

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

SARAH CHRISTNER,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

APPELLANT'S SUPPLEMENTAL BRIEF ON LIMITED
ISSUES

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STATE OF WASHINGTON
COURT OF APPEALS
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Table of Authorities

Cases

<i>Alverado v. WPPSS</i> , 111 Wn.2d 424, 429-30, 759 P.2d 427 (1988), cert. denied, 490 U.S. 1004 (1989).....	2
<i>Campbell v. State, Dep't of Soc. & Health Servs.</i> , 150 Wn.2d 881, 894 n.4, 83, P.3d 999 (2004)	7
<i>Griffith v. Dep't of Employment Sec.</i> , 163 Wn.App. 1, 8, 259 P.3d 1111 (2011).....	7
<i>King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 142 Wn.2d 543, 553, 14 P.3d 133 (2000).....	7
<i>Lang v. Washington State Dep't of Health</i> , 138 Wn. App. 235, 252, 156 P.3d 919, 928 (2007)	5
<i>Motley–Motley, Inc. v. Pollution Control Hearings Bd.</i> , 127 Wash.App. 62, 81, 110 P.3d 812 (2005), <i>review denied</i> , 156 Wash.2d 1004, 128 P.3d 1239 (2006)	5
<i>Overton v. Econ. Assistance Auth.</i> , 96 Wn.2d 552, 555, 637 P.2d 652 (1981).....	7
<i>Ritter v. Bd. of Comm'rs of Adams Cty. Pub. Hosp. Dist. No. 1</i> , 96 Wn.2d 503, 507, 637 P.2d 940 (1981)	3
<i>Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep't</i> , 120 Wn.2d 394, 842 P.2d 938 (1992).	2
<i>State, Dep't of Ecology v. Lundgren</i> , 94 Wn. App. 236, 245, 971 P.2d 948, 953 (1999).....	2

Statutes

RCW 34.05.230(1).....	4, 5
RCW 34.05.570(3)(d), (e), (h), and (i)	7
RCW 42.56.070(b) and (c)	6
RCW 50.04.294(1)(b).....	2, 4, 7, 9
RCW 50.12.160	5

Other Authorities

<i>In re Dolan</i> , Empl. Sec. Comm'r Dec.2d 957 (WA) (2010).....	6
<i>In re Hendrickson-Jackson</i> , Empl. Sec. Comm'r Dec.2d 953 (WA) (2010).....	6
<i>Kellum v. Emp't Sec. Dept.</i> , Sup. Ct. No. 85-2-02773-0, available at 1988 WL 1606712 (Sup. Ct. Clark Cnty. May 25, 1988).....	4, 6
Employment Security Department, excerpt pages from <i>Unemployment Insurance Resource Manual</i> , 5440 – Discharge (March 8, 2013).....	8
<i>Handbook for Unemployed Workers: Your unemployment benefits, rights and responsibilities</i> , " available at	

[https://esdorchardstorage.blob.core.windows.net/esdwa/Default/ESDW
AGOV/Unemployment/ESD-Handbook-for-Unemployed-Workers.pdf](https://esdorchardstorage.blob.core.windows.net/esdwa/Default/ESDW
AGOV/Unemployment/ESD-Handbook-for-Unemployed-Workers.pdf)

Rules

RAP 10.8.....2

Regulations

WAC 192-15-150(6).....5

Table of Contents

I. INTRODUCTION.....	1
II. ARGUMENT	1
A. This court may consider the document because (1) the statement of additional authorities was properly filed under RAP 10.8, and (2) consideration of this document is necessary to reach a proper decision in this case.	1
1. Appellant’s statement of additional authority and attached excerpt pages from ESD’s UIRM are properly submitted under RAP 10.8.....	1
2. The document is necessary for this court to reach a proper decision in this case because it reveals that ESD’s existing interpretation of (1)(b) is inconsistent with Respondent’s position on appeal.	2
B. This court should give the document substantial weight because it contains ESD’s own written interpretation of RCW 50.04.294(1)(b) which is relied upon by ESD for adjudication of unemployment benefits, a property interest, and made publicly available under the APA.....	3
C. This document should be considered to determine the issues before this court including whether the Commissioner properly interpreted (1)(b) or took action that was arbitrary and capricious.	7
III. CONCLUSION.....	9

I. INTRODUCTION

Appellant Sarah Christner respectfully submits this supplemental brief on limited issues upon the court's directed order dated January 15, 2016. Specifically, with regard to the excerpt pages from Employment Security Department's (ESD) Unemployment Insurance Resource Manual ("UIRM")¹ for which Ms. Christner cited as additional authority, the following questions are addressed: (1) Whether this court can properly consider this document; (2) What weight, if any, this court should give to this document, and (3) What effect, if any, this document has on the issues before this court.

II. ARGUMENT

A. This court may consider the document because (1) the statement of additional authorities was properly filed under RAP 10.8, and (2) consideration of this document is necessary to reach a proper decision in this case.

1. Appellant's statement of additional authority and attached excerpt pages from ESD's UIRM are properly submitted under RAP 10.8.

Rule of Appellate Procedure 10.8 authorizes the filing of additional authorities without argument. RAP 10.8; *State, Dep't of Ecology v.*

¹ ESD's "Benefit Policy Guide," referenced at WAC 192-15-150(6), is currently published under the title, Unemployment Insurance Resource Manual (UIRM). For simplicity, Appellant will refer to the entire manual under ESD's current abbreviated title, 'UIRM.'

Lundgren, 94 Wn. App. 236, 245, 971 P.2d 948, 953 (1999). A statement of additional authorities may be filed and served anytime before a final decision on the merits is made. RAP 10.8. Ms. Christner filed her statement of additional authorities on January 12, 2016, before a final decision was made in the case. Thus, this court may properly consider Appellant's Additional Statement of Authorities. RAP 10.8.

2. The document is necessary for this court to reach a proper decision in this case because it reveals that ESD's existing interpretation of RCW 50.04.294(1)(b) is inconsistent with Respondent's position on appeal.

This court has inherent authority to consider an issue raised for the first time in a supplemental brief if such consideration is necessary to reach a proper decision. *Alverado v. WPPSS*, 111 Wn.2d 424, 429-30, 759 P.2d 427 (1988), cert. denied, 490 U.S. 1004 (1989). Although a reviewing court will normally decline to consider an issue raised for the first time in a supplemental brief, the reviewing court's inherent authority permits it to address an argument when it is necessary to reach a proper decision in the case. *See Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep't*, 120 Wn.2d 394, 842 P.2d 938 (1992).

A key issue in this case is whether ESD's Commissioner erred in misapplying the law denying Ms. Christner's claim for unemployment benefits under RCW 50.04.294(1)(b) and whether the Commissioner's

final decision is arbitrary and capricious. The additional authority cited by Ms. Christner contains ESD's own written interpretation for how ESD interprets (1)(b). There should be no prejudice to Respondent because this document comes from ESD's own policy manual. Thus, even though it was not raised at the administrative hearing below or addressed by the Commissioner, the issue of whether the Commissioner's order is inconsistent with the rule of the agency or whether it is arbitrary and capricious is properly before this court and may be considered on appeal. Accordingly, this court has the discretion to address this authority in order to reach a proper decision in this case.

B. This court should give the document substantial weight because it contains ESD's own written interpretation of RCW 50.04.294(1)(b) which is relied upon by ESD for adjudication of unemployment benefits, a property interest, and made publicly available under the APA.

It is well settled that an administrative body must follow its own rules and regulations when it conducts a proceeding which can deprive an individual of some benefit or entitlement." *Ritter v. Bd. of Comm'rs of Adams Cty. Pub. Hosp. Dist. No. 1*, 96 Wn.2d 503, 507, 637 P.2d 940 (1981). This court must give "substantial weight to the agency's interpretation of the statutes it administers." *Smith v. Employment Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010).

Under the Administrative Procedure Act, an agency is “encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements.” RCW 34.05.230(1). The agency’s current interpretive and policy statements are advisory only.² *Id.* To better inform and involve the public, an agency is encouraged to convert long-standing interpretive and policy statements into rules. *Id.*

Here, ESD failed to change its own advisory rules or promulgate the definition for (1)(b) that it is now arguing on appeal and it contradicts what its own advisory policy. Thus, ESD’s UIRM should be afforded substantial weight to determine whether the Commissioner erred in misinterpreting and misapplying RCW 50.04.294(1)(b) to the facts in Ms. Christner’s case, as well as to determine whether the Commissioner’s deviation from its own policies constitutes arbitrary and capricious action.

Furthermore, weight should be extended because it is necessary to making a right decision in this case. ESD’s inconsistent application of its policy inhibited Ms. Christner’s ability to defend against the charge of misconduct under (1)(b) at the adjudication level. *See Motley–Motley, Inc.*

² But see, *Kellum v. Emp’t Sec. Dept.*, Sup. Ct. No. 85-2-02773-0, available at 1988 WL 1606712 (Sup. Ct. Clark Cnty. May 25, 1988.) (Benefit Policy Guide Revision No. 39 had the “force of law” and is binding on the Respondent).

v. Pollution Control Hearings Bd., 127 Wash.App. 62, 81, 110 P.3d 812 (2005), *review denied*, 156 Wash.2d 1004, 128 P.3d 1239 (2006); *Lang v. Washington State Dep't of Health*, 138 Wn. App. 235, 252, 156 P.3d 919, 928 (2007). (Prejudice can be shown based on the claimant's inability to prepare or present a defense.)

The UIRM is a policy manual containing the Agency's interpretation of the statutes and regulations for which the Agency is delegated to administer under its enabling act. It contains policy for how ESD applies its statutes and rules, and provides illustrative examples from precedential decisions of the Commissioner and court rulings. It is the front-line resource used by adjudicators in fact-finding and adjudication of claims, collection actions, and other functions under ESD's delegated authority. It is also considered one of the eight "relevant and suitable" rules or material available for inspection and copying by the public. *See* RCW 50.12.160; RCW 34.05.230(1) and WAC 192-15-150(6).

Historically, the UIRM was a manual available on the Internet as an unemployment insurance resource to claimants, employers, and other interested parties. For a period of time, claimants were encouraged by ESD to "Read the Resource Manual, which contains the policy that is used to rule on issues in the UI program," however, the current claimant handbook no longer contains a reference directing claimants to consult the

policy manual.³ The UIRM is not longer available on ESD’s website, but it is still available through a public records request or at ESD Worksource Centers.

The Administrative Procedure Act directs ESD to “maintain and make available certain records issued, adopted, or promulgated after January 1, 1973 including but not limited to (b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency; and (c) Administrative staff manuals and instructions to staff that affect a member of the public. RCW 42.56.070(b) and (c). ESD, under its delegated powers has the authority to change and revise those policies—*without having to submit any such policy change to rulemaking*. Requiring it to do so would create an inflexible burden on the agency. ESD itself cites to it in numerous Precedential Decision of Commissioner. *See, e.g., In re Dolan*, Empl. Sec. Comm'r Dec.2d 957 (WA) (2010). *In re Hendrickson-Jackson*, Empl. Sec. Comm'r Dec.2d 953 (WA) (2010). Thus, this policy manual should have authority on ESD and

³See Employment Security Department, Unemployment Claims Kit, *What Unemployment Insurance Resources Are Available on the Internet?* EMS 8139 UCT (Rev. 12/04), 36, <http://leg.wa.gov/JointCommittees/Archive/UITF/Documents/Claimskit.pdf>, last visited on 2.3.2016. The “Unemployment Claims Kit” is now called “*Handbook for Unemployed Workers: Your unemployment benefits, rights and responsibilities*,” available at <https://esdorchardstorage.blob.core.windows.net/esdwa/Default/ESDWA GOV/Unemployment/ESD-Handbook-for-Unemployed-Workers.pdf>.

while the policies may be advisory, ESD should not be permitted to deviate from them without a clear explanation.

- C. **This document should be considered to determine the issues before this court including whether the Commissioner properly interpreted (1)(b) or took action that was arbitrary and capricious.**

Whether a claimant engaged in misconduct connected with work is a mixed question of law and fact. *Griffith v. Dep't of Employment Sec.*, 163 Wn.App. 1, 8, 259 P.3d 1111 (2011). This court determines the law independently and has the ultimate authority to determine the purpose and meaning of statutes. *Overton v. Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981). The appellate court reviews questions of law de novo, but the court gives substantial weight to an agency's interpretation of a non-ambiguous statute the agency administers. *See, e.g., Campbell v. State, Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 894 n.4, 83, P.3d 999 (2004); *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

This court should defer to ESD's interpretation of RCW 50.04.294(1)(b) because the document serves to highlight the Commissioner's final order is invalid under RCW 34.05.570(3)(d), (e), (h), and (i) in applying RCW 50.04.294(1)(b). From a plain language reading, and given Respondent's concession that (1)(b) involves behavior

for which no warning or notice is required, this court should hold ESD to its promulgated policy and not permit it to rely on a variant definition.

According to ESD's UIRM, "standards of behavior" which warrant a denial under (1)(b) encompass things like reporting to work under the influence of illegal drugs or alcohol, stealing from the employer, disrupting the employer's workplace without provocation, unlawful discrimination, unlawful harassment, or other universally accepted standards of behavior such as impudence, insolence, disrespectfulness, or rudeness to one's supervisor, and other situations where there is "[t]here is no circumstance that excuses the misconduct." Employment Security Department, excerpt pages from *Unemployment Insurance Resource Manual*, 5440 – Discharge (March 8, 2013). This document is significant then because the arguments made by Respondent regarding Ms. Christner's behavior simply do not rise to that level.

The section, "Deliberate Violation or Disregard of Standards of Behavior, RCW 50.04.294(1)(b)" contained in captioned chapter "5440 – Discharge," provides illustrative examples of what constitutes "standards of behavior" the employer has the "right" to expect under (1)(b). Employment Security Department, excerpt pages from *Unemployment Insurance Resource Manual*, 5440 – Discharge (March 8, 2013). As Respondent concedes, such behavior under (1)(b) is behavior where no

notice or warning is required. Resp. Brief at 21-22. That is what the Legislature intended. *Id.* Ms. Christner does not disagree with ESD's interpretation of misconduct as outlined in its UIRM and believes it shows the conduct she was accused of does not rise to that level.

As argued at oral argument, ESD's interpretation about what is misconduct under (1)(b) matches Ms. Christner's position in this case. Simply, Ms. Christner's behavior of requesting too much time off from work and Washington Center for Pain Management's inability to accommodate that is not comparable to the kind of universal behavior described in ESD's UIRM.

Finally, the Commissioner did not give a basis for why it deviated from its policies with respect to (1)(b). This factor is particularly important in situations involving pro se claimants where cases of misconduct are decided without a trial; and especially when the UIRM is no longer available online and claimants are no longer informed of it, and when the UIRM will need to be accessed by a public records request, thus foreclosing a claimant's ability to prepare a fair defense.

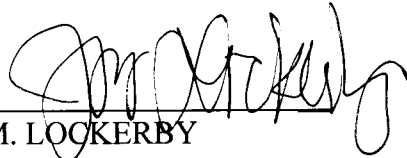
III. CONCLUSION

Appellant urges this court to give significant weight to ESD's written policies that interpret RCW 50.04.294(1)(b). ESD should not be

permitted to rule inconsistently from what it promulgates in its policies without giving a reason when its effect serves to deprive Ms. Christner of unemployment benefits to which she would have be otherwise entitled to under a plain reading of the statute or the application of the ESD's written policy. If this court decides ESD policies should not be given any weight, Appellant believes reversal is still appropriate for the reasons previously argued before this court.

RESPECTFULLY SUBMITTED this 4th day of February, 2016.

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PROOF OF SERVICE

The undersigned attorney, Joy Lockerby, declares under penalty of perjury under the laws of the State of Washington that on this day, February 4, 2016, a true and correct copy of the foregoing *Appellant's Supplemental Brief on Limited Issues* was filed with the court and served to counsel of record and interested parties as indicated below:

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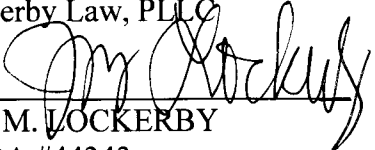
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