STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-05485

vs.

Referee Decision No. 13-43626U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the claimant's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision wherein the claimant was held disqualified from receipt of benefits and the employer's account was noncharged.

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.

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

The referee's findings of fact state as follows:

> The claimant worked full-time for the employer, a skilled nursing facility, from March 10, 2011, until April 1, 2013, as a certified nursing assistant. On March 28, 2013, the claimant was written up for insubordination towards the nurses and refusing to alter her run as the nurse requested. The nurses had to call the Director of Nursing and administrator to address the issues with the claimant not wanting to perform the assignment they gave

> her. The claimant advised the [d]irector of [n]ursing that she was angry, could not control her temper and that she was trying to work on it. On April 1, 2013, the claimant again became loud and refused her assignments with the nurses. The Director of Nursing advised the claimant she was going to terminate her at which time the claimant advised her she wanted to resign rather than be discharged.

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 decision is legally inadequate; consequently, the case must be remanded for further proceedings and the rendition of a new decision.

A review of the record reflects the claimant was discharged for allegedly being loud and insubordinate after receiving a prior warning for a similar past occurrence. The employer's witness, the director of nursing, had no firsthand knowledge regarding the final incident aside from a conversation she had with the claimant in which the claimant apologized for her inability to control her temper. The witness testified the claimant "admitted" she had been insubordinate and/or refused to do her assigned duty. However, when the referee asked specifically what the claimant said during their conversation, the witness testified the claimant disagreed with what other employees had said about the incident, but told the witness she was under the impression she should always be able to do her permanent "run." This evidence does not amount to an admission by the claimant that she was, in fact, insubordinate; consequently, the evidence is insufficient to support a finding that the claimant "refused her assignments with the nurses" or was otherwise insubordinate.

The Commission notes the employer submitted written statements from two employees involved in the incidents that occurred on March 28 and April 1, 2013, which led to the claimant's discharge. Those documents were mailed to the claimant prior to the hearing, discussed at the hearing, and marked as exhibits. The authors' names are redacted on the documents, and it is unclear from the face of the documents who wrote them. While the employer's desire to protect the privacy of alleged witnesses is understandable, generally statements or other documents that do not identify the identities of the persons making the assertions therein are not sufficient to be admitted under any of the exceptions to the hearsay rules and are thus not sufficient to form the basis for a factual finding. At the hearing, however, one of the employer's witnesses identified the authors, and it appeared the claimant knew in advance who wrote the statements.

The admission of evidence in an appeals hearing is within the sound discretion of the appeals referee. Under Section 443.151(4)(b)5.a, Florida Statutes; "*Any part of the evidence may be received in written form . . . .*" As the statutory language implies, documentary evidence should be received and considered where properly admissible, and an absolute preference for oral testimony over probative documentary evidence is unjustified. However, documentary evidence often is, or contains, hearsay, and its admissibility must be properly determined.

In making evidentiary rulings, the referee must be guided by the statutory standard in Section 443.151(4)(b)5., Florida Statutes, as well as, when applicable, the Florida Evidence Code. In this case, although the referee appears to have relied on the written statements in making his findings of fact, he did not address the admissibility and competency of the documents under the hearsay rules.

"Hearsay" evidence is an oral or written assertion made outside the hearing, which is offered into evidence to prove the truth of the matter asserted. *See* §90.801, Fla. Stat. Under Section 443.151(4)(b)5.c., Florida Statutes, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, and can be used to support a finding of fact if the hearsay evidence falls within an exception to the hearsay rule and would be admissible over objection in civil actions – in other words, it meets one of the hearsay exceptions in Sections 90.803 and 90.804, Florida Statutes. Additionally, hearsay may be admissible to support a factual finding under the statutory "residual" hearsay exception added in Section 443.151(4)(b)5.c.(I)-(II), Florida Statutes, in 2011. That provision states:

> Notwithstanding s.120.57(1)(c), hearsay evidence may support a finding of fact if: (I) The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and (II) 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.

Thus, in determining whether hearsay may be used to base a finding of fact pursuant to Section 443.151(4)(b)5.c., Florida Statutes, the referee is required to make and outline the following analysis in the decision:

- Identify whether the evidence is hearsay;
- Determine whether one of the statutory exceptions in the Florida Evidence Code applies; if so, and if the evidence was properly served on the other party, it should be admitted;

- If the evidence does not fall within the exceptions in the Florida Evidence Code, then the referee should identify whether the party against whom the documents are being offered had a reasonable opportunity to review such evidence prior to the hearing;
- *Review* and *discuss* the evidence specifically to determine the relevancy and reliability of the evidence. The referee must identify whether the hearsay evidence is trustworthy and probative and the interests of justice would best be served by its admission into evidence;
- If the evidence meets the statutory requirements for its admission into evidence, an analysis must then be made regarding such evidence in light of any conflicting evidence that may have been presented by the opposing party.

If the employer submits a written statement of a nontestifying witness, the referee must first decide whether the claimant has had a reasonable opportunity to review the statement/report prior to the hearing (as with all documentary or tangible evidence). Under Florida Administrative Code Rule 73B-20.014(3), this requires 24 hours advance receipt for evidence to be admissible under the residual exception. The referee must then determine whether the evidence can be authenticated (again, as required with any documentary or tangible evidence). Finally, the referee must determine whether to admit the statement/report into evidence for either general (admissible hearsay) or corroborative (otherwise inadmissible hearsay) purposes. This does not mean the referee denies admission of any hearsay evidence the referee deems to be less credible than the claimant's testimony. If the referee does admit the hearsay evidence into the record, the referee can nonetheless find the claimant's evidence/testimony that conflicts with, for example, the written statement, is more credible.

The statements admitted in this case were clearly hearsay, as they were being offered for the truth of the matters asserted. The referee should first consider whether one of the exceptions from the Florida Evidence Code applies. The Commission notes that, pursuant to Section 90.803(6), Florida Statutes, witness statements that are properly authenticated may constitute business records and thus are admissible under that hearsay exception if they were prepared in the course of business, as opposed to being prepared specifically as evidence for a hearing.

The Commission again notes that when hearsay evidence is comprised of statements from undisclosed sources, like that propounded by the employer in this case, unless such error is "cured" by the claimant's prior knowledge of the identities of the witnesses and the identification of the witnesses at the hearing, the reliance upon such evidence to disqualify a claimant for benefits constitutes a denial of due process since the claimant cannot subpoena and cross-examine the unidentified witnesses. *See* U.A.C. Order No. 11-12593 (October 12, 2011).

Although the author's names were redacted from these statements prior to the hearing, the identification of the authors at the hearing and the claimant's apparent prior knowledge of the identities of the witnesses appears to have cured any deficiencies under the business record exception. On remand, the referee is directed to develop the record regarding whether the documents meet the statutory business record exception and whether the redaction of the documents was "cured" by the claimant's prior knowledge of the witnesses and the employer's identification of the authors at the hearing. Alternatively, even if the documents do not constitute business records, they may be considered admissible under the "residual" hearsay exception. The Commission notes that written statements such as these are precisely the type of evidence the Florida Legislature envisioned under this exception.

In order to address the foregoing issues, the referee's decision is vacated and this matter is remanded for the rendition of a new decision addressing the competency of the employer's documentary evidence. On remand, the referee is directed to convene a supplemental hearing to determine whether the employer's evidence constitutes a business record pursuant to Section 90.803(6)(a), Florida Statutes, or is otherwise admissible and competent pursuant to the residual hearsay exception under Section 443.151(4)(b)5.c., Florida Statutes; properly evaluate the employer's documentary evidence; and render a decision that contains accurate and specific findings regarding whether the claimant's actions constituted misconduct under the statutory definition of misconduct. If necessary, the referee's decision should include an appropriate credibility determination in accordance with Florida Administrative Code Rule 73B-20.025.

On appeal to the Commission, the representative for the claimant has neither set forth arguments to support the request for review nor requested approval of any representation fees charged to the claimant. Under the circumstances, the claimant's representative is not entitled to collect a fee from the claimant for representation of the claimant before the Commission.

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

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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

This is to certify that on 10/7/2013, the above Order was filed in the office of the Clerk of the Reemployment Assistance Appeals Commission, and a copy mailed to the last known address of each interested party.

By: Kady Thomas
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
MSC 344 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. **2013-43626U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant **EMPLOYER/Appellee**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3623-0

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 full-time for the employer, a skilled nursing facility, from March 10, 2011, until April 1, 2013, as a certified nursing assistant. On March 28, 2013, the claimant was written up for insubordination towards the nurses and refusing to alter her run as the nurse requested. The nurses had to call the Director of Nursing and administrator to address the issues with the claimant not wanting to perform the assignment they gave her. The claimant advised the Director of Nursing that she was angry, could not control her temper and that she was trying to work on it. On April 1, 2013, the claimant again became loud and refused her assignments with the nurses. The director of nursing

advised the claimant she was going to terminate her at which time the claimant advised her she wanted to resign rather than be discharged.

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 reflects the employer was the moving party in the job separation. Therefore, the claimant is considered to have been 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 the claimant was discharged for insubordination and refusing her work assignments. The record reveals the claimant refused to perform the assignment given to her by the nurses. An intentional refusal to follow a superior's valid work order is considered misconduct connected with work. Hines v. Department of Labor and Employment Security, 455 So.2d 1104 (Fla. 3rd DCA 1984). In addition, it was shown the claimant was loud with the nurses, advising the director of nursing that she could not control her anger. The claimant's actions can only be described as a deliberate disregard for the employer's interest and a conscious disregard for her job obligations towards the employer. As such, the claimant was discharged for misconduct under subparagraph (a) and (b). Therefore, the claimant is disqualified.

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

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 record shows the claimant was discharged for misconduct. Therefore, the employer's account is not charged in connection with the claim.

Decision: The determination dated May 10, 2013, is AFFIRMED.

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 June 14, 2013.

DEXTER PARKER
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.