

NO. 74116-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION 1

NOOKSACK INDIAN TRIBE,

Appellant,

and

STATE OF WASHINGTON,
DEPARTMENT OF EMPLOYMENT SECURITY,

Cross-Appellant,

and

NADENE RAPADA,

Respondent.

REPLY BRIEF OF APPELLANT NOOKSACK INDIAN TRIBE

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The Nooksack Indian Tribe, interested employer and appellant, files this Reply Brief seeking the Court of Appeals uphold the Decision of Commissioner of the Employment Security Department (ESD) Commissioner's decision.

I. Argument and Authority

Here, the Claimant requests this Court overturn a final administrative decision of the Employment Security Department. The Commissioner's decision is presumed to be correct and the "burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a); *Daniels v. Dep't. of Emp't. Sec.*, 168 Wn.App. 721, 727, 281 P.3d 310 (Div. 1 2012); *Anderson v. Emp't. Sec. Dep't.*, 135 Wn.App. 887, 893, 146 P.3d 475 (Div. 2 2006). The Claimant's appeal fails for three distinct reasons: (1) the Claimant relies upon irrelevant materials; (2) the Claimant disregards her burden and ignores the substantial record that supported the Commissioner's decision; and (3) the Claimant did not commit a good faith error in judgment or discretion.

A. CLAIMANT’S RELIANCE ON IRRELEVANT MATERIAL IS INSUFFICIENT TO MEET HER BURDEN OF DEMONSTRATING INVALIDITY OF AGENCY ACTION.

The Claimant has the burden of demonstrating invalid agency action even on appeal to this Court. *See Macey v. Department of Empl. Sec.*, 110 Wash.2d 308, 312, 752 P.2d 372 (1988); (citing *Farm Supply Distribs., Inc. v. State Utils. & Transp. Comm’n*, 83 Wn.2d 446, 448, 518 P.2d 1237 (1974)); *Shaw v. Department of Empl. Sec.*, 46 Wn.App. 610, 613, 731 P.2d 1121 (Div. 2 1987); *Tapper v. State Employment Sec. Dept.*, 122 Wn.2d 397, 858 P.2d 494 (1993). For this, the Claimant relies upon evidence not contained in the finding of fact and on a non-existent heightened legal standard.

1. Claimant’s Reliance on Findings of an Administrative Law Judge are Irrelevant to the Issue on this Appeal.

The Commissioner’s decision is presumed to be correct and the “burden of demonstrating the invalidity of agency action is on the party asserting invalidity.” RCW 34.05.570(1)(a); *Daniels*, 168 Wn.App. at 727; *Anderson*, 135 Wn.App. at 893. This Court reviews only the Decision of Commissioner, not the Administrative Law Judge’s findings or the

Superior Court's findings. *Markham Group, Inc. P.S. v. State Dept. of Employment Sec.*, 148 Wn.App. 555, 561, 200 P.2d 748 (Div. 3 2009).

The Claimant's citation to the findings of the Administrative Law Judge (ALJ) is irrelevant to the issue appealed; that is, whether the Decision of the Commissioner is substantially supported by the record below. The only relevant facts to this case are those identified findings by the Commissioner, not the ALJ. *Tapper*, 122 Wn.2d at 403. The Commissioner's findings establish misconduct, those findings are substantially supported by the record below, and the Claimant failed to meet her burden.

To the extent the Claimant argues her version of the facts is more reliable than those findings adopted by the Commissioner, she is incorrect as a matter of law. This Court "view[s] the evidence and reasonable inferences therefrom in the light most favorable to the party that prevailed" at the administrative proceeding below. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 732 P.2d 974 (1987). The Tribe prevailed at the Commissioner's Office and the Commissioner's decision was supported by substantial evidence contained in the administrative record. Claimant's arguments to the contrary are not supported by law.

To the extent the Claimant argues that the evidence and testimony

presented on her behalf at the hearing is sufficient to meet her burden, the Claimant is also incorrect as a matter of law. The only relevant findings are those adopted by the Commissioner. *Id.* The Commissioner is not required to enter findings of fact that eliminate every other possible factual scenario (negative findings) or enter findings that a certain fact was not accepted because the witness was not credible. *Scott R. Sonners, Inc. v. Dep't of Labor & Indus.*, 101 Wn. App. 350, 356, 3 P.3d 756 (Div. 2 2000). Simply put, the Commissioner found for the Tribe because the Claimant failed to meet her burden. The administrative record substantially supports the Commissioner's decision as set forth below; the Claimant committed misconduct.

2. Claimant's Citation to a "Heightened Level of Scrutiny" is Not Supported by Law.

Claimant also argues that the Commissioner's failure to cut and paste the ALJ's decision should be reviewed under a heightened standard; and, the Commissioner's decision is somehow tainted because of the Commissioner's departure from the ALJ findings and conclusions. This is simply not the state of the law. This Court, and any reviewing court, reviews the Commissioner's decision, not the ALJ's and not the Superior Court's. *Markham Group*, 148 Wn.App. at 561.

Although the Claimant argues that this Court should review the

Commissioner's findings through the lens of a "heightened level of scrutiny;" the Washington case cited by the Claimant does not support such a review. Claimant cites *Regan v. Dep't of Licensing* for the proposition that a heightened level of scrutiny applies to findings of fact where the reviewing officer ignores or reverses the finding of the hearing officer. 130 Wn.App. 39, 121 P.3d 731 (Div. 2 2005). *Regan* does not stand for this proposition; rather, *Regan* reiterates where the reviewing officer's findings modify or replace the ALJ's findings, the Court of Appeals reviews only the reviewing officer's findings. *Id.* The Claimant puts forth no Washington law that would allow this Court to disregard the determinations made by the Commissioner.

Under the APA standard, and the standard identified in *Regan* and other cases, the Claimant must demonstrate the Commissioner's decision was invalid and not supported by substantial evidence. The Claimant fails to meet her burden and the Commissioner's decision was, and remains, correct. The Claimant committed per se misconduct, which led to the loss of the employer's assets.

B. CLAIMANT IGNORES THE SUBSTANTIAL RECORD SUPPORTING THE COMMISSIONER'S DECISION.

The Claimant fails to meet her burden to demonstrate that Findings

of Fact III and V because she refuses to acknowledge the substantial evidence supporting the Commissioner's decision and she relies on evidence not adopted into the Commissioner's findings. The Commissioner's findings of fact are reviewed for substantial evidence in light of the whole record. RCW 34.05.570(3)(e); *Lee's Drywall Co., Inc. v. Dep't of Labor & Indus.*, 141 Wn.App. 859, 864, 173 P.3d 934 (Div. 2 2007). Substantial evidence is evidence that would persuade a fair-minded person of the truth or correctness of the matter. *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Evidence may be substantial to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson*, 107 Wn.2d at 693.

The Claimant argues that "the Commissioner declined to adopt any of the Findings of Fact of the ALJ." This is simply inaccurate. The Commissioner's findings included many of the ALJ findings of fact. CP 303-305, 325-326. The Commissioner was not required to adopt additional findings, as the findings utilized for the misconduct determination were substantially supported by the record below. Again, the Claimant has the burden to demonstrate error and the Claimant has failed.

The Claimant claims that the Accounting Policy "was routinely not

followed” and this fact went uncontested. This claim is false and was contested. The Commissioner determined that the formally approved Accounting Policy adhered to by the Chief Financial Officer, the Controller, and the General Manager was the Tribe’s policy and was violated by the Claimant. This Court cannot substitute its judgment for the judgment of the Commissioner. *Davis v. Dept. of Labor & Indus.*, 94 Wn.2d 119, 615 P.2d 1279 (1980). The Claimant fails to demonstrate that the record does not substantially support the Commissioner’s finding.

The Claimant also complains that the check issuance and the Claimant’s act of cashing the check were “system failure[s]” and this allegation somehow meets her burden of demonstrating the Commissioner’s decision is invalid. These claims are also without merit. The Tribe adopted a comprehensive, detailed Accounting Policy with a very clear process for reimbursement requests. CP 45-49, 65, 75, 77, 159-161. In the current case, had the Claimant complied with the policy at the initial step, the accounting department would not have received a reimbursement request because the Claimant did not obtain written authorization. CP 49, 75, 77, 159-161. Second, had the Claimant not directed subordinate employees to violate the policy at the second step, a purchase order would not have been generated. CP 75, 117, 159-161. Third, had the Claimant not directed a subordinate employee to print a

check at the third step, a check would not have been printed and circulated for signature under the guise that the underlying transaction was approved. *Id.* Fourth, had the Claimant heeded the warning from her co-worker, Ms. Ames, the Claimant would have returned the check that she kept on her desk. CP 67-69, 75-79, 117, 159-161. Then, after the Claimant obtained the check, the Claimant ignored the warning of a co-worker entrusted to approve (or deny) the transaction at issue, and the Claimant cashed the check. CP 117, 301. A system failure did not occur. The Claimant simply circumvented the system, disregarded established policy, and used her position of authority to ensure her reimbursement request resulted in a check before the weekend.

In Claimant's initial response to the Employment Security Department, the Claimant stated: "[t]he check was held until the Controller [Ames] was able to sign the documents [Requisition, Mileage Log, and Purchase Order] after her meeting." CP 117. The Claimant abided by this Policy until it was no longer convenient for her own monetary gain and the Claimant was informed that Ames would not sign the documents, at which point the Claimant left work, went to the casino, and cashed the check. CP 119, 301.

The Commissioner's findings of fact are well supported. The Claimant cannot demonstrate that the Commissioner erred; the

Commissioner was correct – the Claimant committed misconduct. The Claimant violated a well-known, reasonable rule; a rule she was entrusted with enforcing, for personal gain, at the expense of the Tribe. The administrative record as a whole firmly establishes the Claimant’s misconduct.

C. CLAIMANT’S ACTIONS WERE MISCONDUCT; NOT A GOOD FAITH ERROR IN JUDGMENT.

Unemployment benefits may be denied for an employee who commits “misconduct.” R.C.W. 50.20.066. 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 per se misconduct. R.C.W. 50.04.294(2)(f). The Tribe proved that the Claimant committed statutory misconduct by violating a well-known, reasonable work rule that she knew and was entrusted with enforcing.

The Claimant has repeatedly argued that her actions constituted a “good faith error in judgment or discretion.” R.C.W. 50.04.294(3)(c). The terms “good faith error”, “judgment” and “discretion” are nowhere defined in Title 50 or the Washington Administrative Code addressing Unemployment Compensation. The Claimant’s plea that her actions constituted a good faith error is without merit; the Tribe’s Accounting

Policy did not provide the Claimant with any discretionary functions in regards to her personal reimbursement request. CP 159-161. Rather, the Claimant's actions were a straightforward violation of a reasonable and well-known company rule.

The record clearly established that the Tribe had an Accounting Policy that contained a process for reimbursement requests. CP 45-49, 65, 75, 77, 159-161. The process outlined in the Accounting Policy contained strict requirements for employees requesting reimbursements, and memorialized a system of "checks and balances" to ensure instances of fraud and theft of tribal resources were minimized or eliminated. CP 159-161. The Claimant was required to complete two (2) forms: a requisition and a mileage log, before submission to staff for processing. CP 45-51, 75-77, 159-161. These forms were non-discretionary. CP 159-161. These forms required that the Claimant obtain her supervisor's written approval. *Id.* In the event that her supervisor was unavailable, the Claimant could attach a copy of a supervisor's approval made via email or text. CP 65. Meyer delegated this authority to Ames; the Claimant was well-aware of this delegation. CP 41, 47, 62, 117. The completed requisition and mileage log were then reviewed by Ames to ensure that the request was allowable. CP 45-49, 65, 75, 77, 159-161. If allowable, Ames approval would be documented via a written approval. CP 160.

If approved, separate accounting staff would complete data entry and create a Purchase Order, which then required Ames written approval. CP 45-49, 67, 160. If the Purchase Order was approved, separate accounting staff would generate a check, which then required Ames written approval before the check was sent for signature. *Id.* The Claimant, then-Accounting Director, was very aware of each step of the process. CP 75-77, 117-119. The Claimant was also well-aware that her direct supervisor, CFO Meyer, had previously established a “check-run” date pursuant to his discretion, whereby reimbursement checks would not be run until the last day of the month. CP 45-46, 50-51. The Claimant knew that her reimbursement request, if approved - which it was not, should not have resulted in a check until approximately ten (10) days later.

In the event that the Claimant misunderstood the mandatory nature of the provisions contained in the Accounting Policy or any required steps in the process for requesting a reimbursement - which she did not, the Accounting Department had regular meetings to discuss internal operations and the Accounting Policy. CP 50-51. In the event that the Claimant felt she had discretion to disregard any of the policies or steps in the required process, the CFO and Controller reiterated the mandatory nature of the reimbursement request process in no fewer than three (3) separate staff meetings in the previous year. CP 59-51, 171-178.

Contrary to the Claimant's plea, the Claimant lacked any discretion in this matter; the reimbursement process contains mandatory provisions concerning obtaining written approval.

Nevertheless, the Claimant argues without merit that she made a good faith error in judgment. The Claimant, a high-ranking employee of the accounting department with approximately thirty (30) years of experience, stood in a supervisory capacity over all accounting employees (with the sole exception of Ms. Ames) who were physically present in the accounting office on December 20, 2013. CP 39, 117. The Claimant disregarded the required approval requirements identified in the Accounting Policy. CP 159-161. The Claimant then directed subordinate employees to do the same to ensure that they would process the Claimant's personal reimbursement request¹. CP 117. All the while, the Claimant made no effort to text or email Ms. Ames or the General Manager, Ms. Canete, in order to obtain written approval; both of whom were within walking distance from the Claimant's office. CP 64-65, 74, 117. The Claimant admits she intentionally avoided seeking such approval as required **prior to** processing her personal reimbursement

¹ The Tribe also requested that an ALJ decision of a related-employee matter, which included facts regarding testimony of the Claimant herein be entered into evidence. This request was denied. CP 38.

request. CP 75. The Claimant intentionally circumvented the process of checks-and-balances formalized in the Accounting Policy and usurped the chain of command memorialized in the Personnel Manual.

Finally, upon the return of Ames and Canete to the main office, Ames reviewed the Claimant's reimbursement packet and informed the Claimant that the request was denied, and, unallowable in part. CP 67-69, 76, 182, 184, 186-187. For the following two hours, the Claimant made no effort to correct any deficiencies, return the printed check, or appeal Ames' decision to Canete. CP 75-77. The Claimant cashed the check at the neighboring casino within minutes of leaving work. CP 119, 301. At a hearing approximately a month later, the Claimant acknowledged that she should have returned the check; she knew what the "right" thing to do was all along – there was not a good faith error. CP 77. Here, the Claimant lacked any discretion or judgment in the process and her actions evidence her intent to circumvent the process and take what could not be approved legally. The Claimant's plea that she committed a good faith error in judgment or discretion is meritless.

II. Conclusion

Rapada fails to demonstrate that the Decision of Commissioner was invalid. The Commissioner's findings are amply supported by the record below. Simply put, Rapada intentionally violated tribal accounting

policies, circumvented the process, and directed subordinate employees to assist her in order to ensure the printing of her personal reimbursement request would occur before the weekend. The record below firmly evidences that the Claimant's action did not constitute a good faith error and the Claimant lacked any discretion in the matter. Accordingly, this Court should affirm the Decision of Commissioner. The Claimant has not met her burden; she committed misconduct.

Respectfully submitted on this 2nd day of March, 2016.

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I hereby certify that on the 3rd day of March, 2016, I caused to be served the foregoing **REPLY BRIEF OF APPELLANT NOOKSACK INDIAN TRIBE** on the following parties at the following address:

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