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COURT OF APPEALS  
DIVISION ONE

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NOV 05 2014

NO. 71708-1

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

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JEFF KIRBY and PUGET SOUND SECURITY PATROL, INC.  
Appellant-Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT  
SECURITY,  
Respondent.

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**APPELLANT'S REPLY BRIEF**

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ROCKE | LAW GROUP, PLLC  
 Aaron V. Roche, WSBA #31525  
 William I. Aloe, WSBA #40906  
 101 Yesler Way, Suite 603  
 Seattle, Washington 98104  
 (206) 652-8670

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## **I. Restatement of Argument**

### **A. Bolling upset both his supervisor and his client.**

Robert Bolling was fired “for repeatedly failing to follow his supervisor’s instructions and then making threatening comments toward the supervisor.” AR 453 (FOF 14). The tribunal expressed doubt in his credibility: “The claimant tended to give elaborate explanations for why what he had done was appropriate or justified, and intended to serve the best interests of the employer.” AR 454 (FOF 20). The tribunal found Bolling’s “actions were seen as disruptive and possibly damaging to the employer’s relations with the client,” *id.*, because Bolling’s “actions could give the client the impression that the employer did not know what they were doing and could undermine the employer’s credibility with the client.” AR 453 (FOF 16).

The un rebutted evidence is that Bolling antagonized his supervisor and his clients with his self-righteousness. His supervisor testified: “I tell him, but he does whatever he wants. I’m at a loss as what to do now ... I’m helpless. What am I a supervisor for?” AR 205. The clients Bolling repeatedly complained to also offered their perspective:

On occasion Robert Bolling would do a task and then ask us if it was ok. Later, we were informed that his site supervisor, Don Peters, had instructed him not to perform those tasks or enter certain lockers [to get batteries]. It was a matter of concern to us that it appeared he was knowingly using us to disregard the site supervisor’s instructions.

Exhibit 1. It is to guard against this very situation that the employer wrote down reasonable company rules prohibiting running to the client with internal, company problems. Bolling was insubordinate with his supervisor and repeatedly violated this reasonable company rule. The department implies that Bolling was justified. Bolling failed to prove justification, and the tribunal did not understand that was his burden. Because Bolling acted for the selfish purpose of showing his supervisor that he knew better, he is disqualified. The tribunal failed to apply appropriate legal standards and erred in granting benefits.

**B. The tribunal applied only the toughest standard and failed to analyze *per se* examples of misconduct.**

There are four standards to establish misconduct, the hardest of which to prove is “willful and wanton disregard of the employer’s interests.” *See* RCW 50.04.294(1) (Ex. 2 to Opening Brief). The Initial Order correctly states all four, AR 455 (Concl. Of Law 5), and lists *per se* examples of “willful and wanton disregard.” *Id.* (Concl. Of Law 6). Then, it takes a sharp turn. It does not apply those *per se* examples. Instead it concludes that Bolling’s “actions do not exhibit the kind of willful or wanton disregard of the employer’s interests that constitutes misconduct under the statute.” AR 456 (Concl. Of Law 10). Instead of analyzing whether the

company rule was reasonable, which is a *per se* example of willful and wanton disregard, the tribunal expressed: “This was not intentional behavior done deliberately or knowingly with the awareness that the claimant was violating or disregarding the rights of the employer,” *id.* (Concl. Of Law 10), which is another way of saying it was not “willful.” *See* WAC 192-150-205(1) (defining willful). That is one proper legal standard for analysis under “willful and wanton disregard” under RCW 50.04.294(1)(a). However, applying only the toughest standard to the exclusion of easier, more specific standards, is legal error reviewed *de novo*, and the conclusion without analysis is arbitrary and capricious.

The unrebutted evidence is that the employer put Bolling on notice of its interests by assigning him a supervisor to direct him and by giving him reasonable, written work rules. Bolling would not follow either. The employer does not have to prove criminal *mens rea* that Bolling specifically intended to harm it. It was reversible error to require it.

**C. The tribunal required criminal *mens rea* instead of analyzing easier, appropriate standards of misconduct.**

After concluding it was not willful and wanton disregard, the tribunal continues in the wrong direction by failing to apply the other, lower and more specific standards that apply to the case: disregard of standards of behavior which the employer has a right to expect of an employee, and

carelessness or negligence of such degree or recurrence to show substantial disregard of the employer's interests. *See Id.* at 455 (Concl. Of Law 5).

“‘Carelessness’ and ‘negligence’ mean failure to exercise the care that a reasonably prudent person usually exercises.” WAC 192-150-205(3). The tribunal neglected to make findings about whether Bolling's actions were objectively reasonable and failed to find whether his actions showed “substantial disregard of the employer's interests.” The utter failure to conduct this analysis either renders the decision arbitrary and capricious, or is reversible legal error in applying the incorrect legal standard.

Mr. Bolling had previously gone outside the chain of command to vindicate his own self-interest. (Resp. Brief 3-4) (department conceding). The tribunal explicitly found that Bolling “had previously sought a second opinion from the client,” which the client complained of as “playing the mommy-daddy game.” AR 453 (FOF 16). These explicit findings of fact were disregarded in the tribunal's analysis.

Because Bolling acted on purpose in a way that he knew or should have known was in disregard of his supervisor or work rules, he is disqualified. Because Bolling's repeated “negligence,” if it could be characterized as such, shows a substantial disregard of the employer's interests, he is disqualified. No fair-minded trier of fact could find otherwise on this evidence. By neglecting to use appropriate and specific legal standards, the

tribunal generates the wrong result; it requires the employer to prove that the claimant had criminal *mens rea*, a specific intent to harm. This is not the correct standard. The lowest legally correct standard to prove misconduct requires only that the claimant act on purpose in contradiction of his supervisor (insubordination under RCW 50.04.294(2)(a)), act on purpose to violate a reasonable work rule (*per se* willful and wanton disregard under RCW 50.04.294(1)(a)), deliberate disregard of standards of behavior which the employer has the right to expect of the employee (misconduct under RCW 50.04.294(1)(b)), or carelessly with such degree or recurrence to show substantial disregard of the employer's interest (misconduct under RCW 50.04.294(1)(d)). These tests apply and were met. Neglecting to apply these legal standards was reversible error.

Accepting the tribunal's and department's position will have the effect of saying that neither a supervisor, common sense, nor a reasonable, written work rule can put an employee on notice of the employer's interests. If those cannot, there is no circumstance remaining to put the employee on notice of the employer's interests.

**II. Bolling violated reasonable work rules.**

**A. Puget Sound Security properly argued for violation of reasonable company rule.**

The department invites the court to ignore Puget Sound Security's meritorious arguments about Bolling's violation of company rules. *See* (Resp. Brief, pg. 21). Puget Sound Security raised this issue below. *See e.g.*, AR 376-381. Puget Sound Security identified violation of a reasonable company rule as a ground for discharge. Puget Sound Security included the company rules as a part of the administrative record and highlighted the rules Mr. Bolling violated. *Id.* The department's incorrect position on a hyper-technical procedural point reveals its concern about the merits of its position.

**1. The company rules identified by Puget Sound Security were clear and understood by Bolling.**

The company rules provide specific grounds for disciplinary actions or termination (AR 378), including confronting clients with personal issues or problems (#12); and refusing to comply with lawful directions from a supervisor (#14). All guards sign an agreement promising not to impair Puget Sound Security's relationships with its clients or customers. AR 381. Mr. Bolling acknowledged reading and receiving each of these company rules. AR 378-81; AR 239.

**2. Puget Sound Security properly included the above rules in the administrative record and in its request for relief.**

Puget Sound Security argued this in its closing argument. The employer's representative stated "we worked with him [Bolling] to try to get him to follow instructions that were regarding site procedures....The claimant was told all the proper security procedures by the site supervisor..." AR 344-345. The department's attempt to limit the grounds for appeal is improper, just as it was improper for the ALJ to not consider the alternative grounds for finding misconduct at the administrative level.

**B. Repeatedly violating a reasonable company rule is misconduct.**

"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" is a *per se* example of willful and wanton misconduct. RCW 50.04.294(2)(f). A "company rule is reasonable if it is related to your job duties, is a normal business requirement or practice for your occupation or industry...." WAC 192-150-210(4).

On January 1, 2012, Mr. Bolling ignored company rules by going into client property to look for batteries. He was told to not do it by his direct supervisor. AR 454 (FOF 19). He then attempted to undermine his supervisor's authority and re-write the company rule. In an attempt to vindicate his interests in being correct he approached the client to "ask" for his permission to go in the closet. While in the midst of asking that

employee for *ex post facto* permission to go into the client's property, another client overheard the conversation and rebuked Mr. Bolling, telling him that Bolling's manager "and I already discussed this" and guards are not allowed to go into client property without permission. AR 174-175. He was written up for this incident. AR 453 (FOF 17). The letter from the two client employees at Exhibit 1 memorializes the legitimate business concern with his actions.

This is the same problem that he was fired for. When confronted about logging the off-line equipment, Bolling argued with his supervisor. AR 453 (FOF 16). He threatened to go over the supervisor's head, *id.*, which would have been fine. Yet, instead, Bolling went to the client, which violates company rules. *Id.* This "could undermine the employer's credibility with the client," by giving "the client the impression that the employer did not know what they were doing[.]" *Id.* The tribunal acknowledged "the employer's frustration with the claimant is real and understandable," AR 456 (Concl. of Law 10), which is akin to finding that the claimant's actions were either in violation of a reasonable work rule, or unreasonable and in substantial disregard of the employer's interests. There is no explanation as to why these theories were not analyzed. This obvious failure renders the decision arbitrary and capricious. There is no lack of skill or mistake. Bolling's repeated decisions to ignore his employer's rules and orders

harmed Puget Sound Security and damaged the relationship with the client.

This is misconduct.

**C. Even if the ALJ failed to consider the company rules, this court can rely on them where express but essential findings are missing.**

The department urges that the employer's citation to facts contained in the record but not explicitly adopted as "findings of fact" should not be considered. It posits that this court's only job is to determine whether the findings the commissioner did make are supported by substantial evidence. This is a misreading of the statute<sup>1</sup> and belittles this court's role in the appellate process.

Read together, the statutes indicate that a court may make additional findings of fact if there is no disputed issue in that regard, or it may remand for further proceedings if essential findings of fact have not been made by the commissioner and cannot be made with the given record. *Cf.* RCW 34.05.574(1)(b) (a reviewing court may, inter alia, take action required by

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<sup>1</sup> RCW 34.05.570 states that, on judicial review, the court should reverse an order if "the agency has ... failed to follow a prescribed procedure;" "the agency has erroneously interpreted or applied the law;" "the order is not supported by evidence that is substantial while viewed in light of the whole record ..." or "**the agency has not decided all issues requiring resolution by the agency.**" RCW 34.05.570(3)(c)-(f) (emphasis added). Moreover, the court is confined to the agency record only to review "**disputed** issues of fact." RCW 34.05.558 (emphasis added).

law, set aside agency action, or remand for further proceedings).

In this case, the employer's work rules are in the record, yet not analyzed as required by law. Bolling signed a document acknowledging the rules. AR 99-10, 378-381. This court should consider the employer's rules even if the commissioner made no finding of fact regarding that matter. Whether an employee committed misconduct by refusing to follow his employer's rules depends on an essential finding of fact that the employer had reasonable rules proscribing the conduct taken by the employee. Undisputed evidence establishes what those rules are. This court should correctly apply the law to the fact that Mr. Bolling violated the rules based on these exhibits; in the alternative, if it finds the department's argument convincing, it should remand for an express finding on the rules and their reasonableness.

**III. Blurring mistakes and lack of skill with insubordination and refusing to follow reasonable rules is bad law.**

The department argues this case is one of honest errors and lack of skill. (Resp. Brief pgs. 26-27). This approach is dangerous as it makes legitimate misconduct by insubordination and violation of reasonable company rules unfairly difficult to prove. This is not a case in which the employee was attempting a complex task and failed, and it is not a case in which the rules were hard to follow. *Cf. The Markham Group, Inc. v. Emp't*

*Sec. Dep't*, 148 Wn. App. 555, 564 (2009) (employee lacked skill); *Ciskie v. Emp't Sec. Dep't*, 35 Wn. App. 72 (1983) (tried to comply, yet left in an emergency).

Bolling's actions are more appropriately analogous with *Griffith v. Emp't Sec. Dep't*, 163 Wn. App. 1, 9-10 (2011). Just as in *Griffith*, the findings of fact reflect that Mr. Bolling was terminated for a series of improper actions. *Id.* at 8. The *Griffith* court appropriately looked at the entirety of the conduct. *Id.* Mr. Bolling, like *Griffith*, engaged in intentional conduct and disregarded his employer's interests by seeking second opinions from the client in an attempt to vindicate himself. The tribunal properly acknowledged the effect these actions could have but improperly applied what appears to be the *Markham* standard. *See Hamel v. Emp't Sec. Dep't*, 93 Wn. App. 140, 146 (1998) (stating that "we disagree with *Hamel* that there must be intent to harm...the employee must have voluntarily disregarded the employer's interest. His specific motivations for doing so, however, are not relevant.")

#### **IV. Bolling bears the burden of proving justification.**

Bolling disregarded his supervisor and the employer's written work rules. The implicit argument is that disobedience was justified. Under the common law, an agent bears the burden of proving that his or her refusal to follow the instructions of the principal is justified. One authority states the black-letter law:

Insofar as the agent is invested with discretionary powers the agent is required to act only according to the best of his or her judgment for the interest of the principal, and in the absence of negligence or bad faith the agent will not be liable. **However, if the instructions are direct and positive, the agent has no discretion, and the agent's motives in departing therefrom are not material.** It will not affect the agent's liability that the agent departed from instructions in good faith for what the agent's [sic] believed to be the advantage of the principal.

(3 C.J.S. Agency 551, § 272 (emphasis added) (footnotes omitted)).

“Generally, an agent is required to adhere faithfully to the instructions of the principal, regardless of the agent's own opinion as to the propriety or expediency thereof.” (3 C.J.S. Agency 550-51 § 272) (citing, *inter alia*, *Cultum v. Heritage House Realtors, Inc.*, 103 Wn.2d 623, 632 (1985)). If justification is considered, this court should recognize the agent's burden of proving it. Bolling ought to prove his refusal was justified.

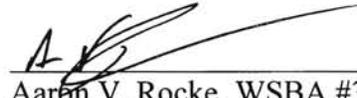
## V. Conclusion

The employer expressed its interests by assigning Bolling a supervisor and written work rules. Bolling refused to respect either. He fought with his supervisor and repeatedly went to the client with his problems for the purpose of justifying himself. He was wrong. Going to the client was against the rules, rules he had previously been disciplined for violating, and annoyed the client. Bolling put his self-interest above his employer's or the client's, and he did it on purpose. This is misconduct.

Unfortunately, Bolling's misconduct may have cost his coworkers their jobs also as the client terminated its relationship with Puget Sound Security after the hearing. Yet, the department expects the employer to directly pay Bolling's unemployment benefits through higher taxes. Benefits were improperly granted, and the decision should be reversed.

Respectfully submitted this 5<sup>th</sup> day of November, 2014.

ROCKE | LAW GROUP, PLLC



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Aaron V. Roche, WSBA #31525  
William Aloe, WSBA #40906  
Attorneys for Appellant

**Declaration of Service**

I caused a copy of the foregoing Appellant's Reply Brief to be served on the following in the manner indicated below:

**Via US Mail to**

Robert E. Bolling  
P.O. Box 1290  
Morton, WA 98356

**Via Email to**

April Benson Bishop  
The Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
Aprilb1@atg.wa.gov

on today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 5<sup>th</sup> day of November, 2014, at Seattle, Washington.

  
\_\_\_\_\_  
Sarah Borsic, Legal Assistant

# Exhibit 1

To whom it may concern:

On occasion Robert Bolling would do a task and then ask us if it was ok. Later, we were informed that his site supervisor, Don Peters, had instructed him not to perform those tasks or enter certain lockers. It was a matter of concern to us that it appeared he was knowingly using us to disregard the site supervisors instructions.

This information was conveyed to Don Peters and to Bill Cottringer during one of his site visits some time ago.