STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-05686

vs.

Referee Decision No. 13-45988U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the employer's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision which held the claimant not disqualified from receipt of benefits and charged the employer's account.

Pursuant to the appeal filed in this case, the Reemployment Assistance Appeals Commission has conducted a complete review of the evidentiary hearing record and decision of the appeals referee. *See* §443.151(4)(c), Fla. Stat. By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record.

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 qualified for benefits.

The referee's findings of fact state as follows:

> The claimant worked as a web developer intern for [the employer] ending March 25, 2013. The claimant was advised at the time of hire that he was required to contact the employer at the end of his assignment for future work assignments. The claimant did not contact the employer following the completion of his internship. However, the claimant was not advised that his failure to do so could result in the denial of benefits. On March 7, 2013, the claimant received an email from the employer advising that his

> internship hours will be exhausting in the near future. The employer did not advise the claimant that his failure to contact them for future assignments would result in the denial of benefits. On March 25, 2013, the claimant was discharged at the completion of his internship, and not offered additional work.

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 record was not sufficiently developed; consequently, the case must be remanded.

Section 443.151(4)(b)5.c., Florida Statutes, provides that 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 Section 120.57(1)(c), Florida Statutes, hearsay evidence may support a finding of fact in a proceeding before an appeals referee if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the appeals referee 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.

The referee's conclusions of law state in pertinent part:

> The record shows that the claimant was discharged at the completion of his internship, and [he was] not offered additional work. The employer that appeared [at] the hearing did not have [firsthand] testimony of placing the claimant on notice [that] his failure to contact the employer for future work assignments could result in the denial of benefits. Although the claimant was advised that he was required to contact the employer for future work, he was not advised that benefits would be denied as a result of his failure to do so. While the employer may have made a valid business decision in discharging the claimant, misconduct had not been established under [subparagraphs (a), (b), and/or (e) of Section 443.036(30), Florida Statutes]. Accordingly, the claimant is not disqualified from the receipt of benefits.

The referee determined that the employer's general manager provided hearsay *testimony* regarding whether the claimant was informed at the time of hire he must report for reassignment upon the conclusion of each assignment and that reemployment assistance benefits may be denied for failure to report. Upon review of the actual testimony of the general manager, it appears that the manager was

testifying not as to information that he had been told by someone else, but as to the standard business practice of the employer. Such evidence is not hearsay. Instead, it is admissible under Section 90.406, Florida Statutes, to create an inference that the party acted in accordance with that practice on any particular occasion. Although the general manager did not testify specifically that this was the practice of the employer, the Commission does not expect that lay witnesses will know how to establish the specific foundation for admission of evidence in every situation. If a party offers testimony suggesting the normal practice of the organization is to act in a particular way in a particular situation, the referee should ask sufficient foundational questions to determine whether or not the organization has established a routine practice or procedure, and the specifics of that practice or procedure.

Moreover, the employer also submitted a document for the hearing. The employer's document was entered into evidence as an exhibit. That document is titled, "Notification of Unemployment," and states, in part, "Failure to seek subsequent work with 24 hours upon completion of an assignment could result in denial of unemployment benefits." The document is dated September 21, 2011 and indicates the claimant provided an "e-signature." The claimant testified that, while he does not specifically recall electronically signing the document in question, he "did all the paperwork online" and "probably" electronically signed the document in question. The referee's decision fails to indicate whether the referee properly evaluated the employer's document under Section 443.151(4)(b)5., Florida Statutes.

The admission of evidence in the appeals hearings is within the sound discretion of the appeals referee. However, in making evidentiary rulings, the referee must be guided by the statutory standard, as well as, when applicable, the Florida Evidence Code. Under Section 443.151(4)(b)5.a: "*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.

On remand, the referee must develop the record further and issue a new decision that clearly evaluates whether the employer's evidence is trustworthy and probative and the weight that should be given such evidence. Such record development should include, but not necessarily be limited to, adducing testimony regarding the employer's e-signature process and whether the claimant electronically signed the individual document in question as opposed to providing a single e-signature at the conclusion of multiple documents.

In addition to the foregoing, the record must be developed further regarding the type of employment relationship that existed between the claimant and the employer. The referee has the duty in cases involving employers of this nature to ensure that the record is fully developed regarding the relationship between the parties and to make appropriate findings that will enable the Commission to review the correctness of the referee's decision. The Commission notes records maintained by the Department of Economic Opportunity suggest this employer may be a temporary help service. Nevertheless, in the absence of such evidence in the record, the Commission cannot determine how the separation occurred. Section 443.101(10)(b), Florida Statutes, provides, in pertinent part:

> A temporary or leased employee is deemed to have voluntarily quit employment and is disqualified for benefits . . . if, upon conclusion of his or her latest assignment, the temporary or leased employee, without good cause, failed to contact the temporary help or employee-leasing firm for reassignment, if the employer advised the temporary or leased employee at the time of hire and that the leased employee is notified also at the time of separation that he or she must report for reassignment upon conclusion of each assignment, regardless of the duration of the assignment, and that reemployment assistance may be denied for failure to report. For purposes of this section, the time of hire for a day laborer is upon his or her acceptance of the first assignment following completion of an employment application with the labor pool. The labor pool as defined in s. 448.22(1) must provide notice to the temporary employee upon conclusion of the latest assignment that work is available the next business day and that the temporary employee must report for reassignment the next business day. The notice must be given by means of a notice printed on the paycheck, written notice included in the pay envelope, or other written notification at the conclusion of the current assignment.

On remand, the referee is directed to develop the record further regarding whether this employer is an employee leasing company, temporary help service, or day labor provider. If this employer is a leasing company, then the employer's evidence contained in the current record is insufficient to establish the claimant quit his employment under Section 443.101(10)(b), Florida Statutes, because the employer has not established the claimant was notified at the time of separation regarding the reporting requirement and the consequences of failing to report back

for reassignment. If, however, the employer is a temporary help service, then the employer was only required to provide notice at the time of hire, and the above-mentioned document may be sufficient to establish such notice. The record must also be developed further regarding the date the claimant began working the assignment that ended on or about March 25, 2013.

In order to address the issues raised above, the referee's decision is vacated and the case is remanded. On remand, the referee is directed to develop the record in greater detail and render a decision that contains accurate and specific findings of fact concerning the events that led to the claimant's separation from employment and a proper analysis of those facts along with an appropriate credibility determination made in accordance with Florida Administrative Code Rule 73B-20.025(3)(d). 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
8/14/2013 ,
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: Natasha Green
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 prèn àmpil tàn, paské tàn limité pou ou ranpli apèl la.

Docket No. **2013-45988U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee **EMPLOYER/Appellant**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3674-0

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 as a web developer intern for ending March 25, 2013. The claimant was advised at the time of hire that he was required to contact the employer at the end of his assignment for future work assignments. The claimant did not contact the employer following the completion of his internship. However, the claimant was not advised that his failure to do so could result in the denial of benefits. On March 7, 2013, the claimant received an email from the employer advising that his internship hours will be exhausting in the near future. The employer did not advise the claimant that his failure to contact them for future assignments would result in the

denial of benefits. On March 25, 2013, the claimant was discharged at the completion of his internship, and not offered additional work.

Conclusions of Law: The law provides that a claimant who was discharged for misconduct connected with the work shall be disqualified from receiving benefits. 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 that the employer was the moving party in the 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, 468 So.2d 413 (Fla. 1986). The record shows that the claimant was discharged at the completion of his internship, and not offered additional work. The employer that appeared to the hearing did not have first hand testimony of placing the claimant on notice of his failure to contact the employer for future work assignments could result in the denial of benefits. Although the claimant was advised that he was required to contact the employer for future work, he was not advised that benefits would be denied as a result of his failure to do so. While the employer may have made a valid business decision in discharging the claimant, misconduct had not been established under Florida Statutes 443.036(30)(a)(b)(e). Accordingly, the claimant is not disqualified from the receipt of benefits.

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 30, 2013, is MODIFIED and AFFIRMED. The determination is MODIFIED to show that the claimant was discharged. As AFFIRMED, the claimant is not disqualified from the receipt of benefits. The employer's account shall 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 June 18, 2013.

QUINIECE POWELL
Appeals Referee

By: Shaundrecia Robinson
SHAUNDRECIA T. ROBINSON, 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.