

72463-1

72463-1

NO. 72463-1

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

ELVIRA DAVISON,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT
SECURITY,

Appellant.

OPENING BRIEF OF APPELLANT

ROBERT W. FERGUSON
Attorney General

APRIL S. BENSON,
WSBA # 40766
Assistant Attorney General
Attorneys for Appellant
OID #91020
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
Phone: (206) 464-7676
Fax: (206) 389-2800
E-mail: LALSeaEF@atg.wa.gov

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....3

IV. STATEMENT OF THE CASE.....3

V. SCOPE AND STANDARD OF REVIEW9

VI. ARGUMENT12

 A. Substantial Evidence Supports the Commissioner’s
 Factual Findings.....14

 B. The Commissioner Correctly Concluded That Davison
 Was Not Entitled to Benefits Because She Was
 Discharged for Disqualifying Misconduct Under the
 Employment Security Act.....19

 1. Davison violated a reasonable company rule of
 which she knew or should have known, RCW
 50.04.294(2)(f).20

 2. Alternatively, Davison’s conduct amounted to
 misconduct as defined in RCW 50.04.294(1)(a) or
 RCW 50.04.294(1)(b).....23

 3. Davison’s conduct is not exempt from misconduct
 under RCW 50.04.294(3).26

 C. The Commissioner’s Decision Was Neither Arbitrary Nor
 Capricious28

 D. The Court Should Reverse the Superior Court’s Award of
 Attorney Fees and Costs Commissioner’s Decision Is
 Reversed or Modified29

VII. CONCLUSION29

TABLE OF AUTHORITIES

Cases

<i>Campbell v. Emp't Sec. Dep't</i> , 180 Wn.2d 566, 326 P.3d 713 (2014).....	9, 10
<i>Daniels v. Dep't of Emp't Sec.</i> , 168 Wn. App. 721, 281 P.3d 310 (2012).....	9, 13, 20
<i>Delagrave v. Emp't Sec. Dep't</i> , 127 Wn. App. 596, 111 P.3d 879 (2005).....	10
<i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> , 107 Wn.2d 693, 732 P.2d 974 (1987).....	10, 17
<i>Galvin v. Emp't Sec. Dep't</i> , 87 Wn. App. 634, 942 P.2d 1040 (1997).....	9
<i>Griffith v. Dep't of Emp't Sec.</i> , 163 Wn. App. 1, 259 P.3d 1111 (2011).....	12
<i>Hamel v. Emp't Sec. Dep't</i> , 93 Wn. App. 140, 966 P.2d 1282 (1998).....	25
<i>Hillis v. Dep't of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997)	28
<i>In re Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004)	10, 17
<i>Markam Group, Inc. v. Dep't of Emp't Sec.</i> , 148 Wn. App. 555, 200 P.2d 748 (2009).....	11
<i>Nelson v. Emp't Sec. Dep't</i> , 98 Wn.2d 370, 655 P.2d 242 (1982).....	12
<i>Pierce Cnty. Sheriff v. Civil Serv. Comm'n of Pierce Cnty.</i> , 98 Wn.2d 690, 658 P.2d 648 (1983)	28, 29

<i>Scott R. Sonners, Inc. v. Dep't of Labor & Indus.</i> , 101 Wn. App. 350, 3 P.3d 756 (2000).....	18
<i>Smith v. Emp't Sec. Dep't</i> , 155 Wn. App. 24, 226 P.3d 263 (2010).....	10, 11, 17
<i>State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce</i> , 65 Wn. App. 614, 829 P.2d 217 (1992).....	11
<i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	18
<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	2, 10, 11, 12, 14, 18, 19
<i>William Dickson Co. v. Puget Sound Air Pollution Control Agency</i> , 81 Wn. App. 403, 914 P.2d 750 (1996).....	10, 11, 17, 18, 19

Statutes

RCW 34.05	2, 9
RCW 34.05.464(4).....	10
RCW 34.05.558.....	10
RCW 34.05.570(1)(a)	10
RCW 34.05.570(3)(d).....	11
RCW 34.05.570(3)(e).....	10, 18
RCW 50	12
RCW 50.01.010	12
RCW 50.04.294	12, 13
RCW 50.04.294(1).....	13, 24
RCW 50.04.294(1)(a)	1, 14, 19, 23, 24, 25, 26, 28

RCW 50.04.294(1)(b)	1, 14, 19
RCW 50.04.294(2).....	13, 24
RCW 50.04.294(2)(f).....	1, 13, 14, 19, 20, 24, 28
RCW 50.04.294(3).....	26
RCW 50.04.294(3)(b)	20, 26
RCW 50.04.294(3)(c)	20, 26, 27
RCW 50.20.066	1
RCW 50.20.066(1).....	12
RCW 50.32.120	2, 9
RCW 50.32.150	10
RCW 50.32.160.....	29
RCW 50.94.294(2)(f).....	27

Rules

RAP 10.3(h).....	2
RPC 1.15A.....	20, 21, 25
RPC 1.15B.....	20, 25
RPC 5.3.....	21, 22, 25
RPC 5.3(a).....	21
RPC 5.3(b)	21
RPC 5.3(c).....	21
WAC 192-150-205(1).....	24, 25

WAC 192-150-210(4).....	20, 21, 22
WAC 192-150-210(5).....	22, 23

I. INTRODUCTION

Elvira Davison was discharged from her job as a social worker by her employer—Associated Counsel for the Accused (ACA), a law office—for violating its rule requiring all client funds to be placed in a trust account. An administrative law judge and the Commissioner of the Employment Security Department found ACA’s witnesses more credible than Davison when those witnesses testified that Davison knew or should have known about this rule because she was given a copy of it when first hired. Davison does not dispute that she opened a joint checking account with one of ACA’s clients, who was a minor; maintained the account; and made several transfers of the client’s funds into her own personal bank account. Davison violated her employer’s reasonable rule where she knew or should have known that the rule existed. Accordingly, the Department’s Commissioner correctly adopted the administrative law judge’s findings and concluded that Davison committed work-related misconduct and was disqualified from receiving unemployment benefits. RCW 50.20.066; RCW 50.04.294(1)(a), (1)(b),(2)(f).

On judicial review, a court applies the substantial evidence standard to the facts found below and should accept the fact finder’s determinations of witness credibility and the weight to be given reasonable but competing inferences. Here, the King County Superior Court failed to

follow this standard and erred in reversing the Commissioner's decision. Because substantial evidence in the administrative record supports the Commissioner's factual findings, and the decision was correct under the law, the Department respectfully requests that this Court reverse the superior court and affirm the Commissioner's decision denying Davison unemployment benefits.

II. ASSIGNMENTS OF ERROR

The Department assigns no error to the final decision of the Department's Commissioner. However, because the King County Superior Court erred in reversing the Commissioner's decision, and the Department is now the appellant, the Department assigns error to the following aspects of the superior court's order:¹

1. The superior court erred in making additional findings of fact, reweighing the evidence, and reversing the Commissioner's decision, which adopted the administrative law judge's credibility determinations and concluded Davison was discharged from employment for work-connected misconduct.
2. The superior court erred in awarding attorney fees and costs to Davison.

¹ This is a judicial review under the Washington Administrative Procedure Act, chapter 34.05 RCW, where the Court of Appeals sits in the same position as the superior court and reviews the Commissioner's decision. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Accordingly, the Respondent, Davison, must assign error to the Commissioner's findings and conclusions she challenges. See RAP 10.3(h); RCW 50.32.120 (judicial review of the Commissioner's decision is governed by the Administrative Procedure Act).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether substantial evidence in the record supports the Commissioner's finding that ACA had a policy requiring all client funds to be placed in a trust account and that Davison knew or should have known of this rule, when two witnesses testified that ACA gave Davison a copy of its employee manual, which contained the rule, and the record contains a checklist with Davison's signature, indicating her receipt of the employee manual. (Assignment of Error 1)
2. Whether the Commissioner correctly concluded that Davison committed misconduct under the Employment Security Act when:
 - a. Davison violated her employer's reasonable rule requiring client funds to be placed in a trust account, of which she knew or should have known, when she opened a joint checking account with one of her employer's clients and thereafter made several transfers of the client's funds into her personal bank account;
 - b. Davison acted in willful or wanton disregard of her employer's rights, title, and interests; or
 - c. Davison deliberately disregarded a standard of behavior which her employer had the right to expect of her. (Assignment of Error 1)
3. Whether the Commissioner correctly concluded that Davison's conduct was not exempt from misconduct for inadvertence or ordinary negligence in isolated instances, or a good faith error in judgment or discretion. (Assignment of Error 1)
4. Whether the Court should reverse the superior court's award of attorney fees and costs to Davison because the Commissioner's decision should be affirmed. (Assignment of Error 2)

IV. STATEMENT OF THE CASE

Elvira Davison worked part-time as a social worker for Associated Counsel for the Accused (ACA) from December 1, 2009, through May 31,

2013. Clerk's Papers (CP) at 208, 284 (Finding of Fact (FF) 2). ACA, a law office, had a policy requiring all client funds to be placed in a trust account. CP at 128, 130, 148, 214-16, 254, 284 (FF 3). The policy provided:

6.2 Trust Account

A. When Used

Any time an ACA employee receives monies from a client or on behalf of a client, the funds must be deposited in the client trust account.

B. Procedure for Use

(1) Deposit

The Controller is to receive all client funds. A trust account activity form and a receipt for the funds will be completed with a copy of the client trust activity form going to the case attorney. Personal checks must be verified for sufficient funds prior to deposit. The case attorney will be notified immediately if the funds are found to be insufficient.

(2) Withdrawal

The Controller will draw a check on a client trust account fund upon request of a case attorney as long as cash for the client has actually been received by the trust account. The case attorney must sign the client=s [sic] trust account form prior to drawing checks on the account.

CP at 215-16.

ACA gave Davison copy of this policy in its employee manual when Davison was first hired. CP at 140, 151-53, 215-217, 284 (FF 3). ACA's

former human resources manager, Julie Whitney, testified at Davison's administrative hearing that the policy was in the employee manual and that Davison had signed a document called "Checklist for In-processing" that confirms she received the manual. CP at 140-41, 215-17. ACA's controller, Anne Dolan, testified that she gave Davison the manual and witnessed Davison sign the checklist. CP at 151-53. The relevant pages of the employee manual and a copy of the signed checklist are exhibits in the administrative record. CP at 215-17.

In May 2013, the guardian of one of ACA's underage clients complained to ACA that Davison had been withdrawing funds from the client's checking account without permission. CP at 126-28, 238-39, 254, 284 (FF 11). The client, who was 17 years old, provided ACA with copies of bank records showing the withdrawals and showing that both Davison and the client were signers on a joint account. CP at 126-27, 241-43, 254, 268. ACA investigated the complaint. CP at 126-28, 130, 254-55.

ACA's investigation revealed that Davison had opened a checking account with \$2,253.77 of the client's money and named herself and the client as owners of the account. CP at 132, 134-35, 145, 156, 160-61 241-43, 254, 284 (FF 4, 5). Under ACA's rule, this money should have been placed in a trust account. CP at 128, 130, 254, 284 (FF 4).

Over a several month period, Davison made five transfers of the client's funds into her personal bank account. CP at 130-31, 243, 245, 247, 250, 284 (FF 6-10). Specifically, on December 28, 2012, Davison transferred \$500 of the client's funds into her personal checking account, CP at 130-31, 243, 245, 284 (FF 6); on January 23, 2013, Davison transferred \$700 of the client's funds into her personal checking account, CP at 130-31, 133, 243, 247, 284 (FF 7); on January 25, 2013, Davison transferred \$100 of the client's funds into her personal checking account, CP at 130-31, 243, 247, 284 (FF 8); on March 22, 2013, Davison transferred \$300 of the client's funds into her personal checking account, CP at 130-31, 133, 243, 250, 284 (FF 9); and on April 19, 2013, Davison transferred \$500 of the client's funds into her personal checking account, CP at 130-31, 133, 243, 250, 284 (FF 10).

Davison did not dispute that she had opened the joint checking account or that she had made the transfers from the client's account into her own bank account. CP at 156-57, 162-64, 166 (the account "was in – in both of our names"), 167-68 ("I made the transfer" of withdrawals reflected on joint checking account statement), 173-75, 180, 244. Rather, Davison asserted that she made the withdrawals at the client's request and ultimately gave all of the money back to the client as cash. CP at 163-64, 174, 180-81, 244.

After its investigation, ACA discharged Davison for failing to deposit the client's funds into ACA's trust account and for transferring \$2,100 of the client's funds into her personal checking account. CP at 130, 148, 214, 284 (FF 12).

Davison applied for unemployment benefits, which the Department denied. CP at 200-204, 283-84 (FF 1). After an administrative hearing on Davison's appeal, an administrative law judge determined Davison had been discharged from work for disqualifying misconduct. CP at 283-91.

At the hearing, ACA presented testimony from Whitney, Dolan, and managing director Don Madsen. CP at 126-156, 182-186. Davison testified on her own behalf. CP at 156-182. Davison's testimony conflicted with that of ACA's witnesses on several points. CP at 285 (Conclusion of Law (CL) 2). Most significantly, Davison testified that the first time she had seen ACA's policy requiring client funds to be placed in a trust account was after she had been discharged and that she had not signed ACA's checklist acknowledging receipt of the employee manual. CP at 157, 161, 172, 181.

The administrative law judge weighed and resolved the conflicting evidence in ACA's favor. Specifically, the administrative law judge found ACA's witness testimony and other evidence more credible than Davison's after considering "the demeanor and motivation of the witnesses . . . as well as the logical persuasiveness of the parties' positions"; ACA's evidence was

“more logically persuasive than the claimant’s.” CP at 285 (CL 2). Accordingly, the administrative law judge found that Davison had received a copy of ACA’s trust account policy when hired, that she had opened a joint checking account with the minor client, and that she had transferred the client’s funds into her personal checking account as previously described. CP at 284 (FF 2-12). The administrative law judge did not enter findings adopting Davison’s testimony about the circumstances under which she opened the joint checking account or that she made the transfers in order to give the money to the client as cash. *See id.*

Davison petitioned the Department’s Commissioner for review of the administrative law judge’s initial order, attaching to her petition new evidence that she had not presented to the administrative law judge. CP at 293-301. ACA filed a response. CP at 302-06. The Commissioner declined to consider Davison’s new evidence and adopted the findings and conclusions of the administrative law judge. CP at 308-11. The Commissioner recognized that “[r]esolution of this matter turns upon credibility findings made by the administrative law judge. *See adopted Conclusion of Law No. 2.*” CP at 308. Because “[a]n administrative law judge is in the best position to weigh the evidence and make findings as to its credibility,” and “because the record does not clearly show the credibility findings of the administrative law judge to be in error,” the Commissioner

did not disturb them. CP at 308-09. The Commissioner affirmed the initial order. *Id.*

Davison appealed to King County Superior Court. Making new findings and reweighing the evidence, the superior court reversed the Commissioner's decision and awarded Davison attorney fees. Clerk's Papers (CP) at 328-34. The Department now appeals to this Court.

V. SCOPE AND STANDARD OF REVIEW

The appellate court's "limited review of an agency decision is governed by the Administrative Procedure Act (APA), chapter 34.05 RCW." *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014); RCW 50.32.120. Under the APA, the court gives "[g]reat deference" to the Commissioner's factual findings and substantial weight to the agency's interpretation of the law. *Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. 721, 727, 281 P.3d 310 (2012) (quoting *Galvin v. Emp't Sec. Dep't*, 87 Wn. App. 634, 641, 942 P.2d 1040 (1997)).

This Court sits "in the same position as the superior court" and applies "the APA standards directly to the administrative record." *Campbell*, 180 Wn.2d at 571. Thus, the decision on review is that of the Commissioner, not of the administrative law judge or the superior court, except to the extent that the Commissioner adopts the administrative law

judge's factual findings.² *Id.*; *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 405-06, 858 P.2d 494 (1993); *Delagrave v. Emp't Sec. Dep't*, 127 Wn. App. 596, 604, 111 P.3d 879 (2005) (superior court's findings of fact and conclusions of law are superfluous to appellate court's review). Accordingly, because Davison appealed the Commissioner's decision to superior court, it is her burden to demonstrate the invalidity of the decision to this Court. RCW 34.05.570(1)(a); RCW 50.32.150; *Campbell*, 180 Wn.2d at 571.

The Commissioner's findings of fact must be upheld if supported by substantial evidence in the agency record. RCW 34.05.558; RCW 34.05.570(3)(e); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Evidence is substantial if it is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *Campbell*, 180 Wn.2d at 571. Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). The

² As the reviewing officer under RCW 34.05.464(4), the Commissioner has the ability and right to modify or to replace an administrative law judge's findings, though the Commissioner must give "due regard" to the administrative law judge's opportunity to observe the witnesses. RCW 34.05.464(4); *Tapper*, 122 Wn.2d at 404-06; *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 35 n.2, 226 P.3d 263 (2010). Here, the Commissioner adopted the administrative law judge's findings of fact. CP at 308-09.

reviewing court is to “view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed” at the administrative proceeding below—here, the Department. *William Dickson Co.*, 81 Wn. App. at 411; *see also Tapper*, 122 Wn.2d at 403 (court gives deference to agency’s factual findings).

The process of reviewing for substantial evidence “necessarily entails acceptance of the fact-finder’s views regarding credibility of witnesses and the weight to be given reasonable but competing inferences.” *William Dickson Co.*, 81 Wn. App. at 411 (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)); *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 35-36, 226 P.3d 263 (2010). A court may not substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403. Unchallenged factual findings are verities on appeal. *Tapper*, 122 Wn.2d at 407.

The Court reviews questions of law de novo, under the error of law standard. RCW 34.05.570(3)(d); *Tapper*, 122 Wn.2d at 407. However, because the Department has expertise in interpreting and applying unemployment benefits law, the Court should accord substantial weight to the agency’s decision. *Markam Group, Inc. v. Dep’t of Emp’t Sec.*, 148 Wn. App. 555, 561, 200 P.2d 748 (2009); *William Dickson Co.*, 81 Wn. App. at 407.

Whether a claimant engaged in misconduct is a mixed question of law and fact. *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 8, 259 P.3d 1111 (2011). To resolve a mixed question of law and fact, the Court engages in a three-step analysis in which it: (1) determines whether the Commissioner's factual findings are supported by substantial evidence; (2) makes a *de novo* determination of the law; and (3) applies the law to the facts. *Tapper*, 122 Wn.2d at 403. As under any other circumstance, a court is not free to substitute its judgment for that of the agency as to the facts. *Id.* The process of applying the law to the facts is a question of law, subject to *de novo* review. *Id.*

VI. ARGUMENT

The Employment Security Act, title 50 RCW, was enacted to provide compensation to individuals who are “involuntarily” unemployed “through no fault of their own.” RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. As such, a claimant is disqualified from receiving unemployment benefits if she has been discharged from her job for work-connected “misconduct.” RCW 50.20.066(1); RCW 50.04.294. The initial burden is on the employer to show by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. *Nelson v. Emp't Sec. Dep't*, 98 Wn.2d 370, 374-75, 655 P.2d 242 (1982).

The statute defining “misconduct,” RCW 50.04.294, identifies numerous acts as *per se* misconduct “because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.” RCW 50.04.294(2); *Daniels*, 168 Wn. App. at 728 (“Certain types of conduct are misconduct *per se*.”). One such act of *per se* misconduct is “[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule.” RCW 50.04.294(2)(f). In addition, “[m]isconduct” includes:

- (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.

RCW 50.04.294(1).

In this case, substantial evidence supports the Commissioner’s findings that Davison received a copy of ACA’s policy requiring client funds to be placed in trust accounts and that Davison violated this reasonable rule. The Commissioner correctly concluded that Davison

committed disqualifying misconduct under RCW 50.04.294(2)(f) (violation of a company rule if the rule is reasonable and if the claimant knew or should of known of its existence), (1)(a) (willful or wanton disregard of the rights, title, and interests of the employer), and (1)(b) (deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee). CP at 285 (CL 7), 308-09. The Court should affirm.

A. Substantial Evidence Supports the Commissioner’s Factual Findings

The only finding Davison expressly challenged in the superior court was Finding of Fact 3, which states, “Employer had a policy requiring all client funds to be placed in a trust account. Claimant was given a copy of this policy when she was first hired.” CP at 284 (FF 3). The Court should uphold this finding because substantial evidence in the record supports it, and the finding is based in large part on a credibility determination.³

First, substantial evidence supports the Commissioner’s finding that ACA had a policy requiring all client funds to be placed in a trust account. CP at 284 (FF 3). A copy of the written policy from ACA’s employee manual was admitted as an exhibit at the administrative hearing.

³ The Court should consider any factual findings that Davison fails to raise a proper challenge to as verities. *Tapper*, 122 Wn.2d at 407.

CP at 123, 215-16. The policy provides: “Any time an ACA employee receives monies from a client or on behalf of a client, the funds must be deposited in the client trust account.” CP at 215. It also states, “[t]he Controller is to receive all client funds” and goes on to describe ACA’s process for deposits and withdrawals. CP at 215-16. ACA’s witnesses also testified to the existence of the policy. CP at 128 (“there is a company policy that states that any funds received from a client must be put into a trust account, um, that is ACA’s”), 140, 148.

Next, the record supports the finding that Davison “was given a copy of this policy when she was first hired.” CP at 284 (FF 3). The administrative hearing exhibits include a copy of a document titled, “Checklist for In-processing,” which indicates Davison’s receipt of several forms and policies, including the “Employee Manual,” on “12/01/09,” her first day of work. CP at 217. Whitney, ACA’s former human resources manager, testified that the checklist indicated Davison’s awareness of the employee manual, which included the trust account policy. CP at 140. ACA’s controller, Dolan, testified that she went over the checklist with Davison on Davison’s first day, gave Davison the listed documents as part of new employee processing, and witnessed Davison sign the checklist. CP at 151-53. Specifically, Dolan “had her sign that she received the employee manual.” CP at 153. Dolan also testified:

[Q]: Ms. Dolan, were you a witness to the signature on Page 18 [CP at 217], the checklist for in-processing?

MS. DOLAN: Yes, I was.

[Q]: And could you explain to me how that, uh, list was, uh, completed and what the purpose of it was?

MS. DOLAN: This is a list of everything that I go over when I in-process an employee. And as we go over each item or give them whatever it is that I need to give them, I checked it off. And then when I'm through I ask them to sign it to verify that they have reviewed everything that's on the – that's on that list.

[Q]: Thank you.

MS. DOLAN: And she signed it after I completed talking about all these different things.

....

[Q]: . . . who all was present at the time this signature was placed on the bottom of Page 18 of these archived documents?

MS. DOLAN: Just the two of us, Elvira and myself.

CP at 151-52.

In contrast, Davison testified that she was not given a copy of the policy. CP at 157. To resolve the conflicting evidence, the administrative law judge considered the witnesses' demeanor, motivations, and the logical persuasiveness of the parties' positions. CP at 285 (CL 2). The administrative law judge determined that the testimony and evidence presented by ACA's witnesses was more credible, and the Commissioner

adopted the administrative law judge's finding. CP at 284 (FF 3), 285 (CL 2), 308. To accept Davison's version of events, the trier of fact would have had to find that both Whitney and Dolan had testified falsely and that someone forged Davison's signature on the new employee checklist. The administrative law judge and Commissioner declined to do this.

In reviewing factual findings for substantial evidence, the Court should accept the fact-finder's views regarding witness credibility and the weight to give reasonable but competing inferences. *William Dickson Co.*, 81 Wn. App. at 411; *Smith*, 155 Wn. App. at 35-36. Here, the administrative law judge and Commissioner viewed ACA's witnesses as more credible and gave more weight to ACA's version of events. The exhibits and testimony that were before the agency are sufficient evidence to persuade a rational, fair-minded person of the finding that Davison was given a copy of the trust account policy when she was first hired. Indeed, there is more evidence in the record to establish that Davison did receive a copy of the trust account policy when she was hired, which, as described below, is sufficient to establish her knowledge of the policy. The Court should uphold the finding. *See Jones*, 152 Wn.2d at 8 (evidence is substantial if sufficient to persuade a rational, fair-minded person of the truth of the finding); *Fred Hutchinson Cancer Research Ctr.*, 107 Wn.2d

at 713 (evidence may be substantial even if there was conflicting evidence below and could lead to other reasonable interpretations).

The Department anticipates that Davison may make additional arguments relating to the factual findings. Davison's argument to the superior court relied heavily on her version of events, rather than the factual findings entered. Davison may ask this Court, as she did the superior court, to consider evidence in the record that was not made part of the factual findings. *See, e.g.*, CP at 33 (arguing that substantial evidence supports Davison's version of events). But the relevant facts before the Court are those that were entered as findings by the administrative law judge and adopted by the Commissioner; a reviewing court is not in a position to reweigh the evidence or make new findings. RCW 34.05.570(3)(e); *Tapper*, 122 Wn.2d at 403; *William Dickson Co.*, 81 Wn. App. at 411. Additionally, "[t]he trier of fact is not required to enter negative findings or to find that a certain fact has not been established." *Scott R. Sonners, Inc. v. Dep't of Labor & Indus.*, 101 Wn. App. 350, 356, 3 P.3d 756 (2000). Thus, while Davison has urged that certain additional facts justify her actions, those alleged facts were not made part of the Commissioner's factual findings. *See State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) ("In the absence of a finding on a

factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue.”).

The superior court improperly reweighed the evidence in the record and entered new factual findings. *See* CP at 328-30 (Findings of Fact, Conclusions of Law, and Order); *Tapper*, 122 Wn.2d at 403, 406 (court does not substitute its judgment for that of the agency as to the facts, instead it reviews the findings actually entered for substantial evidence). This Court should decline any invitation to reweigh the evidence and should instead review the Commissioner’s actual factual findings and find they are supported by substantial evidence. *See William Dickson Co.*, 81 Wn. App. at 411; *Tapper*, 122 Wn.2d at 403, 406.

B. The Commissioner Correctly Concluded That Davison Was Not Entitled to Benefits Because She Was Discharged for Disqualifying Misconduct Under the Employment Security Act

Based on the factual findings, the Commissioner correctly applied the law to conclude that Davison was discharged for misconduct as defined by the Employment Security Act. Davison committed misconduct because she violated a reasonable company rule of which she knew or should have known, her conduct was in willful or wanton disregard of her employer’s rights, title, and interests, and she deliberately disregarded standards of behavior that her employer had the right to expect of her. *See* RCW 50.04.294(1)(a), (1)(b), (2)(f). Additionally, Davison’s conduct

was not an isolated instance of inadvertence or ordinary negligence, or a good faith error in judgment or discretion. *See* RCW 50.04.294(3)(b), (3)(c). The Court should affirm.

1. Davison violated a reasonable company rule of which she knew or should have known, RCW 50.04.294(2)(f).

An individual commits misconduct *per se* if he or she commits a “[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule.” RCW 50.04.294(2)(f); *Daniels*, 168 Wn. App. at 728. The Commissioner correctly concluded that Davison committed misconduct under this provision. CP at 285 (CL 7), 309.

ACA’s policy requiring all client funds to be placed in trust accounts was reasonable. “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, or is required by law or regulation.” WAC 192-150-210(4).

Davison worked as a forensic social worker for the dependency and felony units of Associated Counsel for the Accused, a law office. CP at 129-30, 275, 294 (FF 2). All Washington lawyers and their staff are under strict professional obligations to safeguard clients’ property in trust accounts. *See* Rules of Professional Conduct (RPC) 1.15A; RPC 1.15B; RPC 5.3. A lawyer must hold clients’ property separate from the lawyer’s

own property, including depositing any funds in a trust account. RPC 1.15A.⁴ Lawyers also must make reasonable efforts to ensure that the conduct of their firms and nonlawyer assistants are compatible with the lawyer's professional obligations. RPC 5.3(a), (b). In certain circumstances, a lawyer will be held responsible for the conduct of nonlawyer staff that would be a violation of the Rules of Professional Conduct if it had been engaged in by the lawyer. RPC 5.3(c). For these reasons, ACA's rule requiring all client funds to be placed in trust accounts was "required by law or regulation" and "a normal business requirement or practice" for the industry of a law office. WAC 192-150-210(4). The rule was reasonable.

Davison may argue that the rule was not reasonable, or not reasonable as applied to her, because it did not relate to her particular job duties because she is not a lawyer. But this ignores the purpose of such a rule, which is to ensure that *no one* misuses or misappropriates clients' funds, especially in light of the Rules of Professional Conduct that would hold the lawyers accountable, in some circumstances, for nonlawyer conduct. Extending the rule to all staff, not just lawyers, is reasonable to achieve this purpose. The argument also ignores the plain language of

⁴ This rule "applies to property held in any any fiduciary capacity in connection with a representation, whether as trustee, agent, escrow agent, guardian, personal representative, executor, or otherwise." RPC 1.15A, cmt. 3.

WAC 192-150-210(4), which provides that a rule is reasonable in any of three alternatives: “if it is related to your job duties, is a normal business requirement or practice for your occupation or industry, *or* is required by law or regulation.” WAC 192-150-210(4) (emphasis added). ACA’s rule was reasonable and necessary for a law office. To conclude that a law office’s trust account rule should apply to some, but not all, staff, would be illogical and would disregard the Rules of Professional Conduct. *See* RPC 5.3.

Additionally, Davison knew or should have known of the existence of the trust account rule. Under WAC 192-150-210(5):

The department will find that you knew or should have known about a company rule if you were provided an orientation on company rules, *you were provided a copy or summary of the rule in writing*, or the rule is posted in an area that is normally frequented by you and your coworkers, and the rule is conveyed or posted in a language that can be understood by you.

WAC 192-150-210(5) (emphasis added). As previously discussed, the Commissioner found that Davison “was given a copy of [ACA’s trust account] policy when she was first hired,” and substantial evidence supports this finding. CP at 140, 151-53, 215-17, 284 (FF 3). Although Davison may argue that she should not be held responsible for knowing the rule because she allegedly was not given a substantive orientation or training, this is not required by the plain language of WAC 192-150-

210(5). The Commissioner properly concluded Davison knew or should have known of the existence of the rule because she was provided a copy of the rule in writing. WAC 192-150-210(5); CP at 285 (CL 7).

Davison may also argue, as she did at the superior court, that she should not be held responsible for knowing the rule because in certain other appellate decisions, it was a factor that the employees admitted that they received the policies or handbooks or otherwise acknowledged the rules and policies in some way. But where substantial evidence supports the finding that Davison received a copy of the relevant policy, including a checklist bearing her signature acknowledging its receipt, she cannot be excused from being aware of it simply because she disputes the evidence on appeal or because of her apparent failure to read the policy.

Because the Commissioner properly concluded Davison violated a reasonable employer rule, which she knew or should have known, the Court should affirm.

2. Alternatively, Davison's conduct amounted to misconduct as defined in RCW 50.04.294(1)(a) or RCW 50.04.294(1)(b).

Davison's conduct also amounted to a "[w]illful or wanton disregard of the rights, title, and interests of the employer" or "[d]eliberate

violations or disregard of standards of behavior” which her employer had the right to expect of her.⁵ RCW 50.04.294(1)(a), RCW 50.04.294(1)(b).

An employer has the right to expect its employees to be aware of and follow its policies. It is also reasonable for an employer to expect its employees to maintain appropriate professional and financial boundaries with clients, particularly when those clients are minors. Davison opened a joint checking account with a client who was under the age of 18 and later, in five separate instances, transferred the client’s money into her personal account. CP at 284 (FF 4-10). Davison’s conduct was in deliberate disregard of a standard of behavior that ACA had the right to expect of her. RCW 50.04.294(1)(b).

Additionally, Davison’s conduct amounted to a “[w]illful or wanton disregard of the rights, title, and interests of the employer.” RCW 50.04.294(1)(a). “Willful” means “intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer or a co-worker.” WAC 192-150-205(1). In determining whether the employee’s actions were “willful” as that term is used in the statute, the focus is not on whether the employee

⁵ To affirm the Commissioner’s decision, the Court need only conclude that Davison’s conduct constituted misconduct as defined in any one of the provisions in RCW 50.04.294(1) or (2). Therefore, if the Court concludes that Davison’s conduct constituted misconduct under RCW 50.04.294(2)(f)—violation of a reasonable company rule that Davison knew or should have known about—it need not decide whether any other definition of misconduct applies.

intended to harm the employer. *Hamel v. Emp't Sec. Dep't*, 93 Wn. App. 140, 146, 966 P.2d 1282 (1998). Rather, an employee acts willfully if he or she acts deliberately or knowingly. WAC 192-150-205(1).

Here, Davison's opening of a joint checking account with a minor client of ACA's, and later transferring the client's funds into her own personal checking account, demonstrated deliberate disregard for her employer's interests. CP at 284 (FF 4-10) RCW 50.04.294(1)(a); WAC 192-150-205(1). As a law office, ACA has a strong interest in meeting the professional requirements set forth in the Rules of Professional Conduct and in handling client funds properly. CP at 128-30, 148; *see also* RPC 1.15A; RPC 1.15B; RPC 5.3. It also has an interest in safeguarding clients' funds and in maintaining appropriate boundaries with its clients, particularly minor clients. Davison knew or should have known that ACA's clients' property must be kept in a trust account. CP at 284 (FF 3). At a bare minimum, she should have inquired of her employer whether opening a joint checking account with a minor client was appropriate. Nonetheless, Davison intentionally opened a joint checking account with one of ACA's clients. CP at 284 (FF 5). Then, on five separate occasions, she intentionally transferred portions of the client's funds to her personal checking account. CP at 284 (FF 6-10). This

conduct constituted a willful disregard of ACA's interests and was, therefore, disqualifying misconduct. RCW 50.04.294(1)(a).

3. Davison's conduct is not exempt from misconduct under RCW 50.04.294(3).

Davison previously argued that her conduct is exempt from misconduct under RCW 50.04.294(3)(b) or (c). CP at 25-29. She is mistaken. That statute provides:

(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(3).

Davison's conduct cannot be said to be the result of "[i]nadvertence or ordinary negligence in isolated instances." RCW 50.04.294(3)(b). Her decisions to open a joint checking account with a minor client, and then repeatedly transfer the client's funds into her own personal checking account, were not "inadvertent" or the result of "ordinary negligence." They were intentional actions. Moreover, Davison's conduct was not an isolated instance—she not only opened the joint account in November 2012 and maintained it into May 2013, she also made *five* transfers into her own personal account over the course of those

several months. CP at 284 (FF 4-10). Her initial opening of the account was a serious violation of ACA's trust account rule, as was any one of the individual transfers she made into her personal account. Her conduct was not isolated.

Additionally, Davison's conduct was not the result of "[g]ood faith errors in judgment or discretion." RCW 50.04.294(3)(c). Davison worked as a forensic social worker for a law office. CP at 284 (FF 2). Davison received a copy of ACA's trust account policy, which required all client funds to be placed in a trust account. CP at 284 (FF 3). Because Davison knew or should have known about ACA's trust account policy, her conduct was not merely a good faith error in judgment or discretion. Any alleged failure to read the policy cannot be said to be a good faith error, particularly in light of the statutory language defining misconduct where a claimant "*should have known* of the existence of the rule." RCW 50.94.294(2)(f) (emphasis added). Moreover, given the straightforward prohibition in the policy, it did not leave any ACA employee room to exercise judgment or discretion with respect to clients' funds. The exception from misconduct in RCW 50.04.294(3)(c) does not apply to Davison.

For the reasons discussed above, the Commissioner correctly concluded that Davison committed misconduct in that she violated a

reasonable company rule of which she knew or should have known, deliberately disregarded a standard of behavior that her employer had the right to expect, and willfully disregarded her employer's interests. *See* RCW 50.04.294(1)(a), (1)(b),(2)(f).

C. The Commissioner's Decision Was Neither Arbitrary Nor Capricious

Davison may argue, as she did below, that the Commissioner's decision was arbitrary or capricious. CP at 33-37. The "one who seeks to demonstrate that action is arbitrary and capricious must carry a heavy burden." *Pierce Cnty. Sheriff v. Civil Serv. Comm'n of Pierce Cnty.*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). Agencies act in an arbitrary or capricious manner when their action is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). A decision is not arbitrary or capricious if there is room for more than one opinion and the decision is based on due consideration, even if the Court disagrees with it. *Id.*

The Commissioner's decision in this case was not "willful and unreasoning and taken without regard to the attending facts or circumstances." *Id.* The parties presented conflicting evidence, which the administrative law judge and Commissioner resolved in the employer's favor after due consideration of the witnesses' demeanor and motivation and the

logical persuasiveness of the evidence. CP at 285 (CL 2). The record shows that the Commissioner carefully considered the testimony and evidence in the record in reaching his conclusion. Thus, Davison cannot meet her “heavy burden” to convince the Court that the Commissioner’s decision was arbitrary or capricious. *See Pierce Cnty. Sheriff*, 98 Wn.2d at 695.

D. The Court Should Reverse the Superior Court’s Award of Attorney Fees and Costs Commissioner’s Decision Is Reversed or Modified

Davison is entitled to reasonable attorney fees and costs only if this Court ultimately modifies or reverses the Commissioner’s decision. *See RCW 50.32.160*. As shown above, this Court should reverse the superior court’s decision and affirm the Commissioner’s decision. Thus, this Court should also reverse the superior court’s award of attorney fees and costs to Davison.

VII. CONCLUSION

The Commissioner correctly concluded that Davison was discharged from employment for statutory misconduct and was, therefore, disqualified from receiving unemployment benefits. The Commissioner’s decision is supported by substantial evidence and is free of errors of law. The Department asks the Court to reverse the superior court’s decision, including the order awarding attorney fees and costs, and affirm the Commissioner’s decision denying Davison unemployment benefits.

RESPECTFULLY SUBMITTED this 26th day of November,
2014.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink that reads "April S. Benson". The signature is written in a cursive style with a large initial "A" and "B".

APRIL S. BENSON,
WSBA # 40766
Assistant Attorney General
Attorney for Appellant

PROOF OF SERVICE

I, Judy St. John, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.
2. That on the 26TH day of November 2014, I caused to be served a copy of **Opening Brief of Appellant** on the below date as follows:

Via ABC Legal Messenger,
Denise Diskin
Steven Teller
Teller & Associates, PLLC
1139 34th Ave, Suite B
Seattle, WA 98122

Court of Appeals, Division 1
600 University St.
Seattle, WA 98101-4170

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

Dated this 26TH day of November 2014 in Seattle,

Washington



Judy St. John, Legal Assistant