failed to meet the burden of proving disqualifying misconduct pursuant to section 443.036(30), Florida Statutes. The Commission notes that the employer met the burden of establishing that the claimant violated the employer's rule requiring all purchase orders be entered into the system based on the claimant's admission that she inadvertently overlooked a purchase order which she was required to enter into the system. We specifically note that no requirement of an intentional violation exists under subsection (e). Whether the violation was intentional or not is a factor to be considered in determining whether the rule was consistently or fairly enforced.

Once the employer establishes a rule violation, 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. In this case, the claimant met the burden of showing the rule was not fairly enforced. Subparagraph (e) requires both that a rule be violated and that there be some notice to the employee of the potential consequences for the rule violation. The employer's rule in this case did not prescribe a specific punishment for failure to comply. The claimant was given no notice or warning that her failure to comply, even inadvertently, with the rule would result in termination. The employer's three witnesses testified that they never specifically told the claimant her job was in jeopardy if she failed to comply with the rule. The claimant likewise testified she was never told her job was in jeopardy. Based on the testimony and evidence presented, there was competent, substantial evidence from which the referee could find the claimant met the burden of establishing that the rule was not fairly or consistently enforced due to the lack of notice as to the consequences for violation of the rule. Because of the lack of notice to the claimant, the Commission does not need to consider whether the degree of culpability the claimant bears, as compared to the seriousness of the violation to the employer's operation, justifies a conclusion of misconduct in this case.

Having considered all arguments raised on appeal and having reviewed the hearing record, the Commission concludes no legal basis exists to reopen or supplement the record by the acceptance of any additional evidence sent to the Commission or to remand the case for further proceedings. The Commission concludes the record adequately supports the referee's material findings and the referee's conclusion is a reasonable application of the pertinent laws to the material facts of the case.

The referee's decision is affirmed.

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

9/16/2013 ,

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 350WD 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. **2013-33700U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant **EMPLOYER/Appellee**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3650-0

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 hired by on February 13, 2012, as a retail buyer. The claimant was solely responsible for placing product orders and maintaining the product orders in the employer's computer system. The claimant maintained a written log for the order numbers, and would always update the product orders on the computer system within the same day. In mid-2012, the executive vice president of the company learned of discrepancies with the amount of product orders compared to the amount of product the employer was receiving. In October 2012 the claimant began to feel overwhelmed with her job duties and work load. The claimant asked for help from her supervisor and the executive president, but she never received any assistance with her job duties. The claimant was instructed by her

supervisor and the executive vice president to update the computer system with accurate information on the product orders and ship dates for the orders. The claimant was not instructed to include unapproved product orders in this update. The claimant updated the system, but she did not enter unapproved product orders. The claimant also overlooked an approved product order and forgot to enter it into the system. The claimant was never placed on notice that her job would be in jeopardy because of these discrepancies. The claimant did not manipulate the system, nor refuse to update the system. The employer implemented a new policy on February 27, 2013, regarding product orders. The policy does not describe the punishment for failure to adhere to the policy. The claimant was aware of the policy when it was implemented, but she was not aware of any specific policy before its implementation. The claimant was discharged on March 22, 2013, because the product order information was inaccurate.

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

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

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

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

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

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

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

The record shows the claimant was discharged. 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 employer witnesses did not provide credible evidence regarding the job separation. The claimant's credible evidence shows she did not intentionally refuse to perform the task assigned to her by the executive president nor did she falsify the employer's information. Additionally, the record shows the claimant was overwhelmed because of her work load. Furthermore, she updated the information using only approved product orders, and was not instructed to include unapproved orders into the update. Therefore, the reason for the claimant's discharge was due to the claimant's poor work performance. The claimant completed her job duties to the best of her abilities and complied with all her job orders. At most, the claimant's actions show an isolated incident of poor judgment since the claimant was never placed on warning that her job was in jeopardy. Isolated incidents of poor judgment do not meet the definition of misconduct as outlined under subsection (a) and (b). Subsections (c) and

(d) do not apply in this instant case. While the claimant may have violated the policy in this instant case, the policy in question does not provide any information regarding the punishment for failure to adhere to the policy. The claimant's actions were, at most, merely an isolated incident of poor judgment and performance; therefore, termination in this instant case was not a fair enforcement of the policy. Therefore, the claimant has met one of the exceptions outlined under subsection (e). Consequently, the employer has not met its required burden of proving misconduct. Accordingly, the claimant is qualified for benefits.

The law provides that benefits will not be charged to the employment record of a contributing employer who furnishes required notice to the Department when the claimant was discharged for misconduct connected with the work. The employer will be charged because misconduct was not established.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. In Order Number 2003-10946 (December 9, 2003), the Commission 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 dated April 12, 2013, is REVERSED. The claimant is qualified for benefits. The employer will be charged.

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 May 16, 2013.

JOHN SOETE
Appeals Referee

By: _____
DREXELL CARTER, 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.