**STATE OF FLORIDA**
**REEMPLOYMENT ASSISTANCE APPEALS COMMISSION**

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-04687

vs.

Referee Decision No. 13-31687U

Employer/Appellant

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**ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION**

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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.

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 made the following findings of fact:

> The claimant worked for the employer as a cook, beginning on July 31, 2012. The claimant was not given a handbook on the date of hire, nor did he receive the rules of conduct at the time of hire. The employees are given free meals. The claimant has seen other employees give their free meals away. On January 28, 2013, the claimant and his brother played pool before the [claimant's] shift began. The claimant's friend's identification was checked prior to the start of the [claimant's] shift. There was [no] supervisor on duty. A co-worker was falling down and loud on the job. The co-worker went home and the claimant covered the [co-worker's] duties. The claimant asked the bartender if he could have a friend

> help him with his kitchen duties. The bartender informed the claimant that he could have his friend help with his duties. The claimant purchased his friend a beer for helping him with his duties. The claimant gave his brother his free meal. On January 29, 2013, the claimant was confronted by the owner regarding the previous night. The owner informed the claimant that video surveillance showed the claimant allowing his friend to work in the kitchen [and] giving beer and free food to his brother. The claimant explained what occurred, the previous night, to the owner. The owner discharged the claimant for giving away the [claimant's] free meal to his brother and reportedly giving away a beer without paying for it.

Based on these findings, the referee held the claimant was not disqualified for misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the record was not sufficiently developed due in part to an erroneous conclusion regarding the admissibility and probative value of evidence offered by the appellant; consequently, the case must be remanded.

The record reflects the owner gave extensive testimony regarding what he observed via the employer's video surveillance system, and testified that he questioned the claimant about what he had seen on the video. The referee concluded this testimony was hearsay. The referee noted that hearsay evidence can be admitted to prove a material fact under Section 443.151(4)(b)5.c.(I)-(II), Florida Statutes, but did not make an express ruling as to the testimony's admissibility under that exception.

The referee's conclusion – that the owner's testimony as to the contents of the video was inadmissible hearsay – is error.[1] For evidence to be hearsay, it must be a "statement" made outside of a trial or hearing, and offered at trial or hearing for the purposes of proving the matter asserted. §90.801(1)(c), Fla. Stat. A statement is "1. [a]n oral or written assertion; or 2. [n]onverbal conduct of a person if it is intended by the person as an assertion." §90.801(1)(a), Fla. Stat. Non-verbal actions by a person which are captured by a video, other than those intended as some form of communication, are not statements and are thus not within the scope of the hearsay rule.[2] Thus, testimony at hearing as to what a witness observed someone doing on a video is not evidence about an "out-of-court" statement.

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[1] In fairness to the referee, this appears to be a commonly held, though incorrect, view among the referees in the Office of Appeals.

[2] By contrast, a video that also includes audio recording of conversation *does* implicate the hearsay rules as to the audio portion, and must be analyzed appropriately if the audio portion is offered.

The issue here is not hearsay, but the closely-related "best evidence rule." *See generally*, §§90.951-58, Fla. Stat. As a general matter, the best evidence rules require a party to provide the best evidence available to establish certain facts: in particular, the contents of a tangible item such as a document, recording, photograph, video, etc. Thus, under the best evidence rule, oral testimony at trial in court of what a witness observed on a video would be admissible only if the video could not be presented through no fault of the declarant. *See* §90.954, Fla. Stat.

While the best evidence rules are applicable to trials in state courts, the evidentiary standard to be applied in reemployment assistance appeals hearings is more lenient: "Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, *whether or not such evidence would be admissible in a trial in state court*." §443.151(4)(b)5.b., Fla. Stat. (emphasis added). This standard is that established in Florida law for most administrative proceedings. *Cf.* §120.569(2)(g), Fla. Stat. Given this relaxed standard, the Commission concludes that routine, strict enforcement of the best evidence rules is neither required nor appropriate in reemployment assistance appeals cases.[3] Thus, the testimony offered is this case regarding the contents of the video was admissible.

In holding that the testimony was *admissible*, however, the Commission does not determine what *weight* must be given to the evidence. The philosophy behind these rules - to ensure the most probative evidence possible - remains applicable, and the referee must use sound discretion in determining the appropriate weight to give such secondary evidence.[4] When a party offers secondary evidence, the evidence should generally be admitted if a proper foundation is established and the evidence is probative. However, in order to determine the weight that should be given the evidence, the referee should inquire as to (1) why the party offering it did not produce the primary evidence for hearing; (2) the steps that party took, if any, to attempt to produce the primary evidence; and (3) whether the opposing party ever had access to the primary evidence – for example, in this case, whether the claimant was able to view the video. After this inquiry is made, the referee should evaluate the weight to be given the evidence, considering these factors: (1) whether or not the primary evidence was in the possession or control, at the time of the hearing, of the

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[3] One important exception is the content of detailed employer policies used to establish misconduct pursuant to Section 443.036(30)(e), Florida Statutes, as discussed in Commission Order No. 12-01590 (May 3, 2012).

[4] For the purposes of this order, "primary evidence" includes the original tangible item or other source matter, as well as, unless the context requires otherwise, a complete and reliable duplication. "Secondary evidence" includes some other form of proof of contents, such as an excerpt, oral testimony or a written statement or description.

party offering secondary evidence of it; (2) whether the primary evidence is unavailable through no fault of the offering party; (3) whether the primary evidence was available to the opposing party at any point; and, most significantly, (4) the cost, difficulty, or other burden on the offering party to produce the primary evidence, or the merits of any other justification as to why the primary evidence was not produced. As to the last issue, the Commission notes that surveillance video may present difficulties in duplicating or producing for the hearing. Whether the video is recorded digitally or in analog format, it may not be easy to transmit in some form to the referee or opposing party. It may require proprietary software or platforms to view. The methods of duplication or production may be unknown to the party. Furthermore, the use of telephone hearings means live playback is not possible. In some instances, production of the video evidence for hearing may not be feasible, and live testimony as to the contents of the video may be the best reasonably available evidence.

Finally, the referee should give consideration to the form of the secondary evidence and its reliability, as well as the opportunity of the opposing party to challenge it at the hearing. For example, an authenticated screen capture or printed still photo taken from a video would be highly reliable; a written statement describing the video, which might be admissible under a hearsay exception, would have less reliability; and oral testimony at the hearing, which could be challenged under cross-examination, would fall somewhere between. Of course, where the secondary evidence is live testimony regarding the contents of a tangible item, as in the case at hand, the evidence is subject to the same credibility considerations as any other live testimony.

Thus, the employer's offering of live testimony at the hearing below, in lieu of production of the video, would bear on the weight the referee chooses to accord the evidence under these factors; however, it would not render the employer's testimony regarding what he observed on the tape hearsay evidence that could not support a finding of fact. Without a proper analysis, summarily dismissing the employer's evidence is error.

The record also reflects the claimant's testimony he did not play pool with his brother and other points on which the findings are inconsistent with the testimony. The referee must take care that the findings reflect the material, competent, believed evidence in the record.

In addition, the record reflects the claimant had no supervisor on duty, but asked the bartender if a non-employee could perform work on the claimant's behalf. The claimant did not call the owner because, although it was not yet midnight, the claimant thought the owner might already be asleep. The claimant was not asked at what hour he made that decision, what facts led him to conclude the owner would be asleep, or whether he had previously been given instructions regarding permissible hours to call.

Finally, the Commission notes the employer properly attempted to submit documentary evidence for the record, but that the claimant did not receive the employer's documents prior to the hearing. On remand, the referee shall enclose all the employer's documents with the notice of hearing. Should the employer decide to present the video as evidence at the next hearing, it would appear prudent to contact the Office of Appeals for information regarding an acceptable format. Should the employer decide to present still captures from a video as evidence, the referee shall take care to preserve them in a manner that does not involve their being processed through the state's imaging system.

In order to address the points raised above, the referee's decision is vacated and the case is remanded. On remand, the referee is directed to develop the record and render a decision that contains accurate and specific findings of fact regarding the events leading to the claimant's job separation and a proper analysis of those facts along with an appropriate credibility determination in accordance with Florida Administrative Code Rule 73B-20.025. 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 8/21/2013, 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 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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| **IMPORTANT:** | For free translation assistance, you may call 1-800-204-2418. Please do not delay, as there is a limited time to appeal. |
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| **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. **2013-31687U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

**CLAIMANT/Appellant** **EMPLOYER/Appellee**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3624-0

## 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 worked for the employer as a cook, beginning on July 31, 2012. The claimant was not given a handbook on the date of hire, nor did he receive the rules of conduct at the time of hire. The employees are given free meals. The claimant has seen other employees give their free meals away. On January 28, 2013, the claimant and his brother played pool before the claimants shift began. The claimant's friend's identification was checked prior to the start of the claimants shift. There was not supervisor on duty. A co-worker was falling down and loud on the job. The co-worker went home and the claimant covered the co-workers duties. The claimant asked the bartender if he could have a friend help him with his kitchen duties. The bartender

informed the claimant that he could have his friend help with his duties. The claimant purchased his friend a beer for helping him with his duties. The claimant gave his brother his free meal. On January 29, 2013, the claimant was confronted by the owner regarding the previous night. The owner informed the claimant that video surveillance showed the claimant allowing his friend to work in the kitchen, the claimant giving beer and free food to his brother. The claimant explained what occurred, the previous night, to the owner. The owner discharged the claimant for giving away the claimant free meal to his brother and reportedly giving away a beer without paying for it.

**Conclusions of Law:** As of June 27, 2011, the Unemployment Compensation 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 that the employer was the moving party in the separation; thus the claimant was considered to be 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). It was shown that the claimant was discharged for giving away beer, and allowing his brother to consume his free meal. The record reflects the claimant did not receive a handbook at the time of hire. Consideration was given to the supervisor's contention that video surveillance shows the claimant give a friend a beer without paying for it, and giving his brother his free meal. However, the testimony of the owner regarding the incident that lead to the claimants separation was based on second hand information and is considered hearsay.

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding s. 120.57(1)(c), hearsay evidence may support a finding of fact if:

1. The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and
2. The appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence

is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

Furthermore, the claimant was given permission by a co-worker to let his friend help with his duties and the claimant purchased the beer he gave to the person who helped him perform his duties. Also, the claimant allowed his brother to consume his free meal because he had seen other employees give away their free meals. Thus, the employer has failed to present evidence to meet the burden tot show that the claimant's actions rose to the level of misconduct to warrant denial of reemployment assistance benefits. 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 claimant's action under prong (A) and (B) of reemployment assistance law do not show conduct demonstrating a conscious disregard of the employers interest, and does not show an intentional disregard of the standards of behavior an employer has a right to expect of his or her employees. While the employer may have made a valid business decision by discharging the claimant, it has not been shown by substantial, competent evidence that the discharge was for misconduct connected with work. Accordingly, the claimant is not subject to disqualification.

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 March 22, 2013, holding the claimant disqualified from receipt of reemployment assistance benefits is REVERSED. That portion of the determination holding the employment record of the employer non-charged is REVERSED. The employer shall be charged for benefits charged to the claimant 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 May 10, 2013.

GARY WRIGHT
Appeals Referee

By: _____
LAUREN FREEMAN, 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.