

74116-1

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NO. 74116-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION 1

NOOKSACK INDIAN TRIBE,

Appellant,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF EMPLOYMENT SECURITY,

Cross-Appellant,

and

NADENE RAPADA,

Appellee.

BRIEF OF APPELLANT NOOKSACK INDIAN TRIBE

Raymond Dodge, WSBA #16020
Rickie Wayne Armstrong, WSBA #34099
NOOKSACK INDIAN TRIBE
OFFICE OF TRIBAL ATTORNEY
5047 Mt. Baker Hwy
P.O. Box 63
Deming, WA 98244
Tel: (360) 592-4158
Fax: (360) 592-2227

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Attorneys for Appellant Nooksack Indian Tribe

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I. Introduction

The Nooksack Indian Tribe, interested employer and appellant, files this brief in support seeking reversal of the Superior Court's Order on Petition for Review and reinstating the Employment Security Department (ESD) Commissioner's decision.

II. Assignments of Error

- A. *The Superior Court erred in entering its Order on Petition for Review, which reversed the Decision of Commissioner that denied Ms. Rapada's claim for unemployment based upon disqualifying misconduct.*

III. Issues Pertaining to Assignments of Error

- A. Whether the Appellee Rapada met her burden to demonstrate that the Decision of Commissioner was invalid when substantial evidence in the administrative record demonstrated that the Appellee was (1) well-aware of the employer's accounting policies aimed at protecting tribal assets and (2) chose to completely disregard those policies to ensure she received a reimbursement check for which she was not entitled.
- B. Whether substantial evidence contained in the administrative record supports the Commissioner's findings that the Appellee Rapada violated a well-known reasonable company rule when the Appellee knew that the employer's accounting policies required preapproval of all reimbursement requests and the Appellee disregarded the requirement to ensure she personally received a reimbursement request for which she was not entitled.
- C. Whether the Appellee Rapada's actions of: (1) submitting a reimbursement request without the necessary approvals; (2)

directing subordinate staff to process the request in the absence of said approvals, and; (3) cashing of a reimbursement check without authorization in violation of the employer's accounting policy constitute disqualifying misconduct.

IV. Statement of Issue

Whether the Superior Court's Order on Petition for Review should be reversed and the Decision of the Commissioner affirmed.

V. Statement of the Case

A. Procedural Facts.

The Nooksack Indian Tribe ("Tribe") terminated the Appellee Rapada's ("Rapada") employment on December 27, 2013 for misconduct premised upon multiple violations of the Tribe's accounting and personnel policies, which ultimately led to the loss of tribal assets. Administrative Record (AR) at 122-123. Rapada sought, and was initially granted, unemployment benefits from the Employment Security Department ("ESD"). AR at 94-98. On January 11, 2014, the Tribe appealed the initial determination and on March 21, 2014, the Administrative Law Judge ("ALJ") issued an Initial Order concluding that Rapada made a "good faith error in judgment" and therefore was entitled to unemployment benefits. AR 101-111; AR 303-311.

On April 17, 2014, the Tribe appealed the Initial Order to the Commissioner's Review Office. AR 315-320. On May 9, 2014, the Commissioner's Review Office, the ultimate finder of fact, issued the Decision of Commissioner which adopted findings of fact, conclusions of law and found that Rapada had committed disqualifying misconduct as contemplated by R.C.W. 50.20.066(1). AR 325-329.

On June 2, 2014, Rapada filed a Petition for Review in the Whatcom County Superior Court pursuant to R.C.W. 34.05.570 et. seq. AR 1-9. Following briefing and a hearing, the Superior Court issued an Order on Petition for Review, reversing the Decision of Commission and which is the subject of this appeal. AR 342-345.

B. *Facts of December 20, 2013.*

On or about December 20, 2013, Rapada, the then-current Accounting Director of the Tribe, reported to work. AR 41, 60-61, 64, and 74. Rapada's direct supervisor, Jeff Meyer ("Meyer"), Chief Financial Officer, was on vacation, and had previously delegated his signing authority for the Tribe's accounting department to the Tribe's Controller, Elizabeth Ames ("Ames¹"). AR 41, 47, 62, and 181. In

¹ Elizabeth Ames legally changed her name from Elizabeth Flones during the pendency of the administrative proceedings.

Meyer's absence, Rapada's supervisor was the Tribe's General Manager, Katherine Canete ("Canete"). AR 122-123.

The Tribe declared an administrative leave day on December 20, 2013 due to inclement weather; however, necessary staff, including Canete, Rapada, and Ames reported to work in order to process payroll, prepare for budget meetings, and conduct other necessary transactions. AR 61, 63, and 74. Rapada was present in order to ensure payroll was completed. AR 74-75. Early in the morning, Ames and Canete informed Rapada that they would be in a meeting in a nearby tribal building, but would be available by email and/or text, and would return late in the day. AR 64 and 74.

While Ames and Canete were in a meeting, Rapada completed and submitted a request for a mileage reimbursement, which consisted of a Mileage Report and a Requisition. AR 41, 63, and 75. Prior to submission of the request, Rapada failed to obtain any necessary signatures documenting approval for the request although she knew both Ames and Canete were available by text and email and would return later in the day. AR 64, 74-75, 184, and 186-187. Following Rapada's completion of the mileage reimbursement forms, Rapada directed subordinate staff (one of which was related to her) that Rapada would

later obtain necessary approvals and to process the request without the requisite approvals. AR 75. Staff, pursuant to Rapada's representations and directives, processed the mileage request by generating a Purchase Order, printing a check, and obtaining signatures from appropriate check signors. AR 41-42, 63, 67-68, and 75. Rapada then left the documentary proof of the transaction (with the exception of the requisite approvals) in Ames' in-box for an after-the-fact review. AR 63, 75, and 181-187. Upon Ames' return to the office, Ames met with Rapada to discuss discrepancies in Rapada's reimbursement request. AR 63, 68-69, 75-77, and 181-187. Rapada told Ames that one destination on the Mileage Report was inaccurate, at which time Ames also discovered Rapada requested reimbursement for a trip from home to her normal worksite, or "commuter mileage". AR 63, 67-69, and 75-77. Ames informed Rapada that Rapada could not be reimbursed for commuter mileage. AR 63, 76, and 187. However, as Ames was not Rapada's supervisor, Ames could not demand return of the check, but could merely report the failure to follow Tribal policies to her supervisor - Meyer. AR 63, and 69-70. In the following hours, despite Rapada knowing she did not have any approval for the reimbursement or check, Rapada took no action to correct the original request, return the improperly issued check, or appeal Ames' denial to Canete. AR 68-69 and 76-77. Rather, at approximately

7:00 p.m., Rapada left work for the day and cashed the check at the neighboring casino. AR 60-61, 76, and 188. Rapada was ultimately terminated for this misconduct. AR 42, 76, and 122-123.

C. *Tribal Policies and Rapada's Knowledge of Said Policies.*

The Nooksack Tribal Council – the tribal legislative body approved both the Tribe's Accounting and Personnel Policies Manual ("Manual"). AR 44, 47, 60, 65, 73-74, 141-144, and 151-169. The Manual is very clear with regards to the process for obtaining employee reimbursement. AR 45-49, 65, 75, 77, and 159-161. First, an employee must complete a Mileage Report and a Requisition. AR 48-49, 67, 75 and 160. The employee then **submits the forms to the Department Director or authorized designee for approval.** *Id.* The Department Director or authorized designee reviews the transaction and determines if the request is allowable; if allowable, the forms are signed and forwarded for entry into the Tribe's accounting software so that a Purchase Order ("PO") may be developed. AR at 160. Once the accounting entry is made into the software program, a PO is developed. *Id.* The Property and Procurement Agent verifies the PO for accuracy and that all other policy requirements are satisfied. *Id.* The Procurement Agent approves the PO by signature and **forwards the PO to the Chief Financial Officer or authorized**

designee and the Tribal Administrator and authorized designee for approval by signature. *Id.*

If the PO is approved, the PO is returned to the Procurement Agent so that an Invoice Voucher can be developed. *Id.* The Invoice Voucher is **forwarded to the Chief Financial Officer or authorized designee for review and approval.** AR 160-161. Once approved, the Invoice Voucher is forwarded to the Accounts Payable Coordinator for check printing. AR 161. Once a physical check is printed, the entire transaction (“AP Packet”) is **reviewed by the Chief Financial Officer or authorized designee to determine whether the checks are validly approved,** then sent to the check signors for signature of the actual check. AR 161-161. At that time, Accounting Department staff notifies the employee that the reimbursement check is ready for pick-up. The Manual also prohibits any employee from approving his or her personal reimbursement request. AR 47. Finally, the Manual empowers the Chief Financial Officer to declare “check run dates.” AR 161. C.F.O. Meyer declared check run dates for employee reimbursements as the 15th and the last day of the month. AR 45-46.

The Manual was available in the Accounting Office, Rapada’s computer on the network drive, and reinforced at regular meetings attended by Rapada. AR 45, 50-51, and 170-178. Further, Rapada

acknowledged that she was well aware of the Manual, as she should have been in her role as Accounting Director. AR 74-75, 112-114, and 117-120. Rapada also attended no fewer than three (3) accounting staff meetings in the prior year wherein the specific topic of the Manual's requirement for necessary approvals on requisitions was discussed. AR 50-51 and 170-178.

In addition, the Tribal Council also approved Personnel Policies governing Rapada's conduct, which Rapada was well aware of. AR 47, 60, 73-74, and 141-144. Again, these policies were reinforced at the same meetings that Rapada attended. AR 50-51 and 170-178.

VI. Argument and Authority

A. Standard of Review.

Judicial review of a final administrative decision of the Commissioner of the Employment Security Department is governed by the Washington Administrative Procedure Act (WAPA). *Macey v. Department of Empl. Sec.*, 110 Wash.2d 308, 310, 752 P.2d 372 (1988); *Safeco Ins. Cos. v. Meyering*, 102 Wash.2d 385, 389, 687 P.2d 195 (1984); *Becker v. Employment Sec. Dep't*, 63 Wash. App. 673, 675, 821 P.2d 81 (1991). 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 (2006). The WAPA allows a reviewing court to reverse an administrative decision when, *inter alia*: (1) the administrative decision is based on an error of law; (2) the decision is not based on substantial evidence; or (3) the decision is arbitrary or capricious. RCW 34.05.570(3). In reviewing administrative action, this court sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency. *See Macey*, 110 Wash.2d at 312, (citing *Farm Supply Distribs., Inc. v. State Utils. & Transp. Comm’n*, 83 Wash.2d 446, 448, 518 P.2d 1237 (1974)); *Shaw v. Department of Empl. Sec.*, 46 Wash.App. 610, 613, 731 P.2d 1121 (1987); *Tapper v. State Employment Sec. Dept.*, 122 Wn.2d 397, 858 P.2d 494 (1993). Therefore, this Court does not consider the superior court’s findings and conclusions, but reviews the Decision of Commissioner exclusively. *Markham Group, Inc. P.S. v. State Dept. of Employment Sec.*, 148 Wn.App. 555, 561, 200 P.2d 748 (2009).

B. *The Decision of Commissioner that Rapada Committed Disqualifying Misconduct is Supported by Substantial Evidence.*

The legislature enacted the Employment Security Act to award

unemployment benefits to “persons unemployed through no fault of their own.” RCW 50.01.010; *Safeco*, 102 Wn.2d at 392. The Act disqualifies a person from receiving benefits if the individual worker is to blame for the unemployment. *Id.* Thus, the Act disqualifies a person from receiving benefits if she was discharged for disqualifying misconduct. RCW 50.20.066(1); 50.04.294.

Misconduct includes the willful or wanton disregard of the rights, title, and interests of the employer. RCW 50.04.294(1)(a). The statute identifies certain conduct as “per se” misconduct. The

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

Here, the Commissioner determined that the Rapada was disqualified from receipt of unemployment benefits due to her disqualifying misconduct and the Decision of the Commissioner is supported by substantial evidence in the administrative record.

Great deference is given to the [c]ommissioner’s factual findings and substantial weight is given to the agency’s interpretation of the law. *Tapper*, 122 Wn.2d at 403. 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 (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 Cancer Research Ctr. V. Holman*, 107 Wn.2d 693, 732 P.2d 974 (1987). This Court should “view the evidence and reasonable inferences therefrom in the light most favorable to the party that prevailed” at the administrative proceeding below. *Id.* Importantly, this Court cannot substitute its judgment on the credibility of the witnesses or the weight to be given to conflicting evidence. *Davis v. Dept. of Labor & Indus.*, 94 Wn.2d 119, 615 P.2d 1279 (1980).

Here, the Commissioner’s finding that the Tribe had reasonable company rules that Rapada was aware of is supported not simply by “substantial evidence”, but by the entire record and the testimony of all the parties. Ames and Meyer from the Tribe, and Rapada, testified that the Tribe had adopted the Manual. AR 44, 47, 60, 65, 73-74, and 151-169. Further, Ames, Meyer, and Rapada testified that they were all aware of the

Manual and specific requirements pertaining to reimbursement requests, which consisted of a multi-step process whereby an employee requesting reimbursement needed several approvals, at different stages of the process, prior to obtaining a reimbursement check. AR 44, 47, 60, 65, 73-74, and 159-161. The Tribe and Rapada provided evidence and/or testimony that the Manual required the approval of the Tribe's C.F.O. for Rapada's initial reimbursement request, then an approval of the Purchase Order, which was generated after submission of the reimbursement request to the Accounts Payable staff, then an approval of the Invoice Voucher, and finally approval of the final "AP Packet", which consists of all the transactional documentation. *Id.* Further, Meyer testified that pursuant to the Manual, check run dates for employee reimbursements were only on the 15th and last day of the month. AR 45-46. Further, Meyer testified that Rapada attended no fewer than three (3) staff meetings wherein the Manual's requirements were discussed and reinforced, specifically the need for approvals on all reimbursement requests prior to processing said requests. AR 45, 50-51, and 170-178. The Commissioner's finding that the Tribe had a reasonable company rule that Rapada was aware of was supported by substantial evidence in the administrative record.

Next, substantial evidence, in light of the whole record, supports findings specific to the issue of Rapada's disqualifying misconduct – that

Rapada submitted and ensured the processing of her reimbursement request without the requisite approvals in violation of the Manual. Both parties provided evidence and/or testimony that Rapada submitted a reimbursement request to the Accounts Payable staff without the necessary approval and ensured said staff processed Rapada's request prior to obtaining such approval (an approval which was never obtained). As such, this Court must affirm the Decision of Commissioner.

Ames, Meyer, and Rapada testified that Rapada submitted a Mileage Report and Requisition for a mileage reimbursement without the necessary approvals. AR 41, 63-640, and 74-75. Further, Ames and Rapada testified that Rapada knew that Ames was available in a nearby building and returned to the primary office late in the day to address important matters, including approval on all necessary documents. AR 64 and 74. Further, Ames, Rapada, and Meyer testified that Rapada's request required Ames' approval prior to being submitted for processing pursuant to the Manual. Both Ames and Rapada testified that Ames personally notified Rapada that Rapada's original request was not approved and that Rapada took no action to modify her original request in order to obtain approval or appeal Ames' denial to Canete. AR 63, 68-69, 75-77, and 181-187. Finally, the administrative record is clear on the most significant point- Rapada, knowing that she did not have approval for a check she

already possessed, left the office and cashed the check at the neighboring casino. AR 60-61, 68-69 and 76-77. Findings related to Rapada's misconduct are supported by substantial evidence in the administrative record.

Although Rapada attempted to cast doubt on the Tribe's policy requirements concerning reimbursement requests, the administrative record is devoid of a single piece of evidence or testimony demonstrating that Rapada either: (1) obtained approval for her reimbursement request or (2) was not required to obtain such approval for her reimbursement request.

Rapada's only defense for her failure to obtain approval for her reimbursement request can only be pinpointed to the limited testimony of former employees who attempted to cast doubt on the director-approval requirement for employee reimbursements. First, Rapada testified that she had always been reimbursed for similar mileage reimbursement requests. AR 76. Even if such a reimbursement request were allowable pursuant to federal law, which it is not, Meyer testified that in the prior year - 2013, Rapada did not make such a request, nor was such a request approved. AR 83. Rapada's testimony (if accepted by the Commissioner as true, which it was not) does not conflict with the findings made by the Commissioner, that is, **Rapada failed to obtain the necessary approval**

for the current reimbursement request prior to cashing the reimbursement check.

Second, Ms. Leah Zapata, a former accounting employee of the Tribe, testified that timesheets (completely unrelated to employee reimbursement requests) were processed on a daily basis even though the timesheets did not contain the necessary approvals. AR 79-81. Ms. Zapata also testified she had never seen a mileage reimbursement (such as Rapada's reimbursement request) processed without the proper approvals or signatures. AR 81. Further, on rebuttal, Meyer testified that Ms. Zapata never worked in the accounts payable department and would not have seen reimbursement requests and that Zapata was also terminated from her position for violations of the Manual. AR 83-85. Again, Zapata's testimony (if accepted by the Commissioner as true, which it was not) was not contrary to the findings made by the Commissioner, that is, **Rapada failed to obtain the necessary approval for the current reimbursement request prior to cashing the reimbursement check.**

Lastly, Rapada testified that she intended to obtain after-the-fact approval for her reimbursement request; an approval she never obtained. AR 75. Rapada was aware at the time she directed coworkers to process her mileage reimbursement that she lacked the requisite approval. *Id.* The record is devoid of any attempt by Rapada to obtain an after-the-fact

approval prior to taking the reimbursement check. Ames and Rapada testified that Ames specifically informed Rapada that her request was not approved. AR 63, 76, and 187. In the hours following Ames' notice to Rapada, Rapada did not attempt to submit a new request to Ames, nor did Rapada appeal Ames' denial to Canete. AR 68-69 and 76-77. Rather, Rapada took the unapproved check and cashed it at the neighboring casino. AR 60-61, 76, and 188. Further, from December 20, 2013 until the date of her termination, Rapada made no known effort to obtain an after the fact approval. The Commissioner's finding that Rapada never obtained approval (either before- or after-the-fact) for her reimbursement request as required by the Manual is substantially supported by the administrative record.

C. *Rapada's Violation of a Well-known, Reasonable Company Policy Constituted Per Se Misconduct*

This Court reviews the commissioner's legal conclusions for error of law. *Markham* at 561. Whether an employee's behavior constitutes misconduct warranting termination is a mixed question of law and fact. *Tapper*, 122 Wn.2d at 402-03. On mixed questions of law and fact, this Court determines the law and then applies the facts as found by the agency - in this case, the Commissioner. *Hamel v. Emp't. Sec. Dep't.*, 93

Wn.App. 140, 145, 966 P.2d 1282 (1998). This Court reviews questions of law de novo, giving substantial weight to the agency's interpretation of the statutes it administers. *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988).

In the current case, **Rapada's actions constituted per se misconduct.** The relevant findings of fact are outlined in the Commissioner's decision. The Tribe adopted a Personnel Policy and its Manual. AR 44, 47, 60, 65, 73-74, 141-144, and 151-169. The Tribe made these policies available to all accounting employees via their work computers and shared drive, a hardbound version was available in-office to all accounting employees, and Rapada acknowledged she was well-aware of these policies. AR 45, 50-51, and 170-178. Furthermore, Rapada attended no less than three meetings of the Accounting Department in which the specific accounting policies addressing the need for director approval for requisitions was emphasized. AR 50-51 and 170-178. Rapada, well-aware of the Manual's director approval requirement for reimbursements, took it upon herself on December 20, 2013, (1) to request reimbursement for an unallowable expense, (2) to ensure other staff (one of whom was related to Rapada) processed the request and issued a check, and then (3) to cash the check at the adjacent casino. AR 41-42, 60-61, 63, 67-68, 75-76 and 188. Rapada's actions constituted per se misconduct, especially when viewed in

light of Rapada's position of trust and responsibility within the Accounting Department. Worse yet, Rapada's actions were completely unnecessary given that Ames specifically notified Rapada that the transaction was not authorized prior to Rapada cashing the check. AR 63, 68-69, 75-77, and 181-187. Rapada testified:

Q: Judge Studt: But I think you told me during your testimony that she [Ames] has said that you were not going – you were not approved for that entry. Is that right?

A: Ms. Rapada: Yes. AR 77.

Rapada also testified “when I left at the end of the day. So I grabbed the check off my desk and left and – for the day.” AR 76. The record, when viewed as a whole, substantially supports the Commissioner's findings that Rapada committed per se misconduct by violating a well-known reasonable company rule.

VII. Conclusion

Rapada has not shown 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, which directly resulted in a monetary loss. In so doing, the Commissioner correctly identified the relevant law; the Commissioner correctly found that Rapada's actions constituted statutory misconduct.

Accordingly, this Court should reverse the Superior Court Order on Petition for Review and should affirm the Decision of Commissioner.

Respectfully submitted on this 30 day of December, 2015.

NOOKSACK INDIAN TRIBE
OFFICE OF TRIBAL ATTORNEY

By: _____


Raymond Dodge, WSBA #16020
rdodge@nooksack-nsn.gov
Rickie Wayne Armstrong, WSBA
#34099
rarmstrong@nooksack-nsn.gov
*Attorneys for Appellant Nooksack
Indian Tribe*

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2015, I caused to be served the foregoing **BRIEF OF APPELLANT NOOKSACK INDIAN TRIBE** on the following parties at the following address:

- [X] COURT OF APPEALS DIVISION 1
One Union Square
600 University Street
Seattle, WA 98101-4170

- [X] NADENE RAPADA
c/o: Shepherd and Abbott
Attn: Bethany Allen, WSBA 41180
2011 Young Street, Ste. 200
Bellingham, WA 98225

- [X] WASHINGTON ATTORNEY GENERAL
Attn: R July Simpson
PO Box 40110
Olympia, WA 98504-0110

- [X] EMPLOYMENT SECURITY DEPARTMENT
COMMISSIONER, EMPLOYMENT SECURITY DEPT.
Attn: Records Center Manager
212 Maple Park Drive
P.O. Box 9046
Olympia, WA 98507-9046

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 electronic service
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Sue Gearhart
Legal Assistant, Nooksack Indian Tribe