NO. 73024-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SARAH CHRISTNER,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

2016 FEB 26 PM 1:17

DEPARTMENT'S SUPPLEMENTAL RESPONSE BRIEF

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ORIGINAL

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I. INTRODUCTION

On January 12, 2016, the Appellant, Sarah Christner, submitted a Statement of Additional Authorities, to which she attached three excerpted pages from the Employment Security Department's Unemployment Insurance Resource Manual (UIRM). Following oral argument, the Court requested the parties to submit supplemental briefs addressing: 1) whether the Court can properly consider the submission, 2) what weight, if any, the Court should give to it, and 3) what effect, if any, the document has on the issues before the Court. Because the excerpted pages of the UIRM are not binding or persuasive legal "authority," they are not a proper submission under RAP 10.8, and the Court should not consider them. Even if the manual excerpt was properly submitted, the Court should give it no weight because courts afford such internal guidance manuals no deference. And even if the Court gives the manual any weight, the manual is consistent with the Employment Security Act, and the Department acted consistently with the manual's guidance.

II. ARGUMENT

A. The Court Should Not Consider the Supplemental Document Because it is Evidence, Not Authority

RAP 10.8 allows a "party to file a statement of additional authorities. . . . prior to the filing of the decision on the merits . . . ." This

Court has interpreted the rule "as being intended to provide parties with an opportunity to cite authority decided after the completion of briefing." *O'Neill v. City of Shoreline*, 183 Wn. App. 15, 23, 332 P.3d 1099 (2014). The rule is not "intended to permit parties to submit to the court cases that they failed to timely identify when preparing their brief." *Id.* Although the Washington Supreme Court has noted that "nothing in [RAP 10.8] limits its application to newly created law," *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 248 n.2, 189 P.3d 161 (2008), it is clear that the source cited to the Court after briefs have been filed must be legal "authority." Because an agency's manual is not a legal authority that binds either the agency or court, it was not a proper submission under RAP 10.8. *See Giedra v. Mount Adams School Dist. No 209*, 126 Wn. App. 840, 845 n.1, 110 P.3d 232 (2005) (arbitrator's decision, which had no collateral estoppel effect, did "not qualify as an additional authority under RAP 10.8").

The Unemployment Insurance Resource Manual is not "authority" because it contains guidelines for internal use only and, as such, does not represent the official agency interpretation of the Employment Security Act.[1] *See Ass'n of Wash. Bus. v. Dep't of Rev.*, 155 Wn.2d 430, 447, 120 P.3d 46 (2005) (even interpretive rules are not binding on public or court

[1] The fact that someone ought to testify to establish what the document is and that it is for internal use only further establishes that it is evidence, not legal authority.

"and are afforded no deference other than the power of persuasion."); *see also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 635 n.32, 90 P.3d 659 (2004) (noting agency's purported failure to follow a permit writer's manual that was not adopted as a regulation did not justify modification of agency condition in a permit). Here, the Department's manuals are not even interpretive statements, which themselves would be afforded no deference.[2] *Ass'n of Wash. Bus.*, 155 Wn.2d at 447. Moreover, the manual cannot be construed to contradict the terms of RCW 50.04.294, controlling case law, or Commissioner's decisions.

Accordingly, the excerpt from the Department's manual is not an "authority," it is evidence. Therefore, the Court should not consider it under RAP 10.8.

The Administrative Procedure Act (APA) governs when a court may accept additional evidence on judicial review. RCW 34.05.562(1). Christner made no argument that the additional submission satisfied the APA, and it does not. The reviewing court may receive additional evidence only when it:

> relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

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[2] Even interpretive and policy statements themselves "are advisory only." RCW 34.05.230(1). They do not carry the same weight as rules. *State Dep't of Soc. and Health Servs. v. Nix*, 162 Wn. App. 902, 914, 256 P.3d 1259 (2011).

> (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
> (b) Unlawfulness of procedure or of decision-making process; or
> (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.562(1). There is no dispute about the constitution of the decision-making body or the lawfulness of the procedure or process to determine Christner's eligibility for benefits, and the decision in this case *was* determined on the agency record. Therefore, the UIRM and the related arguments Christner makes do not satisfy the APA requirements for supplementing the agency record. The Court should not consider them.

Finally, Christner concedes that she raises new arguments regarding the Department's manual for the first time in her supplemental brief. Appellant's Suppl. Br. at 2. Her reliance on *Alverado* and *Shoreline Community College* to urge the court to consider these new arguments are misplaced for two reasons. *Id.* (citing *Alverado v. Washington Pub. Power Supply System*, 111 Wn.2d 424, 429-430, 759 P.2d 427 (1988), and *Shoreline Cmty. Coll. Dist. No. 7 v. Emp't Sec. Dep't*, 120 Wn.2d 394, 402, 942 P.2d 938 (1992)). First, in those cases, the Supreme Court agreed to consider arguments raised for the first time in supplemental briefs filed under RAP 13.7(d), which applies after the Supreme Court grants a

petition for review or motion for discretionary review. It was not applying RAP 10.8. Second, and more importantly, the Court in those cases exercised its inherent authority to consider law that would be binding on the courts: a statute in *Alvarado* and the doctrine of federal preemption in *Shoreline Community College*. *Alverado*, 111 Wn.2d at 429; *Shoreline Cmty. Coll. Dist. No. 7*, 120 Wn.2d at 402. Therefore, the new arguments were "necessary to reach a proper decision." *Id.* In contrast, the Court's consideration of an agency's manual, which is entitled to no deference, is not necessary to reach a proper decision. Accordingly, the Court should decline to consider the UIRM.

B. Even if the Submission was Proper Under RAP 10.8, the Court Should Afford it No Weight

For the same reasons the Department's manual is not a proper "authority" under RAP 10.8, the Court should afford it no weight if it considers it. The UIRM provides guidance to Department staff; it is for internal use. It does not contain interpretive or policy statements, and even those are afforded no deference. *Ass'n of Wash. Bus.*, 155 Wn.2d at 447. The Court should give it no weight.

C. Even if the Court Considers the Department's Manual, the Department Acted Consistently with its Guidance

Even if the Court considers the excerpt from the Unemployment Insurance Resource Manual, the Court will find that the Department acted consistently with its guidance.

With her Statement of Additional Authorities, Christner submitted only three, non-consecutive pages from the UIRM, one page of which includes some brief guidance on how to determine whether a benefits claimant's conduct amounted to misconduct under RCW 50.04.294(1)(b) ("Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee."). It provides examples of misconduct under RCW 50.04.294(1)(b), such as coming to work under the influence, stealing, and discriminating against others. Statement of Add'l Auths. of Appellant, Attach. at 2. It also states that an "employer has the right to expect employees to have acceptable working relationships with each other." *Id.* It further provides that "[i]mpudence, insolence, disrespectfulness or rudeness to one's supervisor may be considered a violation of universally accepted standards of behavior." *Id.*

Christner incorrectly argues that her conduct "does not rise to [the] level" of the limited examples in the manual, so the Commissioner's decision was arbitrary and capricious. Appellant's Suppl. Br. at 8-9. First,

the examples of misconduct on one page of the UIRM are not exhaustive. Second, Christner's disqualifying conduct was not merely that she "request[ed] too much time off." Appellant's Suppl. Br. at 9. As the Department articulated in its brief, "Christner was discharged for making frequent requests for time off on short notice, often under false pretenses, when she was aware that this created a hardship on the employer." Respt's Br. at 24. Expecting employees to fulfill their job duties without making five to six requests for time off in a five week period, while on notice that this created a hardship for the employer, and to not make requests for time off under false pretenses is in line with the UIRM's noted expectations that employees "have acceptable working relationships with each other" or not be disrespectful to one's supervisor. Statement of Add'l Auths. of Appellant, Attach. at 2. The Commissioner's decision is thus consistent with the UIRM's guidance.

Further, Christner is correct that warnings are not required for conduct to amount to misconduct under RCW 50.04.294(1)(b).[3] *See* Appellant's Suppl. Br. at 8-9; Respt's Br. at 20-21. That guidance is

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[3] Christner's new argument here about warnings is inconsistent with the argument she raised in her opening brief. In her opening brief, Christner argued that substantial evidence did not support the finding that the employer gave her a "final warning" about repeatedly requesting time off. Appellant's Opening Br. at 3, 38-40. Therefore, she argued, she was not sufficiently on notice that her job was in jeopardy. *Id.* at 39 (*see* the Department's response at Respt's Br. at 12-13). She now argues that because she *did* receive warnings, her conduct could not have been sufficiently egregious to amount to misconduct. Appellant's Suppl. Br. at 8-9. The Court should reject this new, inconsistent argument.

entirely consistent with the Employment Security Act. *See* Respt's Br. at 21-22. But that does not mean that if a claimant *did* receive warnings, his or her conduct *cannot* amount to misconduct under that provision. Christner cites to no contrary authority. Moreover, once an employer does warn an employee that his or her conduct is creating a hardship on the employer, then the employee is on notice that the employer expects the employee not to engage in that conduct. That is what happened here, yet Christner "continued to make frequent requests on short notice, sometimes under false pretenses, and increasingly for employment appointments." Respt's Br. at 14. The Commissioner properly determined Christner deliberately disregarded the standards of behavior her employer had the right to expect of her. Nothing in the UIRM suggests otherwise.

III. CONCLUSION

The Court should not consider the attachment to Christner's Statement of Additional Authorities because it is not a proper submission under RAP 10.8; an agency's manual is not a legal "authority." Even if it was a proper submission, the Court should give it no weight because courts afford such internal guidance manuals no deference. But even if the Court accepts the UIRM excerpt and considers it, the Court should find the Department acted consistently with the guidance it provides.

RESPECTFULLY SUBMITTED this 24th day of February, 2016.

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PROOF OF SERVICE

I, Katie Moceri, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 24th day of February 2016, I caused to be served by mailing a true and correct copy of DEPARTMENT'S SUPPLEMENTAL RESPONSE BRIEF, with proper postage affixed thereto to:

US Mail Postage Prepaid:
Joy Lockerby
PO Box 19444
Seattle, WA 98109

Thomas G. Jarrard
1020 North Washington
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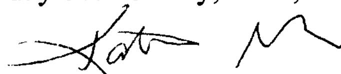
Filed via US Mail Postage Prepaid:
Court of Appeals Division I
One Union Square
600 University Street
Seattle, WA 98101

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED this 24th day of February, 2016, in Seattle, Washington.



Katie Moceri, Legal Assistant