STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-06899

vs.

Referee Decision No. 13-54344U

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 holding the claimant disqualified from receipt of benefits and that she received benefits to which she was not entitled and is liable to repay.

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.

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 issues before the Commission are whether the claimant was discharged by the employer for misconduct connected with work as provided in Section 443.101(1), Florida Statutes, and whether she received any sum as benefits under the reemployment assistance law to which she was not entitled as provided in Section 443.151(6), Florida Statutes.

The referee's findings of fact state as follows:

> The claimant became employed by the employer, a hospital, as an environmental housekeeper, on August 23, 1999. The claimant was paid $10.30 per hour. The claimant worked 40 hours per week the first shift.
>
> The claimant received the time and attendance policy when she was hired on August 23, 1999, and received the unscheduled absent and sick call procedures acknowledgment form on June 27, 2008. The claimant received a verbal warning on September 24, 2008, due to attendance. The claimant received a first written warning on October 8, 2009. The claimant received a second written warning on April 7, 2010. The claimant received another second written warning on October 22, 2012. The claimant received a termination on April 8, 2013. The claimant was absent on December 14, 24, 25, 26, 27, 2012, February 25, 2013, March 9, and 10, 2013. The claimant was absent seven times within a three-month period. The employer's policy is that they could not have [any] more than three absences within a three-month period. The employer considers an unexcused absence even if they call out and are scheduled to work on that day.
>
> The claimant filed a claim for reemployment assistance benefits with an effective date of April 7, 2013, which established a weekly benefit amount of $199.00. The claimant claimed and received benefits for the claim weeks ending April 20, 2013, through May 18, 2013, for a total gross amount of $995.00.

Based on these findings, the referee held the claimant was discharged for misconduct connected with work and was overpaid benefits in the amount of $995. Upon review of the record and the arguments on appeal, the Commission concludes the referee's decision is not supported by competent and substantial evidence and, therefore, is not in accord with the law; accordingly, it is reversed.

Section 443.036(30), Florida Statutes, states that misconduct connected with work, "irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other":

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

The record reflects the claimant was discharged due to excessive absenteeism in violation of the employer's attendance policy. Without specifically citing the language of Sections 443.036(30)(c) and (e), Florida Statutes, the referee concluded the claimant's absenteeism constituted misconduct as the claimant had continued unapproved absences after receiving written warnings for unapproved absences, and that the employer established the claimant violated its attendance policy when she was repeatedly absent after warning. The record, however, does not support the referee's conclusion.

As noted above, Section 443.036(30)(c), Florida Statutes, defines misconduct as "[c]hronic 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" (emphasis added). Thus, two avenues are available for an employer to establish attendance-related misconduct under the provisions of Section 443.036(30)(c), Florida Statutes. For discharges based upon, in general, absenteeism and/or tardiness, the employer must establish both that the absenteeism and/or tardiness was "chronic" as well as a "deliberate violation of a known policy." Under the first prong of subparagraph (c), absences or tardiness attributable to a compelling and/or involuntary reason would not constitute misconduct as they would not be a "deliberate violation." The Commission takes the position that, *generally*, an employee's absence from work based upon a "compelling" reason, when properly reported to the employer, does not rise to the level of being "a *deliberate* violation of a known policy of the employer." In reaching this position, the Commission references court cases under the earlier statute addressing attendance violations for "compelling reason(s)." *See Cargill, Inc. v. Unemployment Appeals Commission*, 503 So. 2d 1340 (Fla. 1st DCA 1987); *Howlett v. South Broward Hospital Tax District*, 451 So. 2d 976 (Fla. 4th DCA 1984); *Taylor v. State Department of Labor and Employment Security*, 383 So. 2d 1126 (Fla. 3d DCA 1980).

The second prong of subparagraph (c) defines misconduct to include "one or more *unapproved* absences following a *written* reprimand or warning relating to more than one *unapproved* absence." No explicit requirement of fault exists under the second prong when the employer establishes a final "unapproved" absence(s) following a *written* warning for multiple prior unapproved absences. However, keeping in mind the language of the second prong, the common understanding of the word "misconduct," the prior case law regarding absences for compelling reasons, and the legislative intent, the Commission has concluded that the second prong of subparagraph (c) does not entirely remove the requirement of fault on the part of the claimant.

For example, the use of the term "unapproved" in the second prong of subparagraph (c) presupposes an employee can request approval for absences and that, depending on the reason for the request, and the information provided by the employee, the employer can either approve or deny the request. While this process is common among many employers, the Commission observes that some employers have adopted "no fault" rules/policies regarding absences. These policies provide that employees are entitled to a certain number of absences, or unscheduled absences, during a specified time period. These policies normally also indicate that the reasons for these absences are irrelevant and employees who exceed the specified number of absences stated in the rule/policy will be discharged. Under such

circumstances, the second prong of subparagraph (c) cannot automatically be utilized to decide the issue of whether a claimant has been discharged for misconduct. An employee cannot be faulted for failing to request approval of an absence when the employer has notified its employees that such requests will not be approved. Further, regardless of the employer's policies, an absence taken with proper notice and documentation by a claimant eligible for Family and Medical Leave Act ("FMLA") leave from an employer covered by FMLA would be an "approved" absence. *See* 29 C.F.R. §825.220(c).

The Commission has concluded that if a claimant (1) requests that an absence for a compelling reason such as an illness be approved or excused (unless the employer has clearly indicated that no further absences will be excused, in which case this requirement is waived); (2) provides notice that is reasonable under the circumstances (either prior notice for a foreseeable absence or prompt notice for an unforeseeable one); and (3) provides whatever appropriate verification or other information the employer may reasonably request; then the claimant cannot be considered to have engaged in "misconduct" within the meaning of the second prong of subparagraph (c). While an employer may choose whether or not to grant approval for such absences, a claimant will not be disqualified if such absences are not approved.

The record in this case reflects the employer has a "no fault" policy regarding the issue of unscheduled absences. The employer's witness testified that the claimant was entitled to three unscheduled absences during a three-month period. The employer's witness also testified that the employer's policy provided that the reasons for unscheduled absences are irrelevant and employees who exceed the specified number of absences stated in the rule/policy will be disciplined, up to and including discharge. While acknowledging that all of the claimant's absences after the October 22, 2012 warning were due to illness and were properly reported to the employer in accordance with its policy, the referee concluded the claimant's absences prior to the October 22, 2012 warning justified her disqualification. Inasmuch as those prior absences were too remote in time to the discharge and the details of those absences were not developed on the record (number of absences, dates of absences, reasons for absences, etc.), those prior absences cannot justify disqualification of the claimant. Moreover, as indicated above, the Commission has concluded, that under the circumstances described in the claimant's case, the second prong of subparagraph (c) cannot be utilized to disqualify the claimant since her final eight absences after the October 22, 2012 warning were due to the claimant's personal illness and were properly reported to the employer. Under these circumstances, the referee's conclusion that the employer established misconduct under this subparagraph is rejected by the Commission.

Even if the employer is unable to establish misconduct under Section 443.036(30)(c), Florida Statutes, the Commission has held that the employer may be able to do so under Section 443.036(30)(e), Florida Statutes, if the claimant's tardiness/absences amounted to a violation of an employer "rule." To prove the existence of a rule violation under this subparagraph, the employer must present evidence of its attendance policy/rules and evidence that the claimant violated it. The claimant would then have 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. With respect to the issue of fair enforcement, the Commission applies the same analysis as to the second prong of subparagraph (c).

The Commission also concludes that, while the employer established the claimant was aware of its attendance policy, the claimant presented evidence to show that the rule was not fairly applied to her circumstances. The record evidence reflects that all of the claimant's final absences were for compelling reasons not within the claimant's control and that the claimant provided notice to the employer of her intended absences. The claimant presented unrebutted evidence that she received approval to leave work early in order to go to the emergency room due to a high fever on December 24, 2012, and that the physician ordered her not to return to work until after December 27, 2012. Moreover, the claimant testified that all of her final absences resulted from personal illness and that she provided medical documentation to support the absences when requested by the employer.

The Commission holds that the employer's rule cannot be seen as being fairly enforced with respect to the claimant's absences from December 14, 2012, through March 10, 2013, inasmuch as the absences were caused by the claimant's illness which were properly reported to the employer and were properly supported by medical documentation when requested by the employer. The claimant's final absences cannot, therefore, be fairly considered a violation of the employer's rule such as would operate to disqualify her from receipt of benefits.

The decision of the appeals referee is reversed. If otherwise eligible, the claimant is entitled to benefits.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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

This is to certify that on 3/24/2014, the above Order was filed in the office of the Clerk of the Reemployment Assistance Appeals Commission, and a copy mailed to the last known address of each interested party.

By: Kady Thomas
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
POST OFFICE BOX 8697
FORT LAUDERDALE FL 33310

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. **2013-54344U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant **EMPLOYER/Appellee**

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.

OVERPAYMENT: Whether the claimant received benefits to which the claimant was not entitled, and if so, whether those benefits are subject to being recovered or recouped by the Department, pursuant to Section 443.151(6); 443.071(7),443.1115; 443.1117, Florida Statutes and 20 CFR 615.8.

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 became employed by the employer, a hospital, as an environmental housekeeper, on August 23, 1999. The claimant was paid $10.30 per hour. The claimant worked 40 hours per week the first shift.

The claimant received the time and attendance policy when she was hired on August 23, 1999, and received the unscheduled absent and sick call procedures acknowledgment form on June 27, 2008. The claimant received a verbal warning on September 24, 2008, due to attendance. The claimant received a first written warning on October 8, 2009. The claimant received a second written warning on April 7, 2010. The claimant received another second written warning on October 22, 2012. The claimant received a termination on April 8, 2013. The claimant was absent on December 14, 24, 25, 26, 27, 2012, February 25, 2013, March 9, and 10, 2013. The claimant was absent 7 times within a 3 months period. The employer's policy is that they could not have no more than 3 absences within a 3 months period. The employer considers an unexcused absence even if they call out and are scheduled to work on that day.

The claimant filed a claim for reemployment assistance benefits with an effective date of April 7, 2013, which established a weekly benefit amount of $199.00. The claimant claimed and received benefits for the claim weeks ending April 20, 2013 through May 18, 2013, for a total gross amount of $995.00.

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 law provides that a claimant who voluntarily left work without good cause as defined in the statute will be disqualified for benefits. A claimant will not be disqualified for voluntarily leaving temporary work to return immediately when called to work by the permanent employing unit that temporarily terminated the claimant's work within the previous 6 calendar months.

The hearing record shows the claimant was discharged on April 8, 2013, when the claimant was informed that she had been terminated due to excessive absences. The employer has the right to establish policies and procedures regarding attendance. The claimant continued to be absent even after warnings. The claimant received verbal warnings and several written warnings and still continued to be absent. Towards the end of the claimant's employment, her absences were due to reasons beyond the claimant's control. She had a car accident and was sick. Even though

these are circumstances beyond the claimant's control, the claimant's attendance as a whole demonstrated a material breach of her duties and obligations to the employer. The employer has the right to establish policies and procedures and expect their employees to be at work. Therefore, the claimant was discharged for misconduct connected with the work.

The law provides that a claimant who was not entitled to benefits received must repay the overpaid benefits to the Department. The law does not permit waiver of recovery of overpayments.

The entry into evidence of a transaction history generated by a personal identification number establishing that a certification or claim for one or more weeks of benefits was made against the benefit account of the individual, together with documentation that payment was paid by a state warrant made to the order of the person or by direct deposit via electronic means, constitutes prima facie evidence that the person claimed and received reemployment assistance benefits from the state.

The hearing record shows that the claimant claimed and received benefits for the claim weeks ending April 20, 2013 through May 18, 2013, for a total gross amount of $995.00. Pursuant to this decision, the claimant was not entitled to these benefits and has to repay these benefits to the agency.

Decision: The determination of the claims adjudicator dated May 31, 2013, which held that benefits are not payable because the discharge was for misconduct connected with the work, and that the claimant was overpaid benefits in the amount of $995.00, 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 July 18, 2013.

ILIANA M PADILLA
Appeals Referee

By: S. Moise
S. MOISE, 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.