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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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No. 66851-0-1

COURT OF APPEALS, DIVISION I,
FOR THE STATE OF WASHINGTON

CHARLES DANIELS,

ORIGINAL

Respondent,

v.

EMPLOYMENT SECURITY DEPARTMENT,
STATE OF WASHINGTON,

Appellant.

RESPONDENT MR. DANIELS' BRIEF

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A. INTRODUCTION¹

Mr. Daniels started work as a security officer for Star Protection Agency in November 2007. CP Comm. Rec. 13, 92 (Finding of Fact “FF” 2).² In September 2008, he received a single written warning for tardiness – the only one in the record. CP Comm. Rec. 80.

Fifteen months later, on November 6, 2009, he arrived at a new job site at 8:30 p.m. for a job that was to begin at 10:00 p.m. CP Comm. Rec. 103. He had his uniform with him and planned to change into it at the job site, but the building was locked. He parked across the street and in front of the building, called his supervisor who was to meet him at the site, and waited. When the supervisor arrived around 9:45 p.m., he walked the perimeter of the building and then phoned Mr. Daniels who told him he was across the street in his car. By then, it was 10:35 p.m., about a half-hour after the shift was to have begun. Several days later, Mr. Daniels was fired for being tardy on November 6. CP Comm. Rec. 14; 103.

¹ Please note that this introduction, unlike the ESD’s introduction to its opening brief, is thoroughly supported by citations to the record.

² Pursuant to RAP 9.7(c), the Superior Court in this case transmitted to this Court the original Certified Appeal Board Record as a separate document (Sub 6) maintaining that record’s original pagination. Thus, references to that Record in this brief will be to the original pagination of the Record and will appear as follows: CP Comm. Rec., meaning “Clerk’s Papers, Commissioner’s Record,” and will be followed by the page number of the original Record.

Finding no misconduct, the Employment Security Department (ESD) granted benefits. An ALJ affirmed, twice. CP Comm. Rec. 83; 94 (Conclusion of Law 7). The Commissioner's Review Office (hereinafter, "the Commissioner")³ reversed. CP Comm. Rec. 102-105. Reversing the Commissioner, the King County Superior Court held that the Commissioner's Decision misapplied and misinterpreted the law on misconduct and held that Mr. Daniels was entitled to benefits, as three prior decisions had held. CP 43-46. The ESD appealed to this Court. CP 47-52.

B. RESPONDENT'S ASSIGNMENTS OF ERROR

1. Mr. Daniels assigns error to the Commissioner's failure to adopt the ALJ's Conclusion of Law 7 which found no misconduct and to the Commissioner's substituted conclusion that misconduct had been established. CP Comm. Rec. 104.
2. Mr. Daniels assigns error to the Commissioner's "modification" of the ALJ's Findings of Fact 3 & 4. CP Comm. Rec. 102-103.

³ While the final decision maker is actually a Review Judge, sometimes referred to as the "Commissioner's Delegate," who is appointed by the Commissioner's Review Office of the Employment Security Department, for simplicity sake the words "Commissioner" and "Commissioner's Decision" will be used here to refer to the decision that is ultimately under review.

Issues Pertaining to Assignments of Error

1. Was Mr. Daniels eligible for unemployment benefits as a matter of law, as four prior decision makers have decided, when he was fired for being late to his shift on November 6, 2009, though he had arrived at the jobsite over an hour early, and when he had only one prior written warning for tardiness from over a year earlier, in September 2008?

(Issue pertaining to assignments of error 1 & 2)

2. Was Mr. Daniels eligible for unemployment benefits, as four prior decision makers have decided, when the Commissioner's Decision to the contrary was premised on findings of numerous prior "written warnings," of a "written policy," and of an "employee handbook" that allegedly explicitly stated the employer's policies, but when the evidentiary record was devoid of any such documents?

(Issue pertaining to assignments of error 1& 2)

3. Should this Court award attorney fees to the law firm that brought Mr. Daniels' appeal to the King County Superior Court, which reversed the Commissioner's denial of benefits to Mr. Daniels?

C. RESPONDENT'S STATEMENT OF FACTS

- 1. MR. DANIELS WAS FIRED BECAUSE OF BEING TARDY, DESPITE HAVING ARRIVED AN HOUR AND A HALF EARLY AND HAVING HIS UNIFORM WITH HIM TO CHANGE INTO AT THE JOB SITE.**

Mr. Daniels worked as a "temporary security officer" for Star Protection Agency, for two years beginning on November 21, 2007. CP Comm. Rec. 13, 92 (Finding of Fact "FF" 2). Mr. LeMar Kelly,⁴ a "portfolio manager" for Star, was one of Mr. Daniels' supervisors. CP Comm. Rec. 15, 16 – 17, 33.

On September 9, 2008, Mr. Kelly signed a warning concerning Mr. Daniels' arriving late to a job site that day. Exhibit 6, page 4, CP Comm. Rec. 80. On October 9, 2008, Mr. Kelly signed a warning concerning Mr. Daniels' use of the computer at work. Exh. 6, pgs. 2-3, CP Comm. Rec. 78.⁵

Mr. Daniels noted that he "never had any problems with any of the supervisors besides Lamar Kelly." CP Comm. Rec. 15. Later he testified that "Mr. Kelly was not my only supervisor. He was the only supervisor that ever filed a complaint against me. I

⁴ Various spellings of this name appear in the record. This brief uses the spelling used in the employer's records except when a quote contains an alternative spelling.

⁵ Whether Mr. Daniels ever received these notices is not clear because on both forms the employee signature lines are blank, the "Employee Statement" sections are blank, and the check boxes indicating whether the employee "agreed" or "disagreed" with the warnings are also blank.

have several others [sic] supervisors (inaudible) loved me and loved the service I provided (inaudible)." CP Comm. Rec. 33.

LeMar Kelly testified of other "incidents" when Mr. Daniels would call "the officer on duty," in other words, not Mr. Kelly, to tell the officer on duty that he was "running late." Mr. Kelly failed to provide dates, times, the names of the officers on duty, the number of minutes involved, or any other details of the prior incidents. See, e.g, CP Comm. Rec. 20.

Over a year later – 15 months after the sole written warning in the record about tardiness that was dated September 2008 – the employer fired Mr. Daniels for an incident that occurred on November 6, 2009. CP Comm. Rec. 92 (FF 3 & 4, adopted by Commissioner at CP Comm. Rec. 102). The Commissioner's findings of fact on the incident were essentially as follows:

Mr. Daniels arrived at a new job site on November 6, 2009, at 8:30 p.m. for a job that was to begin at 10:00 p.m. CP Comm. Rec. 103. He had his uniform with him and planned to change into it at the job site, but the building was locked. Mr. Daniels parked across the street and in front of the building, called his supervisor, Mr. Kelly, who was to meet him at the site (though the supervisor said he did not receive the call), and waited. *Id.*

The Commissioner later found as fact that Mr. Daniels had changed into his uniform at job sites on prior occasions “without reprimand” and planned to do so again on November 6 “[b]ased on prior experience,” which led him to assume “his supervisor would arrive at the work site approximately 30 minutes before the beginning of his shift and would let the claimant into the building to change.” CP Comm. Rec. 103, Commissioner- Modified Findings of Fact 3 & 4.

When Supervisor Kelly arrived around 9:45 p.m. and could not find Mr. Daniels, Kelly walked the perimeter of the building and then phoned Mr. Daniels who told him he was across the street in his car. By then, it was 10:35 p.m., about a half-hour after the shift was to have begun. Several days later, the employer fired Mr. Daniels for being tardy on November 6. CP Comm. Rec. 13-14; 103.⁶

When an ALJ later asked Kelly if there had been warnings between the one shown in Exhibit 6 from 2008 and the November

⁶ The Commissioner’s Decision makes other statements that are not specified as findings or conclusions, including that the employee handbook contained policies regarding arriving in uniform at a job site, though no portions of the handbook were entered into the record. Whether these are findings or conclusions, error is assigned to them as not supported by substantial evidence because the record holds no “written policies” or handbook excerpts. These assignments of error are further discussed in the second argument section below.

2009 firing, Kelly said "Yes," but agreed that the warnings were "[n]ot part of this record." CP Comm. Rec. 23.

Further, Kelly said he did not know whether Mr. Daniels had ever received the company's "rules and the policies" he was alleged to have violated, though he "believe[d]" it was part of the employer's "intake when they first come in as employees." CP Comm. Rec. 24.

The employer's "HR Generalist," Nancy Glass, who participated in firing Mr. Daniels, testified that the employer fired him because "he was supposed to report to his shift and he was late in reporting to his shift." CP Comm. Rec. 13 - 14. She gave no other reason for the firing.

2. THE INITIAL ESD DECISION GRANTED MR. DANIELS BENEFITS AND ALJ'S TWICE AFFIRMED, HOLDING THERE WAS NO MISCONDUCT.

The Employment Security Department granted Mr. Daniels benefits, finding no "misconduct" had occurred based on the following facts:

You [Mr. Daniels] state you do not know if you were fired for being late or because you were not in uniform by the start of your shift. You said you showed up the [sic] work site approximately two hours early and you were waiting for a supervisor to arrive to let you inside the locked building so you could change your clothes. You report you called the

supervisor three times on his cell phone, but you got no response. You said by the time the supervisor showed up, you were late for the start of your shift.

CP Comm. Rec. 65.

Noting that the employer failed to call and provide ESD with information about the incident and that an “attempt was made to get information from the employer” but that “[t]o date, they have not responded”, the ESD granted benefits to Mr. Daniels because “misconduct has not been established.” CP Comm. Rec. 65.

The employer, through its representative, Penser North America, Inc., sought an appeal hearing. CP Comm. Rec. 71. When the hearing was set, the employer’s representative (and apparently the employer’s witnesses) failed to show up or call in for the hearing. CP Comm. Rec. 60.

Mr. Daniels did attend the hearing and represented himself. ALJ Joslyn K. Donlin entered a default judgment against the employer for its failure to appear and entered judgment in favor of Mr. Daniels, affirming the grant of benefits. CP Comm. Rec. 60.

The employer appealed the default judgment, explaining why its representative had failed to appear at the first hearing: “The hearing was scheduled for today (Feb. 2, 2010) at 10:15 a.m. I was in a hearing that went longer than anticipated, so I **was unable to**

call in on time for the hearing. I got out at 10:39 am and immediately called the OAH to inform the judge of my situation. The receptionist checked with Judge Donlin who said she didn't have time to hear the case now." CP Comm. Rec. 87 (emphasis added).

Based upon this written explanation of the employer's failure to appear in a timely manner at its appeal hearing, the Commissioner remanded the case for a hearing on the issue of whether the employer had "good cause" for missing the hearing and, if so, for a *de novo* decision on the merits. CP Comm. Rec. 87, 90.

After the second hearing, at which Mr. Daniels again represented himself, a second ALJ, Cynthia M. Morgan, again granted Mr. Daniels benefits. CP Comm. Rec. 91 – 94. She entered, among others, these findings:

3. On November 6, 2009, the claimant was assigned a new location and was scheduled to begin at approximately 10:00 p.m. The employer arrived on site at approximately 9:45 p.m. and could not locate the claimant. The employer called the claimant, who indicated he was out front and the employer finally located the claimant sitting in his car without his uniform on, looking as if he had been sleeping, at approximately 10:35 p.m. The claimant testified that he arrived to the job site approximately one and one-half hours prior to his shift, but because it was a new location, he was unable to gain entry into the building to change into his

uniform. The claimant returned to his car in front of the building and called the employer to let his supervisor know he had arrived and was waiting out front in his car. The employer denied receiving any calls.

4. The employer's policy requires employees to be in their uniform upon arrival to work, to be ready to perform tasks upon report and to only use client computers for work use. Prior to the final incident, the employer testified that the claimant had arrived late to work on several occasions. The claimant also arrived without uniform and used client computers to excess for personal use. Each violation was addressed both verbally and in writing. The claimant disagreed that he had been warned on several occasions and had not been warned that further violation would result in his termination. ***The employer submitted only two warnings from 2008*** and one email regarding the final incident. **See Exhibit 6.**

CP Comm. Rec. 92 (FF 3 & 4) (emphasis added).

The ALJ here, and the Commissioner later, both relied heavily upon Exhibit 6. A close examination of Exhibit 6 reveals the following.

Exhibit 6, page 1 (CP Comm. Rec. 77) is an unsigned writing with no indication of who wrote it, for whom it was intended, or when it was written.

Exhibit 6, pages 2 & 3 (CP Comm. Rec. 78 & 79), is a "Disciplinary Action Form" dated "09 Oct 2008." It concerns LeMar Kelly's warning Mr. Daniels about his use of a computer at work over two days in June 2008 and one day in September of 2008, for

a total over the three days of 3 hours and 29 minutes, or a little over an hour each of those days spread over three months. The signatures are largely illegible and the employee's signature line is blank – meaning Mr. Daniels may not have ever seen the warning, much less agreed with it – and the signature of the “Director of Operations” appears to be dated 10-9-09 – more than a year after the date of the notice.⁷ Furthermore, Mr. Daniels was not fired for computer use.

Exhibit 6, page 4 (CP Comm. Rec. 80), is a “Disciplinary Action Form” dated “09 Sept 2008,” that is, a month prior to the one on pages 2 & 3 of Exhibit 6. It notes LeMar Kelly gave “oral” warnings to Mr. Daniels on June 17, 19, & 20, 2008, but does not specifically state what those oral warnings concerned. The “Employer Statement” on that form notes that Mr. Daniels was late to work on September 9, 2008. Again, the employee's signature line is blank – meaning once again that Mr. Daniels may never have seen this notice – and the other signatures are illegible.

⁷ It is interesting to note that the anonymous writing at Exh. 6, pg. 1, states that the computer use warning was on 10/09/09, consistent with date next to the Director of Operations' signature on the form, but a year after the “Date of Notice” on the form, “09 Oct 2008.”

Based on this evidence and her findings of fact, ALJ Morgan affirmed there was no misconduct and that Mr. Daniels was entitled to benefits:

7. Here, the claimant's actions were not deliberate, but inefficient, unsatisfactory conduct, or the failure to perform well as the result of inability or incapacity. As a result, despite claimant's errors, statutory misconduct is not established. This decision does not question the employer's right to discharge claimant, nor the wisdom of the act. It is decided only that the evidence presented will not support a denial of benefits under the statute. Claimant is therefore eligible for benefits

CP Comm. Rec. 94 (Conclusion of Law 7).

3. THE COMMISSIONER REVERSED THE THREE PRIOR DECISIONS AND DENIED BENEFITS, BUT THE SUPERIOR COURT REVERSED THE COMMISSIONER AND AGAIN GRANTED BENEFITS.

When the employer appealed again, the Commissioner – reversing all three prior decisions that had granted Mr. Daniels benefits – found there had been disqualifying misconduct. Although adopting all of the ALJ's Findings of Fact – albeit with “modifications” - and all but one (No. 7) of the ALJ's Conclusions of Law, the Commissioner nevertheless denied benefits and held Mr. Daniels liable for repayment of all benefits previously paid to him.

CP Comm. Rec. 105.

In coming to this conclusion, the Commissioner substantially modified the ALJ's Findings of Fact 3 & 4⁸ as follows:

Finding Nos. 3 and 4 are adopted but are modified to state instead as follows: Pursuant to written policy, the employer's security officers are required to report to their assigned locations on time, dressed in uniform and ready to work. The claimant was aware of the policy which was set forth in the employee handwork [sic], issued to the claimant on hire. Over the course of the two year employment relationship, the claimant's supervisor had ongoing concerns regarding the claimant's failure to consistently comply with the above referenced policy. The claimant was repeatedly warned by his supervisor that tardiness was not acceptable and that he was required to arrive at his "duty post" in uniform. In September 2008, the claimant was issued written notice to that effect. Exhibit No. 6, page 4.

Despite the warnings to report for work on time, the claimant did not consistently do so. During the last year of the employment relationship (following the September 2008 written warning), the claimant received numerous additional verbal warnings from his supervisor to report for work on time. (On that point, testimony of the claimant's supervisor - based on personal knowledge of the conversations in question - - is deemed credible and is included herein as fact.) The claimant did not provide the employer with definitive reasons for his tardiness, but it was the supervisor's understanding that the claimant often came to work directly from another job with a different employer and was sometimes delayed, which the interested employer does not consider [sic] excusable tardiness. The claimant attributes his tardiness, in part, "to traffic." The employer does not consider traffic to be an excuse for repetitive tardiness.

⁸ These, though lengthy, are quoted here in their entirety because respondent has assigned error to portions of these "findings" and because the modifications of the ALJ's findings are apparently the reason the Commissioner arrived at the opposite legal conclusion. The ESD's brief at page 12 is therefore greatly mistaken when it states that the "Commissioner's findings of fact are largely undisputed for purposes of this appeal."

On November 6, 2009, the claimant was scheduled to be on duty at his assigned work site at 10 p.m. At approximately 8:30 p.m. (according to the claimant), the claimant arrived at the work site. The claimant did not arrive at the work site in uniform. Having arrived for work early, he intended to enter the building and change into his uniform in the client's restroom. ***The employer did not necessarily approve of that practice, but the claimant had done so before without reprimand.*** On November 6, 2009, however, when the claimant arrived at the work site, he could not get into the building. The claimant called his supervisor's cell phone number, but the supervisor did not receive the claimant's call. ***Based on prior experience, the claimant assumed his supervisor would arrive at the work site approximately 30 minutes before the beginning of his shift and would let the claimant into the building to change.*** The claimant waited in his car. At approximately 9:45 p.m., the supervisor arrived at the work site. He did not see the claimant nor was he approached or contacted by the claimant, so the supervisor walked the outside parameters [sic] of the building but could not find the claimant. At 10:30 p.m., the supervisor contacted the claimant on the claimant's cell phone and was told the claimant was waiting across the street from the work site in his car. Exhibit 6, page 1. The claimant was **covered by a blanket because he was cold.** By then, it was 10:35 p.m. The claimant had been at the work site for more than two hours and was 35 minutes late for work but had not yet changed into his uniform. Given the prior warnings to report for work on time and in uniform, the decision was made to terminate the employment relationship.

CP Comm. Rec. 102-103.⁹

In failing to adopt the ALJ's Conclusion of Law 7, the Commissioner instead concluded in part as follows:

⁹ Though Kelly alleged Mr. Daniels was under a blanket because he was sleeping, the Commissioner did not make such a finding but instead found Mr. Daniels was under a blanket because he was cold – it was near midnight on a November evening.

At the least, the claimant exhibited a wanton disregard of his employer's interest on November 6, 2009, when he was neither in uniform nor on duty as scheduled. Excuses notwithstanding, it was the claimant's responsibility to do so. Regarding the uniform (or lack thereof): First, the claimant should have arrived at the work site wearing (rather than carrying) his uniform. The undersigned is not persuaded that the employer condoned the claimant's practice of dressing for work in the restrooms of the buildings he was supposed to guard. Regardless, assuming the claimant arrived at the work site 90 minutes early on November 6, 2009 but could not get into the building, it defies logic that he did not drive elsewhere to change clothes.¹⁰ After all, he had 90 minutes to do so. Instead, the claimant sat in his car under a blanket for 35 minutes after his shift began. Regarding the claimant's contention that he was waiting for his supervisor to arrive and unlock the building so that he could change his clothes: It was not the supervisor's responsibility to ensure the claimant could get dressed for work; the supervisor came to the work site to ensure the client's premises were guarded.

CP Comm. Rec. 104. The Commissioner thus concluded as follows: "Given the circumstances, the claimant's tardiness was inexcusable, as was his violation of the employer's policy regarding uniforms at the work site. Given the prior warnings, the claimant's course of action (or lack thereof) cannot be attributed to an isolated incident of mistake or poor judgement [sic]. Misconduct has been established." CP Comm. Rec. 104.

¹⁰ Error is assigned to this finding or conclusion as not being supported by substantial evidence because nothing in the record shows in what area the new building was located or whether there were places where Mr. Daniels might have been able to change clothes at 9:30 p.m.

Mr. Daniels appealed to the King County Superior Court. The Honorable Michael C. Hayden reversed the Commissioner's Decision, finding that it misinterpreted and misapplied the law regarding misconduct under the Employment Security Act and holding that Mr. Daniels was entitled to benefits. CP 43-46.

The Employment Security Department appeals to this Court. CP 47-52.

D. ARGUMENT

- 1. THE SUPERIOR COURT SHOULD BE AFFIRMED IN ITS GRANT OF BENEFITS TO MR. DANIELS, JUST AS THREE OTHER DECISION MAKERS HAD DECIDED, BECAUSE THE COMMISSIONER'S CONTRARY DECISION WAS AN ERROR OF LAW.**

The ESD, ALJ Donlin, ALJ Morgan, and Judge Hayden of the King County Superior Court all reached the same correct legal conclusion in this case: Mr. Daniels' conduct was not statutory misconduct under the plain language of the statute and under decades of case law. The Commissioner's contrary conclusion was in error. The Commissioner's modified findings of fact and conclusions of law were not supported by substantial evidence, as argued in section 2 below, and the Commissioner's holding that there was misconduct in this case misinterpreted and misapplied

the law. Therefore, respondent respectfully requests that this Court affirm the Superior Court's order reversing the Commissioner's Decision.

a. No misconduct here under the plain language of the statute.

Under the Employment Security Act, "misconduct" is defined in pertinent part as follows:

(1) "Misconduct" includes, but is not limited to, the following conduct by a claimant:

(a) **Willful or wanton disregard** of the rights, title, and interests of the employer or a fellow employee;

(b) **Deliberate** violations or disregard of standards of behavior which the employer has the right to expect of an employee;

(c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or

(d) Carelessness or negligence of such degree or recurrence to show an **intentional or substantial disregard** of the employer's interest.

(2) The following acts are considered misconduct because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee. These acts include, but are not limited to:

* * *

(b) **Repeated inexcusable tardiness following warnings** by the employer;

* * *

(3) "**Misconduct**" does not include:

(a) **Inefficiency, unsatisfactory conduct, or failure to perform well** as the result of inability or incapacity;

(b) Inadvertence or **ordinary negligence** in isolated instances; or

(c) **Good faith errors in judgment** or discretion.

RCW 50.04.294 (emphasis added).

The ALJ's Conclusion that Mr. Daniels was entitled to benefits, based on subsection (3) of the statute, was correct:

7. Here, the claimant's actions were not deliberate, but inefficient, unsatisfactory conduct, or the failure to perform well as the result of inability or incapacity. As a result, despite claimant's errors, statutory misconduct is not established. This decision does not question the employer's right to discharge claimant, nor the wisdom of the act. It is decided only that the evidence presented will not support a denial of benefits under the statute. Claimant is therefore eligible for benefits

CP Comm. Rec. 94 (Conclusion of Law 7). The failure of the Commissioner to adopt this conclusion or at least its result was an error of law.

While the misconduct statute reflects amendments made effective in 2004, "willful or wanton disregard" remains central to the definition of "misconduct" as it was when misconduct was first

defined by this statute in 1993.¹¹ In addition to those words, the words “deliberate” and “intentional” are also prominent throughout the statute.

Thus, under the plain language of this statute, Mr. Daniels’ early arrival at the job site with an intention to change into his uniform at the site was not misconduct because there was no “deliberate” or “intentional” disregard of the employer’s interests, just as the ALJ had concluded.

This is particularly true in light of the Commissioner’s own findings that Mr. Daniels had changed into his uniform at the job site on prior occasions “without reprimand” and planned to do so again on November 6 “[b]ased on prior experience” which led him to assume “his supervisor would arrive at the work site approximately 30 minutes before the beginning of his shift and would let the claimant into the building to change.” CP Comm. Rec. 103, Commissioner Modified Findings of Fact 3 & 4.

Mr. Daniels was not late to the job site and he had changed into his uniform at other job sites in the past “without reprimand”

¹¹ For a discussion of the legislative history of the definition of misconduct in Washington prior to and following its statutory definition in 1993, see *Galvin v. Employment Security Department*, 87 Wn. App. 634, 641-643, 942 P.2d 1040 (1997), *rev. denied*, 134 Wn.2d 1004, 953 P.2d 95 (1998).

and under similar circumstances of awaiting his supervisor to arrive so he could do so. His acting consistently with this past behavior, “based on prior experience,” cannot be characterized as “willful or wanton disregard” of the employer’s interests. The Commissioner’s Decision to the contrary was rightly reversed by the Superior Court and Mr. Daniels asks this Court to affirm.

b. No misconduct here under decades of case law.

Furthermore, finding misconduct here not only violates the plain language of the statute, but runs afoul of decades of case law that has interpreted misconduct and its attendant adjectives: willful, wanton, intentional, and deliberate.

Under that case law, “willful disregard” must be shown because the Employment Security Act provides benefits to those workers who are out of work “through no fault of their own.” RCW 50.01.010; *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 392, 687 P.2d 195 (1984); *Matison v. Hutt*, 85 Wn.2d 836, 539 P.2d 852 (1975). Blameworthiness or its absence, therefore, is central to a determination of an employee’s entitlement to benefits: “The disqualification provisions of the act are based upon the fault principle and are predicated on the individual worker’s action, *in a*

sense his or her blameworthiness." *Safeco Ins. Co.*, 102 Wn.2d at 392. Thus, case law draws a bold line between the reasons for the discharge *from the employer's point of view* and the reasons for qualifying for unemployment benefits *from the agency's point of view*.

The determination of "fault" under the ESA is not simply to translate the employer's "firing" an employee to "disqualification" of the employee from benefits; instead, the ESD is to determine *under the standards of the ESA and how it has been interpreted*, whether a fired employee nevertheless qualifies for benefits.

The distinction between the two decisions, one about discharge, the other about misconduct disqualifying a claimant from benefits, has been insisted upon by our Supreme Court:

The question of discharge is independent of the question of misconduct. . . . Boeing may or may not have been justified, as a matter of employment law or good business judgment, in terminating [the claimant], but those questions are not before the court. [The claimant's] supervisor may or may not have handled the problems with [the claimant] as sensitively or capably as another supervisor might have, but that question is also not before the court. *The only issue in this case is whether the facts surrounding the discharge, as found by the Commissioner, meet the test for misconduct . . .*

Tapper v. Employment Security Department, 122 Wn.2d 397, 858 P.2d 494 (1993) (emphasis added).

This distinction between the rationale for a discharge and the rationale for allowing benefits is made pointedly in a case where a truck driver had been tardy 14 times in 15 months, but was found eligible for benefits. *Shaw v. Employment Security Department*, 46 Wn. App. 610, 731 P.2d 1121 (1987).¹² The claimant in *Shaw* had not only been late 14 times in 15 months, but he had also been warned by both of his direct supervisors “all the time” that his tardiness might jeopardize his job. 46 Wn. App. at 612. The *Shaw* court quoted language to the effect that willful misconduct under the Employment Security statutes would only be found where there was persistent or chronic tardiness without reasonable excuse or in the face of continued warnings by the employer. *Id.* at 614. The *Shaw* court thus concluded as follows: “Unquestionably, Mr. Shaw’s record validates his discharge. But we hold his conduct does not amount to the misconduct necessary to deny unemployment benefits.” *Id.* at 615.

Thus, under case law interpreting the ESA’s misconduct provisions, a claimant’s misdeeds must rise to a much higher level than Mr. Daniels’ – and must demonstrate deliberate, or intentional,

¹² The ESD’s brief at page 18 attempts to distinguish *Shaw* by saying it “did not address when ‘inexcusable tardiness’ was ‘repeated’ . . .” *Shaw* addressed repeated tardiness and found in that case that 14 tardies in 15 months was not misconduct.

or willful, or wanton conduct - none of which were proved in Mr. Daniels' case sufficient to justify denying him benefits. By a simple mathematical comparison, Mr. Daniels tardies in his 24 months of work for Star (even *at the highest* estimates) were far fewer than Shaw's 14 tardies in 15 months for his employer. Shaw's tardies were not "misconduct," nor were Mr. Daniels'. Far more is required by case law to show misconduct for tardiness or absences.

For instance, a claimant who had accumulated more than 100 hours of unexcused absences at Boeing received counseling and a corrective action memo warning him of possible suspension or dismissal; it was only after a subsequent period of absences for *six consecutive workdays* that he was fired and the denial of benefits was upheld. *Liebbrand v. Employment Security Department*, 107 Wn. App. 411, 426-27, 27 P.3d 1186 (2001)

Similarly, repeated absences were not grounds for denial of benefits for the claimant in *Galvin v. Employment Security Department*, 87 Wn. App. 634, 942 P.2d 1040 (1997) Benefits were denied in that case only after the claimant had taken a vacation without advance approval and in violation of an explicit condition for her continued employment.

Even then, the court in *Galvin* found willful disregard of an employer rule only after the employee's supervisors had "clearly and unequivocally communicated" to the employee that compliance with the rule was a "condition of her continued employment" and these requirements were reiterated "on a monthly basis during one-on-one reviews, and also in numerous memoranda sent" to the employee. *Galvin*, 87 Wn. App. at 646.

The claimant in *Galvin* missed 544 hours of work in 1994, 267 of those hours without pay because she had exhausted her sick leave. The frequent absences continued into 1995. Discharge was for disqualifying misconduct in that case not for the absences but only after the court found the employer's reasonable rule regarding vacation and continued employment was 1. Work-related, 2. Its violation was intentional, and 3. Its violation took place *after numerous warnings. Id.*¹³

¹³ Other cases also **required egregious, often repeated, conduct:** *Haney v. ESD*, 96 Wn. App. 129, 978 P.2d 543 (1999)(consistent "ongoing" negative attitude, verbal and written criticisms of fellow employees, initiating a hostile confrontation with a fellow employee, followed by a written warning letter to the claimant to which she responded with an insulting letter to management required to show misconduct); *Dermond v. ESD*, 90 Wn. App. 128, 947 P.2d 1271 (1997) (claimant left work early and worked at home for two days without permission; upon return she was given a written warning stating that violating performance expectations would result in termination; when she violated these expectations again, she still was not fired until she refused to talk about the violation three times).

And finally, even substantial financial loss to an employer arising from an employee's violation of an employer's policy is not sufficient to deny that employee benefits. *Wilson v. Employment Security Department*, 87 Wn. App. 197, 202, 940 P.2d 197 (1997). The employee in *Wilson* on two different occasions caused the employer substantial losses: on one occasion he did not log in a diamond that the diamond store in which he worked had received and as a result the store lost a \$900 diamond; on the second occasion, he put a \$490 diamond in a plastic bag on his desk and subsequently threw the bag away. While the Court of Appeals held this was sufficient behavior for a discharge, it was not sufficient misbehavior to constitute "misconduct" under the Employment Security Act so as to deny him unemployment benefits.

In reversing the Employment Security Department and the Superior Court that had affirmed the ESD, the Court of Appeals held the employee's conduct was not misconduct:

These acts were . . . in violation of the employer's policy. However, **at most they amounted to negligence**, incompetence, or an exercise of poor judgment. This is not enough to constitute misconduct under RCW 50.04.293.

Wilson, 87 Wn. App. at 202 (emphasis added).

Therefore, when Mr. Daniels' one prior written warning for tardiness more than a year before he was fired and his one subsequent early arrival – deemed a tardy - are compared to the cases discussed above, his conduct did not rise to the level of statutory misconduct sufficient to deny him benefits. While his conduct might have been sufficient for the discharge itself, it was not sufficient to deny him benefits as demonstrated by decades of case law. Thus, neither under the statute nor the case law interpreting the statute did Mr. Daniels' alleged tardiness rise to a level reflecting willful, wanton, deliberate, or intentional disregard.

The ESD's petitioner's brief in this case, pages 21 to 24, argues that there was "misconduct" under the statute here either under the "repeated inexcusable tardiness after warnings" provision or under the "violation of a reasonable rule" provision. The record here, as argued throughout Mr. Daniels' brief, is devoid of prior written warnings, save one that shows no signs of ever having been passed on to Mr. Daniels. Further, even with prior written warnings, the *Shaw*, *Liebbrand*, and *Galvin* cases demonstrate tardiness and absences must rise to a far higher level than they did in any soundly demonstrated or documented way in Mr. Daniels' case. Even if Mr. Daniels received the September 2008 warning, another

tardy 15 months later is not “repeated inexcusable tardiness” under the case law.

And if Mr. Daniels is going to be faulted for “violating a reasonable rule,” the very least the employer could have done was to actually submit the text of the reasonable rule that Mr. Daniels was alleged to have violated. It did not do so and a legal conclusion that Mr. Daniels violated a “reasonable rule” is not supported by substantial evidence when that rule is nowhere in evidence.

Furthermore, even if it had submitted the rule or policy so its actual text could be compared to Mr. Daniels’ actions, a simple violation of a company rule or policy is not by itself “misconduct.” For instance, an employee who on two different occasions violated a company policy that stated an employee could not leave a worksite without notifying the employer was found to qualify for benefits in *Ciskie v. Employment Security Department*, 35 Wn. App. 72, 664 P.2d 1318 (1983).¹⁴ In reversing the ESD and the

¹⁴ The ESD’s brief (at 25-26) attempts to distinguish *Ciskie* from Mr. Daniels in claiming that unlike *Ciskie*, whose “attempt[s] to comply” with the employer’s rule “dispel[led] any inference . . . [of] bad faith,” Mr. Daniels “repeatedly and consistently ignored” the policy. Again, the precise rule or policy here was never in evidence and the facts show Mr. Daniels not only attempted to arrive at the job site on time, but arrived one to two hours ahead of time and was frustrated in his attempts to dress at the site – an accepted practice – by the building being

Superior Court that had affirmed the ESD, the Court of Appeals concluded that the employee's "deviation from *the proper notification procedure* was not sufficiently culpable to constitute a willful or wanton disregard of his employer's interests." *Id.* at 77 (emphasis added). The court also found there that the lack of notice or warnings indicated no "willful disregard" on Mr. Ciskie's part, and therefore no misconduct had been proved.

Consequently, the Superior Court in Mr. Daniels' case rightly reversed the Commissioner's Decision because the Commissioner misinterpreted and misapplied the statute and the case law interpreting misconduct over many decades of unemployment law jurisprudence. Therefore, Mr. Daniels asks this Court to affirm the Superior Court's decision in this case.

c. Under the standards of the Administrative Procedure Act, the Commissioner's Decision here erroneously interpreted and applied the law and the Superior Court therefore rightly reversed that Decision.

In unemployment compensation appeals, the Court of Appeals reviews the findings and conclusions of the Commissioner of the Employment Security Department. *Okamoto v. Employment Security Department*, 107 Wn. App. 490, 496, 27 P.3d 1203, *rev.*

locked and his supervisor not arriving. Mr. Daniels' case is thus indistinguishable from *Ciskie* and the same result is merited: benefits granted.

denied, 145 Wn.2d 1022 (2001). Accordingly, the Court of Appeals reviews the Superior Court's decision *de novo*. *National Electrical Contractors Assoc. v. Employment Security Department*, 109 Wn. App. 213, 219, 34 P.2d 860 (2001).

A Commissioner's Decision is reviewed under the Administrative Procedure Act and will be reversed on judicial review if any one of several grounds is satisfied. RCW 34.05.570. Specifically, in the instant case, "the agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d).

Issues of law are the responsibility of the judicial branch. *Tapper v. Employment Security*, 66 Wn. App. 448, 451, 832 P.2d 449 (1992), *rev'd on other grounds*, 122 Wn.2d 397, 858 P.2d 494 (1993). Therefore, when reviewing legal questions the court is allowed to substitute its judgment for that of the administrative agency. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 324-325, 646 P.2d 113 (1982) *cert. denied*, 459 U.S. 1106 (1983). Pure questions of law are reviewed *de novo*. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982).

Whether an employee has engaged in misconduct is a mixed question of law and fact. *Tapper v. Employment Security*

Department, 122 Wn.2d 397, 402-03, 858 P.2d 494 (1993);
Dermond v. Employment Security Department, 89 Wn. App. 128,
132, 947 P.2d 1271 (1997). In resolving a mixed question of law
and fact, the court first establishes the relevant facts, determines
the applicable law, and applies it to the facts. *Tapper*, 122 Wn.2d
at 403.

While deference is granted to the agency's factual findings,
the agency's application of the law is reviewed *de novo*. *Dermond*
v. Employment Security Department, 89 Wn. App. 128, 132, 947
P.2d 1271 (1997).

Mr. Daniels' conduct in this case was not misconduct under
the statute or decades of case law interpreting it and to find it so
was a misinterpretation and misapplication of the law regarding
misconduct in unemployment cases. The Superior Court was
therefore correct in reversing the Commissioner and Mr. Daniels
asks this Court to affirm the Superior Court.

**2. THE SUPERIOR COURT SHOULD BE AFFIRMED
IN ITS GRANT OF BENEFITS TO MR. DANIELS
BECAUSE THE COMMISSIONER'S CONTRARY
DECISION WAS NOT SUPPORTED BY
SUBSTANTIAL EVIDENCE.**

The record here reveals no "written policy." The record
holds no "employee handbook" or portions of it that allegedly

discussed timeliness or dress code expectations. The record holds one written warning about these issues from 15 months prior to the discharge – but the employee’s signature line is blank and the form is devoid of any other indication that Mr. Daniels ever saw it, much less was warned by it. No other written – or reduced to writing “oral” warnings about tardiness or dress expectations – exist in this record. Therefore, the Commissioner’s “findings” that such things did exist were not supported by substantial evidence. Further, the Commissioner’s conclusions based on those findings were not supported by substantial evidence either and therefore the Superior Court properly reversed the Commissioner’s Decision here.

As noted above, in unemployment compensation appeals, the Court of Appeals reviews the findings and conclusions of the Commissioner of the Employment Security Department. *Okamoto v. Employment Security Department*, 107 Wn. App. 490, 496, 27 P.3d 1203, *rev. denied*, 145 Wn.2d 1022 (2001). The Commissioner’s Decision is reviewed under the Administrative Procedure Act and will be reversed on judicial review if any one of several grounds is satisfied. RCW 34.05.570.

Specifically, an agency's order can be reversed when it does not rest on substantial evidence and evidence is only "substantial

when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter. . . ." RCW 34.05.570(3)(e); *Olmstead v. Department of Health*, 61 Wn. App. 888, 812 P.2d 527 (1991).

"Substantial evidence" only exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. Shaw*, 106 Wn.2d 212, 721 P.2d 918 (1986), *cert. denied*, 479 U.S. 1050 (1987). An appellate court will reverse factual findings of the trier of fact if those findings are not supported by substantial evidence. *Mood v. Banchemo*, 67 Wn.2d 835, 410 P.2d 776 (1966).

In this case, the Commissioner's "modified" Findings of Fact 3 & 4, quoted below, were not supported by substantial evidence at the points indicated by the inserted, bracketed numbers and as discussed below the quote.

Finding Nos. 3 and 4 are adopted but are modified to state instead as follows: **[1]**Pursuant to written policy, the employer's security officers are required to report to their assigned locations on time, dressed in uniform and ready to work. The claimant was aware of the policy which was **[2]**set forth in the employee handwork [sic], issued to the claimant on hire. Over the course of the two year employment relationship, the **[3]** claimant's supervisor had

ongoing concerns regarding the claimant's failure to consistently comply with the above referenced policy. The claimant was repeatedly warned by his supervisor that tardiness was not acceptable and that he was required to arrive at his "duty post" in uniform. In September 2008, the claimant [4] was issued written notice to that effect. [5] Exhibit No. 6, page 4.

Despite the warnings to report for work on time, the claimant did not consistently do so. During the last year of the employment relationship (following the September 2008 written warning), the claimant received numerous additional verbal warnings from his supervisor to report for work on time. (On that point, testimony of the claimant's supervisor - based on personal knowledge of the conversations in question - is deemed credible and is included herein as fact.) The claimant did not provide the employer with definitive reasons for his tardiness, but it was the supervisor's understanding that the claimant often came to work directly from another job with a different employer and was sometimes delayed, which the interested employer does not consider [sic] excusable tardiness. The claimant attributes his tardiness, in part, "to traffic." The employer does not consider traffic to be an excuse for repetitive tardiness.

On November 6, 2009, the claimant was scheduled to be on duty at his assigned work site at 10 p.m. At approximately 8:30 p.m. (according to the claimant), the claimant arrived at the work site. The claimant did not arrive at the work site in uniform. Having arrived for work early, he intended to enter the building and change into his uniform in the client's restroom. **The employer did not necessarily approve of that practice, but the claimant had done so before without reprimand.** On November 6, 2009, however, when the claimant arrived at the work site, he could not get into the building. The claimant called his supervisor's cell phone number, but the supervisor did not receive the claimant's call. **Based on prior experience, the claimant assumed his supervisor would arrive at the work site approximately 30 minutes before the beginning of his shift and would let the claimant into the building to change.** The claimant waited in his car. At

approximately 9:45 p.m., the supervisor arrived at the work site. He did not see the claimant nor was he approached or contacted by the claimant, so the supervisor walked the outside parameters [sic] of the building but could not find the claimant. At 10:30 p.m., the supervisor contacted the claimant on the claimant's cell phone and was told the claimant was waiting across the street from the work site in his car. [6] Exhibit 6, page 1. The claimant was covered by a blanket because he was cold. By then, it was 10:35 p.m. The claimant had been at the work site for more than two hours and was 35 minutes late for work but had not yet changed into his uniform. Given the prior warnings to report for work on time and in uniform, the decision was made to terminate the employment relationship.

CP Comm. Rec. 102-103.

[1]. "Pursuant to written policy." The employer failed to submit any written policy at all and there was no testimony about any specific clauses, phrases, paragraphs, or anything else that these supposed "written" policies actually stated.

[2]. "The policy set forth ...in the employee handwork [sic]." The employer never submitted an employee "handwork" or an employee "handbook," nor did the employer once refer to any specific words, clauses, phrases, paragraphs, or any other matter supposedly contained in such a handbook.

[3]. "Claimant's "supervisor," Mr. Kelly did testify to "ongoing" concerns but could not have done so with regard to "the above referenced policy" since no policy was ever submitted;

moreover, Mr. Kelly was not the only person who supervised Mr. Daniels and nothing in the record demonstrated those other supervisors were concerned with Mr. Daniels' work; finally, the single piece of documentary evidence submitted regarding these "ongoing" concerns was dated September 8, 2008, concerning tardies in June 2008 as well. No other documentary evidence of "ongoing concerns" is in the record here except an unsigned, apparently anonymously written, undated note about the final incident that appears as Exhibit 6, page 1, CP Comm. Rec. 77.

[4]. "Claimant was issued written notice." No evidence shows that Mr. Daniels "was issued" a notice. The only two disciplinary notices in the record show no indication that Mr. Daniels received the notices, agreed or disagreed with the notices, or even knew of the notices since the notices' signature lines for the "employee" are empty, as are the sections set aside for the "Employee Statement" and the boxes to check regarding whether the employee "agrees" or "disagrees" with the employer's statement. CP Comm. Rec. 79, 80.

[5]. "Exhibit 6, page 4." As noted, this page is not signed by the "employee" Mr. Daniels and the sections of that document that are set aside for the "Employee Statement" and the boxes to check

regarding whether the employee “agrees” or “disagrees” with the employer’s statement are all blank – showing no indication that Mr. Daniels was even aware of these documents. CP Comm. Rec. 79, 80.

[6]. “Exhibit 6, page 1.” This page, relied upon in the Commissioner’s Finding, is unsigned, undated, written apparently anonymously, and shows no sign of the person to whom it was addressed. It is at best hearsay, and it shows no sign of being a “business record” under RCW 5.45.020 that would make it an exception to the hearsay rule. Although this writing does interestingly indicate that the written warning about computer use (Exhibit 6, pages 2 & 3) was issued on “10/09/09,” as the date next to the signature for the “Director of Operations” would lead one to believe, though the notice itself states the “Date of Notice” as “09 Oct 2008” – a year before. In other words, the evidentiary value of these documents is suspect at best – and it must be remembered that Mr. Daniels represented himself at the administrative hearings.

In brief, the entirety of Exhibit 6 – pages 1 through 4 - is not worthy of the name “evidence,” let alone “substantial” evidence. An appellate court will reverse factual findings of the trier of fact if

those findings are not supported by substantial evidence. *Mood v. Banchemo*, 67 Wn.2d 835, 410 P.2d 776 (1966).

Furthermore, the Commissioner's Conclusion of Law that is based on these findings of "fact" is equally unsupported, as will be demonstrated in the same manner as above. In failing to adopt the ALJ's Conclusion of Law 7, the Commissioner instead concluded in part as follows:

At the least, the [1] claimant exhibited a wanton disregard of his employer's interest on November 6, 2009, when he was neither in uniform nor on duty as scheduled. Excuses notwithstanding, it was the claimant's responsibility to do so. Regarding the uniform (or lack thereof): First, the claimant should have arrived at the work site wearing (rather than carrying) his uniform. The undersigned [2] is not persuaded that the employer condoned the claimant's practice of dressing for work in the restrooms of the buildings he was supposed to guard. Regardless, assuming the claimant arrived at the work site 90 minutes early on November 6, 2009 but could not get into the building, [3] it defies logic that he did not drive elsewhere to change clothes.¹⁵ After all, he had 90 minutes to do so. Instead, the claimant sat in his car under a blanket for 35 minutes after his shift began. Regarding the claimant's contention that he was waiting for his supervisor to arrive and unlock the building so that he could change his clothes: It was not the supervisor's responsibility to ensure the claimant could get dressed for work; the supervisor came to the work site to ensure the client's premises were guarded.

CP Comm. Rec. 104.

¹⁵ Error is assigned to this finding or conclusion as not being supported by substantial evidence because nothing in the record shows in what area the new building was located or whether there were places where Mr. Daniels might have been able to change clothes at 9:30 p.m.

[1]. "Wanton disregard ... neither in uniform nor on duty."

First, the employer testified that the reason it fired Mr. Daniels was because he was tardy. CP Comm. Rec. 14. It did not testify it fired Mr. Daniels because of being out of uniform or computer use or anything else. Therefore, second, the "wanton disregard" has to be based on the November 6th tardiness. But the statute requires "repeated inexcusable tardiness following warnings" and the record has only one warning on this issue and that document shows no sign of ever having been signed or seen by Mr. Daniels.

[2]. Even if the uniform had anything to do with the job separation, the Commissioner's conclusion about that issue is not supported even by her own findings. Here the Commissioner says she "is not persuaded that the employer condoned the claimant's practice of dressing for work in the restrooms." But on the prior page, in the "modified" findings of fact 3 & 4, the Commissioner states that the "**employer did not necessarily approve of that practice, but the claimant had done so before without reprimand**" and that "**[b]ased on prior experience, the claimant assumed his supervisor would arrive at the work site approximately 30 minutes before the beginning of his shift and would let the claimant into the building to change.**" Obviously

then the employer had acquiesced to the practice since Mr. Daniels “had done so before without reprimand” and he acting “based on prior experience.” His continuing in this practice cannot therefore be characterized as a “willful or wanton disregard of the employer’s interests.”

[3]. The factual finding couched here in terms of a conclusion that “it defies logic that he did not drive elsewhere to change clothes,” is not supported by anything in the record. The employer provided no testimony or evidence about where the building was located and whether there were places that Mr. Daniels might have been able to change clothes – safely and legally – at 9:30 p.m. on a cold November night.

In summary, the Commissioner’s findings and conclusions paint the job separation with the broadest and most imprecise brush possible to justify the end result of denying Mr. Daniels benefits. This practice resulted in a decision that was not supported by substantial evidence and it was rightly reversed by the Superior Court, a decision Mr. Daniels asks this Court to affirm.

3. **ATTORNEY FEES AND COSTS IN THIS CASE ARE MANDATED BY STATUTE WHEN THE COURT REVERSES A COMMISSIONER'S ORDER.**

Mr. Daniels requests attorney fees. Under RAP 18.1(b), a party to be entitled to attorney fees by statute must argue for those fees in its opening brief.

A claimant who succeeds in convincing a court to reverse a Commissioner's Decision is allowed reasonable attorney fees and costs as mandated by statute:

It shall be unlawful for any attorney engaged in any appeal to the courts on behalf of an individual involving the individual's application for initial determination, or claim for waiting period credit, or claim for benefits to charge or receive any fee therein in excess of ***a reasonable fee to be fixed by the superior court in respect to the services performed in connection with the appeal taken thereto and to be fixed by the supreme court or the court of appeals in the event of appellate review, and if the decision of the commissioner shall be reversed*** or modified, such fee and the costs shall be payable out of the unemployment compensation administration fund. ***In the allowance of fees the court shall give consideration to the provisions of this title in respect to fees pertaining to proceedings involving an individual's application for initial determination, claim for waiting period credit, or claim for benefits.*** In other respects the practice in civil cases shall apply.

RCW 50.32.160 (emphasis added). The fees and costs contemplated in this statute are stated in mandatory terms: "such

fee and the costs *shall* be payable out of the unemployment compensation administration fund.” *Id.*

Therefore, because the Commissioner’s Order in this case misinterpreted and misapplied the Employment Security Act and the Superior Court reversed that decision, Mr. Daniels respectfully requests that upon affirming the Superior Court this Court grant attorney fees in an amount to be determined by the filing of a cost bill.

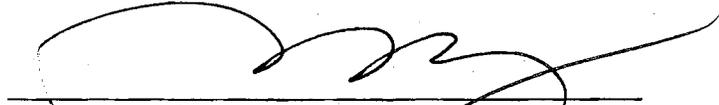
E. CONCLUSION

Mr. Daniels respectfully requests that this Court affirm the King County Superior Court’s Order that reversed the Commissioner’s Decision in this case and affirmed three prior decisions granting benefits to Mr. Daniels. It is the Commissioner’s Decision that is reviewed by this Court and that Decision misinterpreted and misapplied the law and was not based on substantial evidence. Therefore, it was properly reversed by the Superior Court.

Counsel also requests reasonable attorney fees and costs in succeeding to reverse the Commissioner’s Order in this case.

Dated this 8th day of July 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Marc Lampson', is written over a horizontal line.

Marc Lampson
Attorney for Respondent Mr. Daniels
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Dated this 8th day of July 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'M. Lampson', written over a horizontal line.

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IN THE COURT OF APPEALS, DIVISION I
FOR THE STATE OF WASHINGTON

CHARLES DANIELS,
Respondent,
and
STATE OF WASHINGTON,
EMPLOYMENT SECURITY
DEPARTMENT,
Appellant.

No. 66851-0-1

CERTIFICATE OF SERVICE BY MAIL

CERTIFICATE

I certify that I mailed a copy of the Respondent's Opening Brief in this matter postage prepaid, on July 8, 2011, to the Appellant ESD's attorney, Anthony Pasinetti, WSBA # 34305, Assistant Attorney General, Office of the Attorney General, Licensing & Administrative Law Div., 800 Fifth Ave., Suite 2000, Seattle, WA 98104-3188.

Dated this July 8, 2011.



Marc Lampson
WSBA # 14998
Attorney for Respondent

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

No. 66851-0-1

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COURT OF APPEALS, DIVISION I,
FOR THE STATE OF WASHINGTON

CHARLES DANIELS,

Respondent,

v.

EMPLOYMENT SECURITY DEPARTMENT,
STATE OF WASHINGTON,

Appellant.

ORIGINAL

APPENDICES

APPENDIX A: RCW 50.04.294

APPENDIX B: ESD'S ORIGINAL ORDER GRANTING BENEFITS

APPENDIX C: ALJ'S ORDER GRANTING BENEFITS

APPENDIX D: COMMISSIONER'S DECISION

**APPENDIX E: SUPERIOR COURT'S ORDER REVERSING COMMISSIONER
AND GRANTING BENEFITS**

APPENDIX F: EXHIBIT 6

APPENDIX A: RCW 50.04.294

• Misconduct — Gross misconduct.

With respect to claims that have an effective date on or after January 4, 2004:

(1) "Misconduct" includes, but is not limited to, the following conduct by a claimant:

(a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee;

(b) Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee;

(c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee;
or

(d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

(2) The following acts are considered misconduct because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee. These acts include, but are not limited to:

(a) Insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer;

(b) Repeated inexcusable tardiness following warnings by the employer;

(c) Dishonesty related to employment, including but not limited to deliberate falsification of company records, theft, deliberate deception, or lying;

(d) Repeated and inexcusable absences, including absences for which the employee was able to give advance notice and failed to do so;

(e) Deliberate acts that are illegal, provoke violence or violation of laws, or violate the collective bargaining agreement. However, an employee who engages in lawful union activity may not be disqualified due to misconduct;

(f) Violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule; or

(g) Violations of law by the claimant while acting within the scope of employment that substantially affect the claimant's job performance or that substantially harm the employer's ability to do business.

(3) "Misconduct" does not include:

(a) Inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity;

(b) Inadvertence or ordinary negligence in isolated instances; or

(c) Good faith errors in judgment or discretion.

(4) "Gross misconduct" means a criminal act in connection with an individual's work for which the individual has been convicted in a criminal court, or has admitted committing, or conduct connected with the individual's work that demonstrates a flagrant and wanton disregard of and for the rights, title, or interest of the employer or a fellow employee.

[2006 c 13 § 9. Prior: 2003 2nd sp.s. c 4 § 6.]

Notes:

Retroactive application – 2006 c 13 §§ 8-22: See note following RCW 50.04.293.

Conflict with federal requirements – Part headings not law – Severability – 2006 c 13: See notes following RCW 50.20.120.

Conflict with federal requirements – Severability – Effective date – 2003 2nd sp.s. c 4: See notes following

APPENDIX B: ESD'S ORIGINAL ORDER GRANTING BENEFITS

[REDACTED] NMDET

STATE OF WASHINGTON
EMPLOYMENT SECURITY DEPARTMENT
Determination Notice
12/19/2009

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BYE: 11/13/2010

ID: [REDACTED]

A copy of this determination was mailed to the interested parties at their address on 12/19/2009.

YOUR RIGHTS/SUS DERECHOS: If you disagree with this decision, you have the right to appeal. Your appeal must be received or postmarked by 01/19/2010. See "YOUR RIGHT TO APPEAL" at the end of this decision. Si no está de acuerdo con esta decisión, tiene el derecho de registrar un apelación. Vea "SU DERECHO DE APELACION" al final de esta decisión.

NOTICE/AVISO: The language below is intended to be general context of the cited law. You may ask for a copy of the complete law by calling your Telecenter at 1-800-318-6022 or by logging on to www.rcw.go2ui.com. La intención del lenguaje de abajo es para dar un contexto general de la ley que se cita. Puede pedir una copia de esa ley al TeleCentro 1-800-318-6022 ó al entrar en www.rcw.go2ui.com.

State law says you may be denied unemployment benefits if you are fired or suspended for misconduct connected with your work. See RCW 50.20.066.

"Misconduct" includes acts that show a willful or wanton disregard for your employer or co-workers. This includes insubordination, repeated inexcusable absences or tardiness, dishonesty, deliberate acts that are illegal or provoke violence, violation of reasonable

12/19/2009

1 of 5 [REDACTED]

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company rules, or violation of the law while acting within the scope of your employment. See RCW 50.04.294(1) (a) and (2) and WAC 192-150-210.

FACTS:

An attempt was made to get information from your employer. To date, they have not responded and this decision is being made with the information available.

You state you do not know if you were fired for being late or because you were not in uniform by the start of your shift. You said you showed up the work site approximately two hours early and you were waiting for a supervisor to arrive to let you inside the locked building so you could change your clothes. You report you called the supervisor three times on his cell phone, but you got no response. You said by the time the supervisor showed up, you were late for the start of the shift.

REASONING:

As the employer has elected to provide no information regarding your separation, it is held that misconduct has not been shown.

DECISION:Based on the information provided, misconduct has not been established.

RESULT: Benefits are allowed beginning 11/15/2009 if you are otherwise eligible.

12/19/2009

2 of 5

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APPENDIX C: ALJ'S ORDER GRANTING BENEFITS

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE EMPLOYMENT SECURITY DEPARTMENT

IN THE MATTER OF:

Charles Daniels

Claimant

DOCKET NO: 02-2010-02320 R

INITIAL ORDER

ID: [REDACTED]

BYE: 11/13/2010

UIO: 770

Hearing: This matter came before Administrative Law Judge Cynthia M. Morgan on March 25, 2010 at Seattle, Washington after due and proper notice to all interested parties.

Persons Present by Telephone: The claimant, Charles Daniels; the employer-appellant, Star Protection Agency, represented by Nancy Glass, HR Generalist; Lamar Kelly, Portfolio Manager; and the employer representative, Carrie Cline, Penser North America.

STATEMENT OF THE CASE:

The employer filed an appeal on January 08, 2010 from a Decision of the Employment Security Department dated December 19, 2009. At issue in the appeal is whether the employer had good cause for failure to appear at a previously scheduled hearing; and whether the claimant was discharged from employment for a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee as defined in RCW 50.04.294(1)(a), or other misconduct pursuant to RCW 50.20.066, or voluntarily quit without good cause pursuant to RCW 50.20.050. Also at issue is whether the claimant was able to, available for, and actively seeking work during the weeks at issue.

Having fully considered the entire record, the undersigned Administrative Law Judge enters the following Findings of Fact, Conclusions of Law and Initial Order:

FINDINGS OF FACT:

1. On February 2, 2010, a hearing was scheduled in this matter for 10:15 a.m. See Exhibit D. The employer representative was handling another hearing in another judge's courtroom, which ran long. The employer was unable to leave the room to contact the judge assigned to this matter to inform her that she was running late. The hearing let out at 10:39 a.m. and the employer immediately called the office to inform them of the situation. As the hearing time had passed, the

INITIAL ORDER - 1

hearing could not be re-opened. The employer immediately filed a Petition for Review, citing the above reasons for its request. See Exhibit C.

2. The claimant began employment with the interested employer on November 21, 2007 and last worked as a security officer on November 7, 2009. At the time of the job separation, the claimant was scheduled to work a part-time temporary status and was paid \$13.35 per hour.

3. On November 6, 2009, the claimant was assigned a new location and was scheduled to begin at approximately 10:00 p.m. The employer arrived on site at approximately 9:45 p.m. and could not locate the claimant. The employer called the claimant, who indicated he was out front and the employer finally located the claimant sitting in his car without his uniform on, looking as if he had been sleeping, at approximately 10:35 p.m. The claimant testified that he arrived to the job site approximately one and one-half hours prior to his shift, but because it was a new location, he was unable to gain entry into the building to change into his uniform. The claimant returned to his car in front of the building and called the employer to let his supervisor know he had arrived and was waiting out front in his car. The employer denied receiving any calls.

4. The employer's policy requires employees to be in their uniform upon arrival to work, to be ready to perform tasks upon report and to only use client computers for work use. Prior to the final incident, the employer testified that the claimant had arrived late to work on several occasions. The claimant also arrived without uniform and used client computers to excess for personal use. Each violation was addressed both verbally and in writing. The claimant disagreed that he had been warned on several occasions and had not been warned that further violation would result in his termination. The employer submitted only two warnings from 2008 and one email regarding the final incident. See Exhibit 6.

5. During the weeks at issue the claimant was willing and able to accept any offer of suitable work and sought work as directed by the Department.

CONCLUSIONS OF LAW:

1. In determining whether or not an individual has established a good cause for failing to appear at prior proceedings, the undersigned first notes that the term "good cause" implies circumstances beyond their reasonable control of the individual. In the instance case, the employer provided credible testimony that she was in attendance at another hearing scheduled before the administrative hearing scheduled in this matter. The claimant was unable to notify the judge in this matter that she was in another hearing until after the time of that hearing had passed. Therefore, the undersigned concludes the employer has established good cause for failing to appear at the prior proceeding.

2. The provisions of RCW 50.04.294, RCW 50.20.066, WAC 192-150-085, WAC 192-150-200, WAC 192-150-205, and WAC 192-150-210 apply. A claimant shall be

disqualified from benefits if discharged from employment for misconduct. RCW 50.04.294(1)(a) defines misconduct, in part, as willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.

3. According to RCW 50.04.294(2)(a)-(g), examples of a willful and wanton disregard of the interests of the employer or a fellow employee are: Insubordination, repeated and inexcusable tardiness after warnings, dishonesty related to employment, repeated and inexcusable absences, deliberate and illegal acts, deliberate acts that provoke violence or a violation of the law or collective bargaining agreement, violation of reasonable company rules, and violations of the law while acting within the scope of employment. WAC 192-150-200(1) and (2), provide that the action or behavior must be connected with the claimant's work and result in harm or create the potential for harm to the employer's interests. This harm may be tangible, such as damage to equipment or property, or intangible, such as damage to the employer's reputation or a negative impact on staff morale. Misconduct does not include inadvertence or ordinary negligence in isolated instances, good faith errors in judgment, inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity. See RCW 50.04.294(3).

4. The burden of establishing work-related misconduct is on the employer. The burden is successfully carried when the employer has proven misconduct, as defined by the statute, by a preponderance of the evidence. A preponderance of the evidence is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto. *Yamamoto v. Puget Sound Lbr. Co.*, 84 Wash. 411, 146 Pac. 861 (1915). Wn. App. 197 (1997).

5. Mitigating and extenuating circumstances may be considered in resolving questions of misconduct. *In re Solari*, Empl. Sec. Comm'r Dec. 1059 (1973). Whether the claimant was "motivated by defiance, bad faith or indifference to the consequences of his actions" will also be considered in deciding misconduct. *Wilson v. Employment Security Department*, 87 Wn. App. 197, 940 P.2d 269 (1997). A claimant's acts can be in violation of the employer's policy, but if they only amount to negligence, incompetence or an exercise of poor judgment, then they are not enough to constitute misconduct under RCW 50.04.293. Conduct may justify discharge, but not rise to the level of statutory misconduct. *Wilson*, supra.

6. Further, *Hamel vs. Employment Security Department*, 93 Wn. App. 140, 966 P.2d 1282 (1998), states that the employee must be found to have voluntarily disregarded the employer's interest, but the employee's specific motivation for the conduct is not relevant in analyzing intent. Because the word 'willful' modifies the word 'disregard,' the employee must have voluntarily disregarded the employer's interest. Consequently, an employee acts with willful disregard when he (1) is aware of his employer's interest; (2) knows or should have known that certain conduct jeopardizes that interest; but (3) nonetheless intentionally performs the act, willfully disregarding its probable consequences. The claimant's conduct does not rise to the level of statutory misconduct.

7.. Here, the claimant's actions were not deliberate, but inefficient, unsatisfactory conduct, or the failure to perform well as the result of inability or incapacity. As a result, despite claimant's errors, statutory misconduct is not established. This decision does not question the employer's right to discharge claimant, nor the wisdom of that act. It is decided only that the evidence presented will not support a denial of benefits under the statute. Claimant is therefore eligible for unemployment benefits pursuant to RCW 50.20.066.

8. RCW 50.20.010(1)(c) requires each claimant to be able to, available for, and actively seeking work. The claimant was able to, available for, and actively seeking work during the weeks at issue and is therefore not subject to denial under the above-cited statute and related laws and regulations.

Now therefore It is ORDERED:

The Decision of the Employment Security Department under appeal is **AFFIRMED**.

The employer has established good cause for failing to appear at a previously scheduled hearing, and the Default Order dated February 2, 2010 is **VACATED**.

The claimant was not discharged due to a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee as defined in RCW 50.04.294(1)(a), and is therefore not subject to disqualification pursuant to RCW 50.20.066(1).

Employer: If you are a base year employer for this claimant, or become one in the future, your experience rating account will be charged for any benefits paid on this claim or future claims based on past wages you paid to this individual. If you are a local government or reimbursable employer, you will be directly liable for any benefits paid. Benefit charges or liability will accrue unless this decision is set aside on appeal. See RCW 50.29.021. If you pay taxes on your payroll, any charges for this claim could be used to calculate your future tax rates.

Notice to Claimant: Your former employer has the right to appeal this decision. If this decision is reversed because it is found you committed misconduct connected with your work, all benefits paid as a result of this decision will be an overpayment. State law says you will not be eligible for waiver of the overpayment, nor can the department accept an offer of compromise (repayment of less than the total amount paid to you). The benefits must be repaid even if the overpayment was not your fault. See RCW 50.20.066(5).

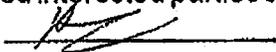
The claimant was able to, available for and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c).

Dated and Mailed on March 26, 2010 at Seattle, Washington.



Cynthia M. Morgan
Administrative Law Judge
Office of Administrative Hearings
600 University Street, Suite 1500
Seattle, WA 98101-3126

Certificate of Service

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. 

PETITION FOR REVIEW RIGHTS

This Order is final unless a written Petition for Review is addressed and mailed to:

**Agency Records Center
Employment Security Department
PO Box 9046
Olympia, Washington 98507-9046**

and postmarked on or before **April 26, 2010**. All argument in support of the Petition for Review must be attached to and submitted with the Petition for Review. The Petition for Review, including attachments, may not exceed five (5) pages. Any pages in excess of five (5) pages will not be considered and will be returned to the petitioner. *The docket number from the Initial Order of the Office of Administrative Hearings must be included on the Petition for Review.* Do not file your Petition for Review by Facsimile (FAX). Do not mail your Petition to any location other than the Agency Records Center.

CMM:cmm

APPENDIX D: COMMISSIONER'S DECISION

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this decision to the
withly named interested parties at their respective
addresses, postage prepaid, on June 4, 2010.

representative, Commissioner's Review Office,
Employment Security Department

UIO: 770
BYE: 11/13/2010

**BEFORE THE COMMISSIONER OF
THE EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON**

Review No. 2010-2078

In re:

CHARLES DANIELS
SSA No. [REDACTED]

Docket No. 02-2010-02320-R

DECISION OF COMMISSIONER

On April 26, 2010, STAR PROTECTION AGENCY, by and through Carrie Cline for Penser North America, Inc., petitioned the Commissioner for review of a decision issued by the Office of Administrative Hearings on March 26, 2010. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), the undersigned enters the following:

The undersigned adopts the Office of Administrative Hearings' finding of fact No. 1.

Finding No. 2 is adopted. Evidence of record establishes the claimant was employed by the interested employer as a security officer from November 2007 to on or about November 11, 2009, when he was discharged.

Finding Nos. 3 and 4 are adopted but are modified to state instead as follows: Pursuant to written policy, the employer's security officers are required to report to their assigned locations on time, dressed in uniform and ready to work. The claimant was aware of the policy which was set forth in the employee handwork, issued to the claimant at hire. Over the course of the two year employment relationship, the claimant's supervisor had ongoing concerns regarding the claimant's failure to consistently comply with the above referenced policy. The claimant was repeatedly warned by his supervisor that tardiness was not acceptable and that he was required to arrive at his "duty post" in uniform. In September 2008, the claimant was issued written notice to that effect. Exhibit No. 6, page 4.

Despite the warnings to report for work on time, the claimant did not consistently do so. During the last year of the employment relationship (following the September 2008 written warning), the claimant received numerous additional verbal warnings from his supervisor to

report for work on time. (On that point, testimony of the claimant's supervisor -- based on personal knowledge of the conversations in question -- is deemed credible and is included herein as fact.) The claimant did not provide the employer with definitive reasons for his tardiness, but it was the supervisor's understanding that the claimant often came to work directly from another job with a different employer and was sometimes delayed, which the interested employer does not consider excusable tardiness. The claimant attributes his tardiness, in part, "to traffic." The employer does not consider traffic to be an excuse for repetitive tardiness.

On November 6, 2009, the claimant was scheduled to be on duty at his assigned work site at 10 p.m. At approximately 8:30 p.m. (according to the claimant), the claimant arrived at the work site. The claimant did not arrive at the work site in uniform. Having arrived for work early, he intended to enter the building and change into his uniform in the client's restroom. The employer did not necessarily approve of that practice, but the claimant had done so before without reprimand. On November 6, 2009, however, when the claimant arrived at the work site, he could not get into the building. The claimant called his supervisor's cell phone number, but the supervisor did not receive the claimant's call. Based on prior experience, the claimant assumed his supervisor would arrive at the work site approximately 30 minutes before the beginning of his shift and would let the claimant into the building to change. The claimant waited in his car. At approximately 9:45 p.m., the supervisor arrived at the work site. He did not see the claimant nor was he approached or contacted by the claimant, so the supervisor walked the outside parameters of the building but could not find the claimant. At 10:30 p.m., the supervisor contacted the claimant on the claimant's cell phone and was told the claimant was waiting across the street from the work site in his car. Exhibit No. 6, page 1. The claimant was covered by a blanket because he was cold. By then, it was 10:35 p.m. The claimant had been at the work site for more than two hours and was 35 minutes late for work but had not yet changed into his uniform. Given the prior warnings to report for work on time and in uniform, the decision was made to terminate the employment relationship. On November 11, 2009, the claimant was so informed.

Finding No. 5 is adopted.

The undersigned adopts the Office of Administrative Hearings conclusion No. 1.

Conclusion Nos. 2 through 6 are adopted. Under the Employment Security Act, an indefinite period of disqualification is imposed during which unemployment benefits are denied when a claimant was discharged for work related misconduct RCW 50.20.066. Pursuant to statutory definition, misconduct is established by wilful or wanton disregard of

an employer's interest, RCW 50.04.294(1)(a). A wilful or wanton disregard of an employer's interest is exhibited by repeated inexcusable tardiness following warnings by the employer. RCW 50.04.294(2)(b). Likewise, misconduct is established by violation of a reasonable company rule of which the claimant knew or should have known. RCW 50.04.294(2)(f).

Conclusion No. 7 is not adopted. The undersigned concludes instead as follows: Here, the employer is in the business of providing security services for clients. Accordingly, the employer has a vested interest in ensuring that properties of the employer's clients are guarded/patrolled as promised and that security is maintained. To that end, the employer relies on security officers to report for work in uniform as scheduled. It is a matter of professional appearance, as well as security. At the least, the claimant exhibited a wanton disregard of his employer's interest on November 6, 2009, when he was neither in uniform nor on duty as scheduled. Excuses notwithstanding, it was the claimant's responsibility to do so. Regarding the uniform (or lack thereof): First, the claimant should have arrived at the work site wearing (rather than carrying) his uniform. The undersigned is not persuaded that the employer condoned the claimant's practice of dressing for work in the restrooms of the buildings he was supposed to guard. Regardless, assuming the claimant arrived at the work site 90 minutes early on November 6, 2009 but could not get into the building, it defies logic that he did not drive elsewhere to change clothes. After all, he had 90 minutes to do so. Instead, the claimant sat in his car under a blanket for 35 minutes after his shift began. Regarding the claimant's contention that he was waiting for his supervisor to arrive and unlock the building so that he could change his clothes: It was not the supervisor's responsibility to ensure the claimant could get dressed for work; the supervisor came to the work site to ensure the client's premises were being guarded. Given the circumstances, the claimant's tardiness was inexcusable, as was his violation of the employer's policy regarding uniforms at the work site. Given the prior warnings, the claimant's course of action (or lack thereof) cannot be attributed to an isolated incident of mistake or poor judgement. Misconduct has been established.

Conclusion No. 8 is adopted.

Now, therefore,

IT IS HEREBY ORDERED that the decision of the Office of Administrative Hearings issued on March 26, 2010, is **MODIFIED**. The employer has established good cause for failing to appear at a previously scheduled hearing, and the February 2, 2010 default order is **VACATED**. Benefits are denied pursuant to RCW 50.20.066(1) beginning November 8, 2009 and continuing thereafter for ten calendar weeks and until the claimant has obtained work in

earned wages equal to ten times his weekly benefit amount. Benefits are not denied pursuant to RCW 50.20.101(1)(c) during the weeks at issue. Under RCW 50.20.066(5), the claimant must repay all benefits paid in error because of a disqualification from benefits based on misconduct. The amount of the overpayment owed by the claimant is REMANDED to the Department for calculation. *Employer:* If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. See RCW 50.29.021.

DATED at Olympia, Washington, June 4, 2010.*

Annette Womac

Review Judge
Commissioner's Review Office

*Copies of this decision were mailed to all interested parties on this date.

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

- a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND
- b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

**APPENDIX E: SUPERIOR COURT'S ORDER REVERSING
COMMISSIONER AND GRANTING BENEFITS**

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II. NO ISSUES OF FACT

The review was conducted on the record of the administrative proceeding. No new evidence was offered or received, and the court has decided no issues of fact.

III. CONCLUSIONS OF LAW

3.1 Jurisdiction. This court has jurisdiction for this review under RCW 50.32.120 and 34.05.514.

3.2 Law governing review. Review is governed by RCW 34.04.570.

3.3 Scope of Review. The scope of review by this court is specified by RCW 34.04.574 which reads in part as follows:

- 1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. The court shall set out in its findings and conclusions, as appropriate, each violation or error by the agency under the standards for review set out in this chapter on which the court bases its decision and order. In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.

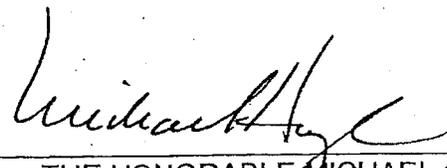
3.4 Basis for reversal: The order regarding the discharge of Ms. Dexter misapplied and misinterpreted the law. Mr. Daniels' conduct was not misconduct; the Commissioner's Order to the contrary misinterpreted and misapplied the law and is therefore reversed under RCW 34.05.570(3)(d).

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IV. JUDGMENT

- 4.1 The court **REVERSES** the appealed decision of the Employment Security Department, in Docket No. 02-2010-02320-R, dated June 4, 2010, regarding Mr. Daniels' eligibility for benefits.
- 4.2 The court **ORDERS** that the Employment Security Department pay Mr. Daniels benefits to which he would have been entitled after being fired.
- 4.3 The court **AWARDS** reasonable attorney fees to the petitioner in an amount to be determined by agreement of counsel and subsequent agree order, or alternatively, by motion, affidavit, and cost bill to be filed within 10 days of this order.

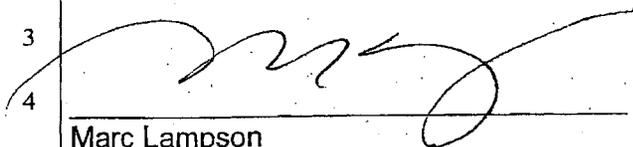
DONE IN OPEN COURT THIS this 17 day of FEB 2011.



THE HONORABLE MICHAEL C. HAYDEN

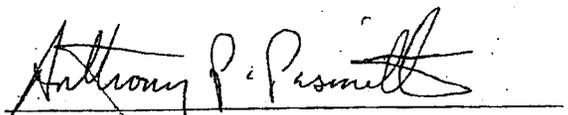
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Presented by:



Marc Lampson
WSBA # 14998
Attorney for Petitioner
Unemployment Law Project
1904 Third Ave., Suite 604
Seattle, WA 98101
206.441.9178

Approved as to form:



Anthony Pasinetti
WSBA No. 34305
Assistant Attorney General
Attorney General's Office
Licensing & Administrative Law Division
800 Fifth Ave., Suite 2000
Seattle, WA 98104

APPENDIX F: EXHIBIT 6

Carrie C

Subject: Charles Daniels / 352-62-0436

FAXED
DEC 29 2009

On 11/6/09 Charles was scheduled to be at his post at 2200. His Manager was at the site to meet and train w/him. When his Manager could not find him after searching the area, he called Charles on his cell phone at 2230. Charles said he was at the site and his Manager then located him in a vehicle across the street from the site. He had a blanket on, appeared to be sleeping and not in uniform. Officers are required to be on site, in uniform and at their post at the start of their shift. Charles was outside the building and not in his uniform. He was not ready for his shift until 2245, which is 45 minutes after the scheduled start time. Charles had received numerous write ups in the last few months as well for using the Internet 4+ hours out of 8 hour shift on 10/09/09, as well as a write up on 9/9/08 for being 1 + hour late to work.

**Star Protection Agency
Disciplinary Action Form**

**RECEIVED
BY: FAXED
DEC 29 2009**



EMPLOYEE INFORMATION	
NAME: Charles Daniels	DATE OF NOTICE: 09 Oct 2008
POSITION: Security Officer	SSN/EMPLOYEE ID#:
DIRECT SUPERVISOR: LeMar Kelly	LOCATION/SITE: Cite Downtown

TYPE OF VIOLATION (see attached report)			
<input type="checkbox"/> Attendance	<input type="checkbox"/> Carelessness	<input type="checkbox"/> Insubordination	
<input type="checkbox"/> Lateness/ Early Quit	<input checked="" type="checkbox"/> Failure to Follow Instructions	<input type="checkbox"/> Violation of Safety Rules	
<input type="checkbox"/> Rudeness, Employee or Customer	<input type="checkbox"/> Willful Damage to Material/ Equipments	<input type="checkbox"/> Working on Personal Matters	
<input checked="" type="checkbox"/> Unsatisfactory Work Quality	<input checked="" type="checkbox"/> Violation of Company Policies or Procedures	<input checked="" type="checkbox"/> Other	

PREVIOUS NOTICE				
1st notice	<input checked="" type="checkbox"/> ORAL	<input type="checkbox"/> WRITTEN	Date: 19 June 2008	By Whom: LeMar Kelly
2nd notice	<input checked="" type="checkbox"/> ORAL	<input type="checkbox"/> WRITTEN	Date: 20 June 2008	By Whom: LeMar Kelly
3rd notice	<input type="checkbox"/> ORAL	<input checked="" type="checkbox"/> WRITTEN	Date: 09 Sep 2008	By Whom: LeMar Kelly

EMPLOYER STATEMENT (Use an additional sheet of paper if necessary): S/O Daniels On 08 October 2008, based on DAILY ACTIVITY REPORTS and INTERNET ACTIVITY there are valid facts to support FAILURE TO FOLLOW INSTRUCTIONS: TO WIT: remaining in security room for extended periods surfing on the internet instead of conducting at least three (3) complete roves of the assigned CLISE PROPERTIES; UNSATISFACTORY WORK QUALITY TO WIT: inability to complete three (3) complete roves of the Cite Property in a ten (10) hour period as directed; FALSIFYING RECORDS TO WIT: the times noted in the DAR as roving were actually spent surfing the internet) S/O Daniels was the only guard that had keys to the guard room and occurred during his shift period and documented as follows:

1900- S/O DANIELS IS ON SITE FOR DUTY, I HAVE RECEIVED AND READ PAST DOWN CONCERNING THE 7TH FLOOR.
1930- ON PATROL OF ALL LISTED CLISE PROPERTIES (SECURITIES' BLDG, DENNY BLDG & 6TH IN LEORS) ALL GROUNDS, PARKING AREAS AND BLDGS AT THIS TIME.

*** 10:8 1902 - 1943: Online Duration 41mins.

2145- RETURNED FROM PATROL OF PROPERTIES, ALL AREAS ARE SECURE AT THIS (ALSO I DOUBLE CHECKED THE 7TH FLOOR OF THE SECURITIES' BLDG.
2145-2245- POSTED IN OFFICE.
2245-2315- ON BREAK.
2315- ON PATROL OF ALL LISTED CLISE PROPERTIES AT THIS TIME.

*** 10:8 2201 - 2337: Online Duration 1hr, 36mins.

0145- RETURNED FROM PATROL, ALL CLISE PROPERTIES WERE CLEAR / SECURE AT THIS TIME.
0145-0245- POSTED IN OFFICE.
0245-0315- ON BREAK.

*** 10:9 0139 - 0251: Online Duration 1hr, 12mins.

0315- ON PATROL OF ALL LISTED PROPERTIES AT THIS TIME.

*** 10:9 0145: Online Duration 1min.

0455- RETURNED FROM PATROL OF ALL LISTED PROPERTIES, ON THE 2ND FLOOR OF THE SECURITIES' BLDG I NOTICED THE LIGHTS ON IN SUITES 246-252 ALSO IN THE DENNY BLDG LIGHTS WERE ON IN SUITE 360?

0500- THE 7TH FLOOR IN THE SECURITIES' BUILDING WAS DOUBLE CHECKED AND ALL WAS SECURE. END OF

SHIFT: _____

*** 169 0506 - 0529: Online Duration 23mins.

Date/Time of Incident, am pm

AXED

DEC 29 2009

RECEIVED

EMPLOYER STATEMENT (Use an additional sheet of paper if necessary):

I agree with the Employer's statement

I disagree with the Employer's statement for the following reasons:

ACTION TO BE TAKEN (material disciplinary action is subject to review by the Star Senior Vice President for final disposition)

Verbal Warning Written Warning Probation Suspension Termination Other

Consequences should incident occur again: _____

SIGNATURES - I have read and understand the Employee Disciplinary Action Notice

EMPLOYER: _____	DATE: _____
SUPERVISOR/MANAGER: _____	DATE: _____
HUMAN RESOURCES/EMPLOYEE SUPPORT: _____	DATE: 11/11/09
DIRECTOR OF OPERATIONS: _____	DATE: 10-7-09

**Star Protection Agency
Disciplinary Action Form**

FAKED
DEC 29 2008
BY:



EMPLOYEE INFORMATION	
NAME: Charles Daniels	DATE OF NOTICE: 09 Sept 2008
POSITION: Security Officer	SSN/ EMPLOYEE ID#: [REDACTED]
DIRECT SUPERVISOR: LaMar Kelly	LOCATION/SITE: Cosmopolitan Condo

TYPE OF VIOLATION (see attached report)		
<input checked="" type="checkbox"/> Attendance	<input type="checkbox"/> Carelessness	<input type="checkbox"/> Insubordination
<input checked="" type="checkbox"/> Lateness/ Early Quit	<input type="checkbox"/> Failure to Follow Instructions	<input type="checkbox"/> Violation of Safety Rules
<input type="checkbox"/> Rudeness, Employee or Customer	<input type="checkbox"/> Willful Damage to Material/ Equipment	<input type="checkbox"/> Working on Personal Matters
<input type="checkbox"/> Unsatisfactory Work Quality	<input checked="" type="checkbox"/> Violation of Company Policies or Procedures	<input type="checkbox"/> Other

PREVIOUS NOTICE			
1st notice	<input checked="" type="checkbox"/> ORAL <input type="checkbox"/> WRITTEN	Date: 17 June 2008	By Whom: LaMar Kelly
2nd notice	<input checked="" type="checkbox"/> ORAL <input type="checkbox"/> WRITTEN	Date: 19 June 2008	By Whom: LaMar Kelly
3rd notice	<input checked="" type="checkbox"/> ORAL <input type="checkbox"/> WRITTEN	Date: 20 June 2008	By Whom: LaMar Kelly

EMPLOYER STATEMENT (Use an additional sheet of paper if necessary): On 09 Sept 2008 at about 0030hrs I received a call from the concierge at the Cosmopolitan Condos stating the Star officer had not relieved her and would wait for her relief. S/O Daniels was scheduled to be on duty at the Cosmopolitan Towers at 0030. S/O Daniels made it into his post around 0120, more than an hour late. On 10 Sept 2008 S/O Daniels was questioned about late arrival and S/O Daniels stated his alarm did not go off but called the Cosmopolitan concierge and stated to them he was on his way.

S/O Daniels, you have been verbally warned numerous times about arriving at your duty shift late to The Meridian Center; you have called the on shift duty officer asking if they wanted to do some overtime because you would be late; verified at least eight times by Meridian center log-in time sheets through payroll logs, calls from officers on duty and calls from you as being from 30 minutes to 2 hours late. In addition to being late, I have witnessed you being out of uniform several times when arriving at duty post.

S/O Daniels even though your work is solid, you must work on being on time. The Client expects and deserves as much and it is in keeping with directives outlined in the Star Protection Agency employee manual.

Date/Time of Incident: am pm

EMPLOYEE STATEMENT (Use an additional sheet of paper if necessary):

I agree with the Employer's statement

I disagree with the Employer's statement for the following reasons:

ACTION TO BE TAKEN (Note all disciplinary action is subject to review by the Star Senior Vice President for final disposition.)

Verbal Warning Written Warning Probation Suspension Termination Other

Consequences should include (if appropriate):

SIGNATURES - I have read and understand the Employee Disciplinary Action Notice

EMPLOYEE: [Signature]	DATE: 9/9/08
SUPERVISOR/MANAGER: [Signature]	DATE: 09-09-08
HUMAN RESOURCES/EMPLOYEE SUPPORT: [Signature]	
DIRECTOR OF OPERATIONS: [Signature]	

APPENDICES