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NO. 68537-6

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

STATE OF WASHINGTON,
DEPARTMENT OF EMPLOYMENT SECURITY,

Appellant,

v.

NOELEE LOEFFELBEIN,

Respondent.

DEPARTMENT'S REPLY BRIEF

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I. INTRODUCTION

Noelee Loeffelbein was aware of her Employer's policies concerning check acceptance, safeguarding company funds, and paycheck advances. Nevertheless, believing that she did not have sufficient funds in her bank account, she wrote a series of checks to the Employer in exchange for cash for a total of \$3,620 in less than one month. The Commissioner did not find credible Loeffelbein's assertion that she did not think she was violating any policies.

Loeffelbein now offers new evidence that was not offered at the administrative hearing below and thus may not be considered by this Court. Finally, Loeffelbein is not entitled to attorney fees for court or administrative proceedings where she was represented by counsel.

II. ARGUMENT IN REPLY

A. **The Court Should Decline to Consider Evidence That is Not in the Administrative Record**

Throughout her brief, Loeffelbein references facts that are not a part of the administrative record. *See* Respt's Br. at 1-2, 4-5, App. This Court's review of the facts is confined to those in the agency record. RCW 34.05.558. While there are limited exceptions to this rule, *see* RCW 34.05.562(1), none of those exceptions applies here. The court may take additional evidence only if it relates to the validity of the agency action at

the time it was taken. *Id.* The provision does not allow for the introduction of evidence that relates to the merits and was available at the time of the hearing.

Ms. Loeffelbein now asserts that the statement she made to her Employer when she was interviewed about her conduct was done “under duress.” Respt’s Br. at 3. There is no evidence in the record that she made her statement under duress, and she was ably represented by counsel at the administrative hearing.

Loeffelbein also discusses details of her work effort that was not offered below. Respt’s Br. at 1-2. Loeffelbein’s employment record is immaterial to whether her conduct in this instance amounted to misconduct under the statute. The fact remains that Loeffelbein’s conduct in writing a series of checks to the Employer in exchange for cash for a total of \$3,620 in less than one month violated three Employer policies: (1) the check acceptance policy, which allows employees to make purchases for up to \$50 over the amount of the purchase; (2) the policy requiring employees to properly safeguard company funds; and (3) the policy requiring employees to obtain approval of the Vice President of Human Resources for advances on their paychecks. Commr.’s R. at 103-104.

Finally, Loeffelbein discusses and attaches a revised Employer policy that was apparently implemented after Loeffelbein was discharged from employment. Respt's Br. at 4, 7, App. This new policy is not a part of the record, and it has no bearing on whether Loeffelbein violated the policies that applied at the time of her conduct. The Court should not consider it.

B. This Court May Not Reevaluate Witness Credibility

Loeffelbein suggests that she was not aware that her conduct violated her Employer's policies. Respt's Br. at 3. She also made this assertion at the administrative hearing. Commr.'s R. at 35, 48. The Commissioner considered Loeffelbein's testimony and specifically found it not credible. *Id.* at 104. The Commissioner found that Loeffelbein was aware of the Employer's policy regarding check cashing. *Id.* The Commissioner "is authorized to make his own independent determinations based on the record and has the ability and right to modify or to replace an ALJ's findings, including findings of witness credibility." *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 36 n.2, 226 P.3d 263 (2010). This Court may not substitute its judgment for that of the agency on the credibility of the witnesses. *Id.* at 35. Accordingly, Loeffelbein's statement that she was unaware that her conduct violated her Employer's policies may not be reevaluated on appeal.

C. Loeffelbein is Not Entitled to Attorney Fees

In her brief, Loeffelbein requests attorney fees and costs should she prevail. Respt's Br. at 7. Because the Court should affirm the Commissioner's decision, Loeffelbein does not prevail and is not entitled to attorney fees. However, even if she prevails, she still would not be entitled to attorney fees. Loeffelbein is appearing before this Court and appeared before the superior court pro se, and she is not an attorney. Therefore, she is not entitled to attorney fees even if the Court reverses the Commissioner's decision.

Additionally, although she was represented by counsel at the administrative hearing below, fees incurred at the administrative level are not compensable. Under the Employment Security Act, attorney fees for work performed at the administrative level are not recoverable out of the unemployment compensation fund. The Act provides:

In all proceedings provided by this title prior to court review involving dispute of an individual's initial determination, or claim for waiting period credit, or for benefits, the fees of all witnesses attending such proceedings pursuant to subpoena shall be paid at the rate fixed by such regulation as the commissioner shall prescribe and such fees and all costs of such proceedings otherwise chargeable to such individual, **except charges for services rendered by counsel or other agent representing such individual**, shall be paid out of the unemployment compensation administration fund. In all other respects and in all other proceedings under this title the rule in civil cases as to costs and attorney fees shall

apply: PROVIDED, that cost bills may be served and filed and costs shall be taxed in accordance with such regulation as the commissioner shall prescribe.

RCW 50.32.100 (emphasis added). Thus, in proceedings prior to court review, *i.e.*, administrative hearings, attorney fees are specifically excluded from payment out of the unemployment compensation fund. Moreover, the attorney fee provision of the Act only allows for the recovery of attorney fees for “any appeal to the courts . . . if the decision of the commissioner shall be reversed or modified.” RCW 50.32.160. It makes no such allowance for attorney fees incurred at the administrative level. *See also Gaines v. Emp’t Sec. Dep’t*, 140 Wn. App. 791, 801-02, 166 P.3d 1257 (2007) (“contrary to the argument of counsel for Gaines, there is no award of fees from the state fund for proceeding at the administrative level.”). Accordingly, should the Court reverse the Commissioner’s decision, Loeffelbein’s request for fees should be denied.

III. CONCLUSION

This Court should decline to consider the new evidence offered by Loeffelbein in her response brief. For the reasons stated above and discussed in the Department's Opening Brief, the Department respectfully requests that the Court affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 7th day of December,
2012.

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PROOF OF SERVICE

I, Dan Marvin, certify that I served a copy of this **Department's Reply Brief** on all parties or their counsel of record on the date below as follows:

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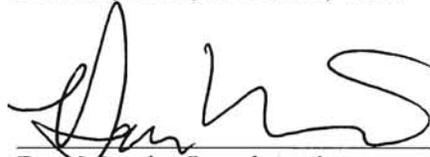
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of December, 2012, at Seattle, WA.


Dan Marvin, Legal Assistant