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

LAWRENCE C. LITTLE,

Appellant,

v.

STATE OF WASHINGTON,
EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

**BRIEF OF RESPONDENT
EMPLOYMENT SECURITY DEPARTMENT**

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I. INTRODUCTION

Unemployment benefits provide financial assistance to workers between periods of employment while they seek new work. For this reason, full-time students are generally disqualified from receiving unemployment benefits unless they can establish they are available for work, which means that they are actively seeking work and are willing to immediately accept any work that is suitable. RCW 50.20.095, RCW 50.20.010(1)(c)(ii).

After losing his job as a certified occupational therapy assistant in February 2016, Appellant Lawrence Little began applying for unemployment benefits. That spring, Little enrolled in a full-time baccalaureate program at Grays Harbor College. He attended 10 hours of class per week on weekday mornings, with four hours of class per week on weekday evenings. Little informed the Department that he would be unwilling to drop his classes if he were offered conflicting employment.

The Commissioner correctly concluded that Little was not actually available for work and was, therefore, disqualified from receiving unemployment benefits while enrolled in school. RCW 50.20.095. Little's course work placed a substantial limitation on the hours he could work. And, because he reported he was unwilling to drop classes for conflicting work, he was not "actually available" for work under RCW 50.20.095(3) and RCW 50.20.010(1)(c)(ii).

Additionally, the Commissioner correctly concluded that Little was liable to repay unemployment benefits for a week in which he failed to appear for a mandatory job search workshop because he was attending a chemistry lab. This is not “good cause,” akin to illness or disability, that would excuse a claimant from participating in the workshop under WAC 192-180-040. Because the Commissioner’s decision is supported by substantial evidence and free from errors of law, this Court should affirm.

II. STATEMENT OF THE ISSUES

1. Did the Commissioner correctly conclude that Little was disqualified from unemployment benefits under RCW 50.20.095 and RCW 50.20.010(1)(c)(ii) when he admitted that he, as a full-time student, was available to work only five hours per day and he reported that he would be unwilling to drop classes to accept suitable work that conflicted with them?
2. Did the Commissioner correctly determine that Little was disqualified from receiving unemployment benefits for the week ending May 21, 2016, because he did not establish “good cause” for missing a mandatory job search workshop under WAC 192-180-040 when he was attending a college class instead?

III. COUNTERSTATEMENT OF THE CASE

Little worked as a certified occupational therapist assistant until his separation in February 2016, when he began claiming unemployment

benefits. Commissioner's Certified Administrative Record (AR) 12–13. On April 11, Little enrolled in a 15-credit full-time Organizational Management Program at Grays Harbor College. AR 15–16, 92 (Finding of Fact (FF 2)), 106 (FF 2). When Little completes the program, he will receive a Bachelor of Science degree in Organizational Management. AR 16, 92 (FF 2), 106 (FF 2).

When Little enrolled in school, he represented to the Department that he would be unwilling to accept employment that was offered to him if it conflicted with his classes. AR 34, 106 (FF 2). On his student eligibility questionnaire, he explained that his schedule with his previous employer “was perfect for a full time student. I was wrongfully terminated but I can work the same schedule for any local skilled nursing home”¹ AR 34. He provided his class schedule on the questionnaire showing that he was attending classes in-person for 14 hours per week, 10 of which were scheduled on weekday mornings. AR 32, 106 (FF 2). He reported he was available for work for only five hours per day. AR 34; *see* AR 106 (FF 2).

Little also applied for Commissioner Approved Training (CAT) benefits, which relieve qualified unemployment benefits claimants of the obligation to look for work while enrolled in school. *See* RCW 50.20.043.

¹ The Department issues students an eligibility questionnaire to determine whether they are “actually available” for work, per RCW 50.20.095(3).

The Department denied CAT benefits because Little's baccalaureate course of study does not qualify for the program.² AR 24–27, 92 (FF 1). The Department also issued a second determination denying Little's application for unemployment benefits because, given his class schedule and unwillingness to drop classes for suitable work, he was not "available" for work. AR 75–81, 106 (FF 1).

Additionally, during the week ending May 21, Little missed a mandatory job search workshop at a local Work Source office to attend a chemistry lab class. AR 18–19, 100 (FF 3). Accordingly, the Department issued a third determination denying Little unemployment benefits for that week. Little did not attend the workshop because he believed he would fail his chemistry course if he missed the lab that day. AR 19, 100 (FF 3).

Little appealed all three determinations to the Office of Administrative Hearings. AR 50–51, 70–71, 87–88. An administrative law judge (ALJ) issued three separate initial orders affirming the Department's determinations. AR 94, 101, 108. First, the ALJ determined that Little's baccalaureate program is not "training" under WAC 192-200-010 and thus he was not eligible for CAT. AR 94 (Conclusion of Law (CL) 6). Second, the ALJ concluded Little was not available for work beginning April 11,

² Little no longer challenges this determination on appeal. *See* Appellant's Br. 6.

and thus was disqualified from unemployment benefits, because he was enrolled in daytime classes and was unwilling to change or drop his classes to accept conflicting employment. AR 107 (CL 5). Finally, the ALJ ruled that a conflict with classes does not establish good cause for failing to attend a mandatory job search workshop. AR 101 (CL 14).

Little petitioned the Commissioner for review of the three initial orders. AR 113–29. The Commissioner affirmed all three decisions, adopting the ALJ’s findings of fact and conclusions of law. AR 132. The Commissioner concluded that Little was unavailable because he was unwilling to change or drop his classes. AR at 133. Although Little testified at his administrative hearing that he would drop school if offered full-time work that conflicts with his school schedule, AR 21, the Commissioner agreed with the ALJ that Little’s statement in his application for benefits was more credible. AR 133. The Commissioner also affirmed the denial of CAT and denial of unemployment benefits during the week ending May 21. *Id.*

Little petitioned the Grays Harbor County Superior Court for judicial review of the Commissioner’s decision. The court affirmed. CP 1–3. Little now appeals to this Court. In his brief, he does not challenge the

Department's decision to deny CAT benefits. *See* Appellant's Br. 6.³ Therefore, this appeal concerns only the decision finding Little not "available" for work and, thus, disqualified for benefits and the decision denying benefits for the week he missed the job search workshop.

IV. STANDARD AND SCOPE OF REVIEW

Judicial review of the Commissioner's decision is governed by the Washington Administrative Procedure Act (APA). RCW 34.05.570; RCW 50.32.120. This Court sits in the same position as the superior court and applies the APA standards directly to the agency decision and record. *Courtney v. Emp't Sec. Dep't*, 171 Wn. App. 655, 660, 287 P.3d 596 (2012); RCW 34.05.476(3). The Court reviews the decision of the Commissioner, not the underlying decision of the ALJ—except to the extent the Commissioner's decision adopted any findings and conclusions of the ALJ's order. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993). The Commissioner's decision is considered *prima facie* correct, and the party challenging the decision, Little, has the burden of demonstrating its invalidity. RCW 34.05.570(1)(a); *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015).

³ "As I've pointed out about 5 million times, my eligibility for CAT is completely irrelevant"

This Court undertakes the limited task of reviewing the findings of fact for substantial evidence. 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). Substantial evidence is that which 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). Review of the facts is limited to the administrative record. RCW 34.05.558. In reviewing the record for substantial evidence, the Court must do no more than search for the presence of evidence. *Dep’t of Licensing v. Sheeks*, 47 Wn. App. 65, 69, 734 P.2d 24 (1987). Evidence may be substantial even if conflicting or susceptible to other reasonable interpretations. *See Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713–14, 732 P.2d 974 (1987). The presence of conflicting evidence does not defeat the presence of substantial evidence in support of a Commissioner’s finding. *See Cummings v. Dep’t of Licensing*, 189 Wn. App. 1, 14, 355 P.3d 1155 (2015). This Court may not reweigh evidence or re-determine credibility. *William Dickson Co.*, 81 Wn. App. at 411. Any unchallenged findings are “treated as verities on appeal.” *Darkenwald*, 183 Wn.2d at 244.

The Court reviews questions of law *de novo*, giving substantial weight to the agency’s interpretation of the statutes it administers. *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). Whether a

claimant is “available” is a mixed question of law and fact. *Arima v. Emp’t Sec. Dep’t*, 29 Wn. App. 344, 347, 628 P.2d 500 (1981). 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. A court is not free to substitute its judgment for the agency’s 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.*

In addition, when an order is alleged to be arbitrary or capricious under RCW 34.05.570(3)(i), the scope of review is narrow, and the challenger carries a heavy burden. *Brown v. Dep’t of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 16, 972 P.2d 101 (1998). An action is arbitrary and capricious only if it is a “willful and unreasoning action, without consideration and in disregard of facts and circumstances.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1995).

V. ARGUMENT

The unemployment compensation fund exists to “reduc[e] involuntary unemployment and the suffering caused thereby to the minimum.” RCW 50.01.010. The fund is not intended to subsidize students engaged in academic, non-vocational pursuits. RCW 50.20.095; WAC 192-

200-005(4)(b). Thus, unless enrolled in approved training, full-time students are presumed ineligible for unemployment benefits. RCW 50.20.095. The Court should affirm because Little did not rebut—and in fact confirmed—the presumption that he was not “available” for full-time work under the Employment Security Act. RCW 50.20.010(1)(c)(ii).

A. Substantial Evidence Supports the Finding that Little was Unwilling to Drop His Courses if Offered Conflicting Employment

The Commissioner found that Little was enrolled in a full-time baccalaureate program, AR 92 (FF 2), that he attended classes on weekday mornings, AR 106 (FF 2), was unwilling to drop those classes to accept conflicting employment, AR 106 (FF 2), 133, and that he missed his work search workshop because he was in class, AR at 100 (FF 3). The only finding Little challenges is that he was unwilling to drop his courses for conflicting work. *See* Appellant’s Br. 6; AR 107 (FF 2), 133. All other findings, therefore, must be treated as verities. *Darkenwald*, 183 Wn.2d at 244.

Substantial evidence supports the finding that Little was unwilling to drop his classes if he were offered suitable work that conflicted with them. On his student eligibility questionnaire, Little admitted he would not drop his classes to accept a job if the hours conflict with his schedule. AR 34, 106 (FF 2), 133. Notably, he stated, “the work schedule for [my prior employer] was

perfect for a full-time student I can work the same schedule for any local skilled nursing home.” AR 34, 133. The statement showed that he would work full time, but only if that work was outside of class hours. His statements indicate that he would not take every position that was offered to him.

To challenge the Commissioner’s finding, Little points to his conflicting testimony at the administrative hearing. There, he testified that he would drop courses if an employer offered him conflicting full-time work. AR 20. The Commissioner weighed the conflicting evidence and concluded that Little’s responses to the questionnaire were more credible than his self-serving testimony. AR 133. Prehearing statements may be made before the claimant is aware of the effect they would have on the adjudication of his claim. Consequently, they are entitled to great weight. *See e.g. Huguenin v. Emp’t Sec. Dep’t*, 32 Wn. App. 658, 661, 648 P.2d 890 (1982) (affirming finding of fact when hearing examiner assigned more weight to a statement made by the claimant on his application for benefits over his conflicting testimony); *In re Fields*, Empl. Sec. Comm’r Dec.2d 874 at *2 (1999) (pre-hearing statements are accorded more weight than conflicting testimony).

The Court may not reweigh evidence or revisit this credibility determination on appeal. *William Dickson Co.*, 81 Wn. App. at 411. The standard for review is whether substantial evidence supports the Commissioner’s findings, not whether the Court finds the petitioner’s view

of the facts persuasive. *Smith*, 155 Wn. App. at 35. The Court may not substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403. Notably, the presence of conflicting evidence does not defeat the presence of substantial evidence in support of an administrative finding. *See Cummings*, 189 Wn. App. at 14. The Court is not to disturb findings of fact supported by substantial evidence, even if conflicting evidence exists in the record. *Id.* at 11. So although Little testified that he would drop courses for conflicting employment, that testimony was not adopted as a finding of the CRO, and is therefore not before this Court for review.

In addition, the scope of review of Little's eligibility for benefits covers only the weeks ending April 16—the week Little enrolled in college—through July 16, 2016—which is just before the ALJ held the administrative hearing. AR 134. Thus Little's assertion that he later dropped a course at the college, Appellant's Br. 7, is not relevant to his eligibility for benefits during the weeks at issue. Notably, the Department invites individuals to contact the Department for eligibility reconsideration once the disqualifying condition no longer exists. AR 76; *see* WAC 192-200-005(2) (disqualification ends midnight on Saturday of the week prior to the first full week a claimant is no longer registered for 12 or more hours of instruction. The claimant must certify to the Department that he is no longer

registered for 12 or more hours for at least 60 days.).⁴ Whether Little later applied for eligibility reconsideration is not evident from his briefing. Nevertheless, a decision on that issue would be separate from the present appeal and is not before this Court.

B. The Commissioner Correctly Concluded that Little's Full-time Student Status Disqualified Him from Unemployment Benefits

In order to receive unemployment benefits, an individual must, among other requirements, be able to work and available for work. RCW 50.20.010(1)(c). A claimant is "available for work" if they are willing and able to work during all the usual hours and days of the week customary for their occupation. WAC 192-170-010(1)(a), (d). A claimant may place certain restrictions upon his or her availability for work and yet be eligible for benefits, but a substantial restriction will render him ineligible. WAC 192-170-010(1)(c); *In re Wolanski*, Empl. Sec. Comm'r Dec.2d 860 at *2 (1997).⁵ The burden is on the claimant to show compliance with the eligibility criteria. *Jacobs v. Office of Unempl. Comp. & Placement*, 27

⁴ Although the individual is considered "disqualified," there is no requirement that the claimant "purge" the disqualification through earnings, as is the case with misconduct or a voluntary quit without "good cause." See RCW 50.20.066(1), RCW 50.20.050(2). Instead, the individual need only contact the Department for reconsideration of availability once the disqualifying condition no longer exists. See AR at 76; WAC 192-200-005(2).

⁵ The precedential decisions of the Commissioner referenced in this brief are included as an appendix in alphabetical order. The Commissioner can designate certain decisions as precedent by publishing them. RCW 50.32.095. The Court may rely on those cases as persuasive authority (parties other than the Department can cite the cases). *Martini v. Emp't Sec. Dep't*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000).

Wn.2d 641, 651, 179 P.2d 707 (1947). Little did not meet his burden before the Commissioner.

1. Full-time Students Are Presumed Ineligible for Benefits

Students who claim benefits are subject to the availability requirement in RCW 50.20.010(1)(c). WAC 192-200-005(5)(b). Full-time students taking 12 or more credit hours are presumed ineligible for unemployment benefits unless they are in Commissioner Approved Training, an approved self-employment assistance program, or demonstrate, by a preponderance of the evidence, that they are actually available for work.⁶ RCW 50.20.095; WAC 192-200-005. In order for a student to establish actual availability for work, he may present evidence of, and the Commissioner shall consider the following factors: prior work history, scholastic history, past and current labor market attachment, and past and present efforts to seek work. RCW 50.20.095(3).

Because Little was enrolled in more than 12 credit hours, he was presumed ineligible for benefits unless he could demonstrate his actual availability for work.

⁶ In the case of students, a determination of unavailability disqualifies the claimant for the period starting the week instruction begins until midnight on Saturday of the week prior to the first full week in which the claimant is no longer registered for twelve or more hours of instruction. WAC 192-200-005(2).

2. The Commissioner correctly concluded that Little's classes imposed a "substantial restriction" on his hours of availability

Full-time students must establish by a preponderance of the evidence that their student status does not significantly interfere with their actual availability for work. WAC 192-200-005(3)(c). To do so, they must show that their academic pursuits are not a "substantial restriction" on their availability for work. *In re Wolanski*, Empl. Sec. Comm'r Dec.2d 860 at *2. Generally, a restriction is substantial if it renders a claimant unavailable for *any* hours customarily worked in his occupation. *Id.*; *cf. In re Brunner*, Empl. Sec. Comm'r Dec.2d 928 at *1 (2009) (student not disqualified where she was enrolled in online classes so that she was available to work full-time and on any shift).

For example, in *In re Wolanski*, the Commissioner concluded that a receptionist who attended school in the mornings was not able and available to accept suitable work. Empl. Sec. Comm'r Dec. 860. The Commissioner determined that receptionists customarily work in the mornings and, therefore, the claimant was not available for all hours customary to that occupation. *Id.* at *2. The claimant was unwilling to leave school to accept employment. *Id.* at *1. The Commissioner was not persuaded by the claimant's argument that she previously attended school and worked full time. *Id.* at *2. Thus if a claimant wants to collect unemployment benefits

while he attends school, he must show that his studies do not constitute a substantial restriction on his availability for hours customary to his profession. *Id.*

In this case, Little was enrolled in a full-time program of study at Grays Harbor College. AR 34, 106 (FF 2). Therefore, he was presumed to be unavailable. RCW 50.20.095. Moreover, the Commissioner correctly applied the law to the facts and determined that Little's coursework actually placed a substantial restriction on his availability for work. AR at 134. Little admitted that he takes 15 credit hours, with most classes scheduled on weekday mornings. AR at 32, 106 (FF 2). He reported spending four hours daily outside of class on his studies. AR at 32; *see* AR at 106 (FF 2). His schoolwork and attendance at school during daytime hours meant that he was available for work only five hours per day. AR at 34, 106 (FF 2). And, like the claimant in *Wolanski*, Little was unwilling to drop classes to accept conflicting work. *See In re Wolanski*, Empl. Sec. Comm'r Dec. 860 at *1; AR at 32, 133. The Commissioner correctly determined that Little's availability for full-time employment was substantially restricted.

3. Little did not establish that he was actually available for work

A full-time student must show that he is actually available for work, and may provide evidence of prior work history, scholastic history, past and

current labor market attachment, and past and present efforts to seek work. RCW 50.20.095(3); WAC 192-200-005(3)(c); *see In re Brunner*, Empl. Sec. Comm'r Dec.2d 928 at *1. For example, in *Brunner*, the Commissioner allowed benefits for a student who actively sought work in any suitable job and was actually available to work full time on any shift because she was enrolled in online classes. *In re Brunner*, Empl. Sec. Comm'r Dec.2d 928 at *1; *see* RCW 50.20.095(3)(c) (current labor market attachment), RCW 50.20.095(3)(d) (efforts to seek work). Her flexible online arrangement allowed her to complete her schoolwork any time she was not scheduled to work. *In re Brunner*, Empl. Sec. Comm'r Dec.2d 928 at *1.

In contrast here, Little was enrolled in courses that require his attendance at particular times of the day (10 scheduled hours before noon on weekdays, and 4 scheduled hours during evenings). AR 32. It is Little's position that the customary hours for his profession range from 6:00 a.m. to 6:00 p.m. AR 141. So although Little was available for *some* of the hours customarily worked in his profession, he was not available for *all* hours, as required by RCW 50.20.010(1)(c)(ii) and WAC 192-170-010(1)(a). AR at 34, 134.

Little does not claim that his school work can be completed at any time of the day, but rather, that he can complete work hours before or after his

scheduled classes. Appellant's Br. 6. But this is not the standard for determining one's availability for work.

Just because an individual *could* find a job in his profession that works with his school schedule does not make him available under RCW 50.20.010 and WAC 192-170-010. A claimant must be willing to accept any suitable work. RCW 50.20.010(1)(c)(ii). For example, the Court of Appeals ruled that claimants who had been hired for a nine-month school year could not claim benefits during the summer months when they limited their work search to jobs that would end before the beginning of the next school year. *Arima*, 29 Wn. App. 344. The Court ruled this self-imposed limitation rendered the claimants ineligible for benefits as they were not "exposed unequivocally to the labor market during the summer." *Id.* at 351.

Similarly, by only being willing to accept work that would accommodate his school schedule, Little substantially restricted his availability and limited his opportunity to return to work at the earliest possible time. WAC 192-170-010(1)(c); *see In re Wolanski*, Empl. Sec. Comm'r Dec. 860. Little's argument turns the availability standard on its head. In order to collect benefits, a claimant must be flexible to accommodate the needs of potential employers, not the other way around.

Nor did Little establish that customary hours are so flexible that a full-time schedule of classes would not substantially restrict his availability for

work. Little now relies on “written witness testimony” throughout his brief to support his argument that he can work a flexible schedule. Appellant’s Br. 2, 3, 5, 6 (attached as part of his notice of appeal to this Court. CP 11–12). But this “written witness testimony” is a letter dated September 2, 2016, which is after the Commissioner issued its decision in this matter, so the Commissioner did not consider it. It was never received in evidence, and the person who signed it did not appear and was never sworn as a witness. AR at 8–22. It is not part of the administrative record, and this Court may not consider it. *See* RCW 34.05.476(2)(d), (3). Even if it were proper evidence, the letter represents the view of one potential full-time employer, not necessarily the customary practice in Little’s profession. *See* WAC 192-170-010(1)(a), (d).

4. Little’s Scholastic History Does Not Overcome the Commissioner’s Finding that His School Schedule Created a Substantial Restriction

Although a student may show he has previously been able to schedule work around school, RCW 50.20.095(3)(a), (b) (Commissioner shall consider, among other things, prior work history and scholastic history in determining a student’s “actual availability for work”), that is not dispositive. For example, the Commissioner denied benefits to a high school student who attended classes in the morning hours each weekday, even though he testified he was available for jobs that did not conflict with his

schooling and that he had previously found jobs that allowed him to continue his schooling. *In re Gatherers*, Empl. Sec. Comm'r Dec. 1026 at *1 (1973). The Commissioner reasoned that his previous ability to schedule work around his classes did “not operate to permit him to limit his availability accordingly.” *Id.*

Here too, although Little was previously able to schedule work around school, and reported that he has worked and attended school full-time in the past, AR 33–34, those factors do not overcome the finding that Little was not available to work hours customary to his profession during the weeks at issue. Little’s daytime course schedule created a substantial restriction on his availability for new employment, and the restrictions on his job search limited his opportunity to return to work at the earliest possible time. RCW 50.20.010(1)(c)(ii); WAC 192-170-010(1)(c), (d); *See In re Wolanski*, Empl. Sec. Comm'r Dec.2d 860 at *2 (“Generally, a restriction is substantial if it renders a claimant unavailable for any hours customarily worked in his or her occupation. . . . This is true, even if, as here, a claimant has been previously successful in finding work which allowed him or her to continue in school.”). The Commissioner properly concluded that Little’s school attendance substantially restricted his availability.

5. The Commissioner properly determined that Little was more attached to academics than the labor market, RCW 50.20.095(3)(c)

If a student's class schedule conflicts with customary work hours, it is within the Commissioner's authority to determine whether the student's primary attachment is to academics or to the workforce. RCW 50.20.095(3)(c) (Commissioner shall consider past and current labor market attachment); *see In re Ebert*, Empl. Sec. Comm'r Dec.2d 383 at *2-3 (1978) (student with full-time status was ineligible for benefits when his statements and job contacts indicated that he would prefer to find work enabling him to continue school, rather than prioritize working). A claimant whose class schedule conflicts with the customary hours of his profession may still receive benefits if he is willing to make himself available by quitting school to accept conflicting employment. *See In re Peterson*, Empl. Sec. Comm'r Dec. 917 at *3 (1972).

The burden to show continuing labor market attachment, as opposed to academic attachment, is on the claimant. *In re Klein*, Empl. Sec. Comm'r Dec. 1148 at *2 (1974). A claimant's willingness to drop conflicting classes in favor of full-time work is determined by all the circumstances; it is not necessarily determinative that a claimant states he will quit school. *In re Peterson*, Empl. Sec. Comm'r Dec. 917 at *3. Additionally, a student who

indicates that he will not take every suitable job shows that he is not “available.” *In re Pecheos*, Empl. Sec. Comm’r Dec.2d 385 at *2–3 (1978).

As explained above, substantial evidence supports the Commissioner’s finding that Little was not willing to drop school for conflicting full-time work. The Commissioner weighed Little’s written response against his later testimony and found his written response to be more credible. The Commissioner correctly applied the law to the facts and determined that Little’s course work substantially restricted the hours he was available for work. Because Little’s primary attachment is to his academic program, the Commissioner correctly concluded Little was not available for work and was, therefore, disqualified from benefits under RCW 50.20.095.

6. The Court of Appeals may affirm on any ground sufficiently developed in the record

Little argues the Commissioner “conveniently disregarded provisions for individuals to attend 12 or more credit hours under RCW 50.20.095(3)” Appellant’s Br. 2. RCW 50.20.095(3)(a)–(d) identifies the four factors the Commissioner shall consider in determining whether he or she is “actually available” for work. Although the Commissioner’s order does not explicitly cite to RCW 50.20.095, it is clear the Commissioner considered all of the evidence Little provided in support of those factors and concluded that he was not actually available for work. AR 133–34. In fact,

the student eligibility questionnaire elicits information about all four factors. It asks about prior work history, whether the claimant has ever worked full time while attending school, what hours of the day the claimant attends school, and how many hours the claimant spends preparing for class, how many hours they are available for work each day, what type of degree they are pursuing, what they are telling prospective employers about their availability, and whether they would drop courses if offered conflicting employment. *See* AR 31–34. The Commissioner’s findings of fact consider the questionnaire as well as Little’s testimony. AR at 106, 133. The Commissioner’s reasoning shows the Commissioner determined Little’s actual availability based on the statutory factors.

Review of the Commissioner’s legal determinations is *de novo*. *Tapper*, 122 Wn.2d at 403. Thus, the Court may affirm the decision on any ground so long as the record is sufficiently developed to consider that ground. *Cuesta v. Dep’t of Emp’t Sec.*, 200 Wn. App. 560, 575, 402 P.3d 898 (2017). Because the record is sufficiently developed on the factors under RCW 50.20.095(3), and the Court may apply the law to the facts of the case *de novo*, the Court may affirm the Commissioner’s determination that Little did not demonstrate his actual availability for work under that statute. *See Cuesta*, 200 Wn. App. at 575.

C. The Commissioner Properly Denied Little Benefits for the Week He Failed to Attend His Scheduled Job Search Workshop Without Good Cause

The Department may direct claimants to attend a job search workshop or training course to improve the claimant's chances of finding employment. RCW 50.20.044; WAC 192-180-040. A claimant who receives a directive from the Department to attend a workshop and then fails to attend the workshop is ineligible for benefits for the entire week, unless he shows good cause for his absence. RCW 50.20.044; WAC 192-180-040(3). Good cause includes a claimant's illness or disability, an illness or disability in the claimant's immediate family, or if the claimant was present at a job interview scheduled with an employer. WAC 192-180-040(3).

The Commissioner found that Little failed to appear at a mandatory work search workshop held on May 18, 2016, because he was attending a class. AR at 100 (FF 3), 133. This fact is unchallenged and is, therefore, a verity on appeal. *Darkenwald*, 183 Wn.2d at 244.

Based on this finding, the Commissioner correctly concluded that a scheduling conflict with school classes does not establish good cause for failing to attend the workshop. AR 101 (CL 14). Good cause reasons are typically illness, disability, or a job interview, i.e. reasons beyond the claimant's control. *See* WAC 192-180-040(3). Little does not show how his conflict with a chemistry lab course is akin to disability, illness, or like

circumstance. Because Little missed the mandatory workshop, he is ineligible to receive benefits for the entire week in which his absence occurred. RCW 50.20.044.

Little argues that he is a “reasonably prudent person” under WAC 192-140-090 who already knows how to look for a job, and therefore, should not be required to attend the job search workshop. Appellant’s Br. 4–5. But the WAC he relies on provides examples of “justifiable cause” for failing to participate in *reemployment services*, which is one of the eligibility criteria under RCW 50.20.010. RCW 50.20.010(1)(e). Here, Little was ineligible for the week he failed to attend a *job search workshop or training course* under WAC 192-180-040, which the Commissioner is authorized to require under RCW 50.20.044. The two employment services are different, and so are the standards for excusing one’s failure to attend them. The “reasonably prudent person” standard applies to “justifiable cause” for one’s failure to participate in reemployment services, RCW 50.20.010(1)(e)(ii), not failure to attend the job search workshop mandated pursuant to RCW 50.20.044.

Second, even if the “reasonably prudent person” standard applied, that standard is not used to evaluate whether a person has the skills to search for a job, but rather whether the reason for failing to participate in reemployment services is justified. *See* WAC 192-140-090(4). The

Department does not contest that Little is a reasonably prudent person. But he remains ineligible for benefits for the week ending May 21, 2016 because he presented no evidence of an extenuating circumstance that excused his failure to attend a job search workshop under RCW 50.20.044 and WAC 192-180-040.

D. The Commissioner's Decision Was Not Arbitrary or Capricious

An arbitrary and capricious action is a “willful and unreasoning action, without consideration and in disregard of facts and circumstances.” *Heinmiller*, 127 Wn.2d at 609. In order to find that an order is arbitrary and capricious, it is not enough for the court to simply conclude that a Commissioner's decision is erroneous. Rather, the court must find that the Commissioner's decision was made in willful disregard of the facts and circumstances of the case. *Id.* The “one who seeks to demonstrate that the action is arbitrary and capricious must carry a heavy burden.” *Pierce Cty. Sheriff v. Civil Serv. Comm'n of Pierce Cty.*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). A decision is not arbitrary or capricious if there is room for more than one opinion and the decision is based on honest and due consideration, even if the Court disagrees with it. *Hickethier v. Dep't of Licensing*, 159 Wn. App. 203, 210–11, 244 P.3d 1010 (2011). The Court may not reverse the Commissioner's decision simply by disagreeing with

its conclusions. *See Eggert v. Emp't Sec. Dep't*, 16 Wn. App. 811, 813, 558 P.2d 1368 (1976).

Little does not carry his heavy burden to show that the Commissioner's decision was arbitrary and capricious. Little may disagree with the conclusions of the Commissioner, but that alone is insufficient to establish that the conclusions are arbitrary and capricious. *Hickethier*, 159 Wn. App. at 211. As explained above, the Commissioner's decision is based upon substantial evidence in the record and contains no error of law. It should be affirmed.

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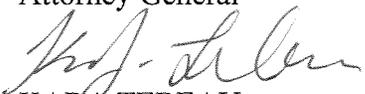
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VI. CONCLUSION

While a worker's decision to return to school is laudable, the legislature has decided that unemployment insurance funds cannot be used to subsidize such a pursuit. RCW 50.20.095. While receiving unemployment benefits, Little went back to school full-time, placing a substantial restriction on his availability for full-time work and his opportunity to return to work at the earliest possible time. The Commissioner's conclusion that Little was ineligible for unemployment benefits is supported by substantial evidence and free from errors of law. Therefore, this Court should affirm.

RESPECTFULLY SUBMITTED this 29th day of December 2017.

ROBERT W. FERGUSON
Attorney General

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PROOF OF SERVICE

I, Jennifer Wagner, certify that I caused a copy of this document, **Brief of Respondent Employment Security Department**, to be served on all parties or counsel of record by Consolidated Mail Services to:

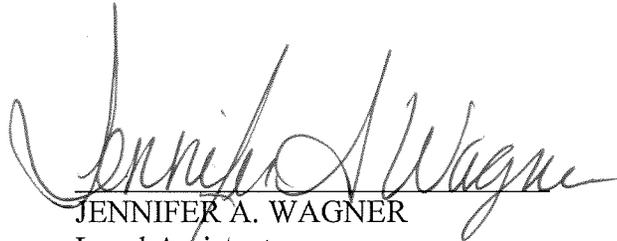
Lawrence C. Little
1201 N Fairfield Street
Aberdeen, WA 98520-3018

Electronically filed with Court of Appeals Division II

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

DATED this 27th day of December, 2017, at Olympia,

Washington.


JENNIFER A. WAGNER
Legal Assistant

Appendix
Precedential Decisions of the Commissioner cited, alphabetical

THOMSON REUTERS
WESTLAW

Washington State Employment Security Department Precedential Decisions of Commissioner

In re: JAMIE ALLI BRUNNER

Commissioner of the Employment Security Department
September 18, 2009

Empl. Sec. Comm'r Dec.2d 928 (WA), 2009 WL 8153829

Commissioner of the Employment Security Department

State of Washington

*1 In re: JAMIE ALLI BRUNNER

*1

Case No. 928

*1

Review No. 2009-3013

*1

Docket No. 02-2009-20521

*1 September 18, 2009

DECISION OF COMMISSIONER

*1 On August 31, 2009, JAMIE ALLI BRUNNER petitioned the Commissioner for review of a decision issued by the Office of Administrative Hearings on July 31, 2009. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), the undersigned does not adopt the Office of Administrative Hearings' findings of fact and conclusions of law, but enters the following therefor.

*1 Claimant was laid off from her full-time job as a manager of a hair salon. Sometime prior to being laid-off, the claimant began pursuing a career change by taking classes that would eventually lead her to becoming a nurse. Claimant's classes were taken on-line. Although she would spend up to eight hours a day in the preparation and taking of her classes, the school work did not interfere with her ability to work full-time. The fact that classes are on-line allows her to work full-time and on any shift.

*1 Since being laid-off from her hair salon job, the claimant has been seeking full-time work and making at least three employer contacts each week. Claimant has been able to find only six openings for hair salon managers. She has, however, been applying for various other types of work that she can perform.

*1 All things considered, we are satisfied from the record that claimant's schooling is not, at this time, a substantial restriction on her availability for work. Moreover, the evidence indicates that she has actively been seeking work. As such, we conclude that the claimant has met the availability requirements of RCW 50.20.010(1)(c) for the weeks at issue.

*1 As to future weeks, considering the length of the claimant's unemployment and the fact that she has been unable to find work in a demand occupation, the Department should counsel the claimant on her work search and provide her with a directive to assist her in finding full-time employment.

*1 Now, therefore,

*1 IT IS HEREBY ORDERED that the decision of the Office of Administrative Hearings issued on July 31, 2009, is SET ASIDE. Claimant is not ineligible pursuant to RCW 50.20.010(1)(c) for the week ending April 11, 2009 nor for any subsequent weeks claimed as of her July 31, 2009 hearing date.

*1 DATED at Olympia, Washington, September 18, 2009.²¹

*1 Donald K. Westfall III

*1 Review Judge Commissioner's Review Office

RECONSIDERATION

*1 Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

*2 If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

*2 If you choose to file a judicial appeal, you must both:

*2 a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

*2 b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

*2 The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

*2 If you are a party aggrieved by the attached Commissioner's decision/order, you may file a petition for reconsideration with the Commissioner's Review Office and/or file a judicial appeal with the superior court. Reconsideration and judicial appeal information is set forth at the end of the Commissioner's decision/order.

*2 If you file a judicial appeal with the superior court, the Employment Security Department will be the respondent and the Office of the Attorney General will represent the Employment Security Department. Accordingly it would be improper for the Employment Security Department or the Office of the Attorney General to advise or assist you in the filing of a judicial appeal with the superior court. If you disagree with the Commissioner's decision/order, it is your responsibility to file a judicial appeal directly with the superior court and serve a copy of that judicial appeal on the Commissioner of the Employment Security Department and the Office of the Attorney General or to retain an attorney to do so on your behalf.

*2 There is information regarding filing a judicial appeal available on the internet through Washington Law Help at www.washingtonlawhelp.org. Washington Law Help is provided as a public service by the Northwest Justice Project in collaboration with other legal aid providers in the Alliance for Equal Justice and Washington courts. Also, attorney referral services are listed in the yellow pages of local telephone directories. While the Employment Security Department cannot endorse or warrant the accuracy or reliability of the website or referral services described above, the information may be useful to you.

*3 Sincerely yours,

*3 *Donald K. Westfall III*

*3 Review Judge Commissioner's Review Office

*3 JAMIE ALLI BRUNNER 15536 CORLISS AVENUE NORTH SHORELINE, WA 98133-6037

Footnotes

a1 Copies of this decision were mailed to all interested parties on this date.

Empl. Sec. Comm'r Dec.2d 928 (WA), 2009 WL 8153829

END OF DOCUMENT

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IN RE CHARLES J. EBERT PETITIONER

Commissioner of the Employment Security Department January 31, 1978

Empl. Sec. Comm'r Dec.2d 383 (WA), 1978 WL 209157
Commissioner of the Employment Security Department
State of Washington

*1 IN RE CHARLES J. EBERT PETITIONER

*1 January 31, 1978

*1 Case No.

*1 383

*1 Review No.

*1 30029

*1 Docket No.

*1 7-17203

DECISION OF COMMISSIONER

*1 On the 16th day of December, 1977, an Appeal Tribunal issued a Decision in the above entitled matter denying benefits to the petitioner lifting the academic student disqualification imposed under Section 8, chapter 33, Laws of 1977, 1st Ex. Sess. Benefits were denied pursuant to RCW 50.20.010(3) for the calendar weeks ending November 5, 1977, through November 26, 1977. On the 27th of December, 1977 an Order taking the matter under advisement was issued. Having now carefully reviewed the entire record and files herein, thereby being fully advised in the premises, the undersigned does hereby enter the following:

FINDINGS OF FACT

*1 The claimant herein, Charles J. Ebert, was registered at the University of Washington for 13 credit hours, during the fall quarter which began September 26, 1977. He was a senior, majoring in anthropology, due to graduate and receive his degree around June of 1978, assuming he continued to pursue his studies through the winter and spring quarters.

*1 During a period of approximately three years previously he had worked in longshoring, and for most of this time he had apparently also attended school. Since he was on a casual list for dispatch, his work was somewhat sporadic. He applied for unemployment benefits on January 24, 1977, and thereafter received benefits which were adjusted according to his earnings as a long-shoreman. Exhibit 3 indicates that he last reported such earnings during the week ending July 23, 1977. At about this time the longshoring dispatch lists were changed, and he did not have sufficient hours to be placed on the preferred list. As a consequence, although he was still on a dispatch list, he had only minimal prospects for further work, and in fact, has not worked as a longshoreman since that time. He testified that he therefore began to look for other work. His only other work experience was on the green chain at Everett Plywood for three months during the summer of 1972. However, he has not sought such work, and his efforts have been limited almost exclusively to three prospective employers. One was a friend, Don Peterson, who was in the construction business, and with whom the claimant worked for a brief period clearing some land. Claimant testified that Mr. Peterson was not performing any work due to some problem, but that when he was able to resolve this problem he expected Mr. Peterson would hire him either full or part time, hopefully on a schedule which would permit him to continue his schooling. Another possible employer was a Mr. Mardesich who owned a boat. Claimant expected there might be work to do on the boat, either while moored or while operating. The third possible employer was a Rick Handy, but the claimant's prospects for work with him are not clear. Claimant also testified that he had contacted five or six other employers but did not name them, or provide the date of contact. Other than this, he testified that he had perused the job listing at the job service center where he reported, as well as newspaper ads. Included in the file are two departmental forms on which the claimant reported his work contacts for the weeks ending October 22nd and 29th, 1977, although these do not appear to have been entered as exhibits. The form for the 22nd shows only repeat contacts. The one for the 29th shows that he contacted Habitat Construction, Carl Ramstad Framing and Foliage Unlimited.

*2 The claimant initially advised the department that his minimum wage demand was \$9.00 per hour (Exhibit 10). On Exhibit 8 he lowered this to \$8. On Exhibit 7 he stated: "I am willing to accept \$5.00 per hour starting." At the hearing he indicated he had been advised to lower his demand if he was to receive unemployment benefits, and that he would accept \$5.00 per hour. He does not state what wage he could expect to receive if offered work with any one of his three primary prospective employers. When asked whether he would quit school in order to accept work, the claimant stated he could probably work out a schedule with Mr. Peterson which would enable him to continue his schooling, but that if offered work with Mr. Mardesich he would "probably" have to quit school. Claimant also asserted he did not consider himself to be a full-time student, since he was attending only ten hours of classes. He did not explain why he was not attending his full schedule of classes.

*2 From the foregoing Findings of Fact, the undersigned frames the following:

ISSUE

*2 Has the claimant established his eligibility for benefits within the provisions of RCW 50.20.____, Section 8, Chapter 33, laws of 1977, 1st ex. sess., and RCW 50.20.010(3)?

*2 From the issue as framed, the undersigned draws the following:

CONCLUSIONS

*2 Conclusions Nos. 1 through 5 of the Appeal Tribunal's decision correctly reflect the applicable statutes and criteria, and are adopted herein by reference.

*2 RCW 50.20.____, Section 8, is a new law which became effective July 3, 1977. It basically requires the same showing of eligibility by a student as is required by RCW 50.20.010(3), though in more specific detail. All claimants, whether student or not, bear the burden of establishing eligibility for benefits by a preponderance of the evidence. See In re Jacobs, 27 W2 641, In re Townsend, 54 W2 532. Thus, as we see it, the burden placed on a student by Section 8 is no greater than that imposed on all claimants by RCW 50.20.010(3).

*2 In considering whether a student has demonstrated his actual availability for work, Section 8 requires that certain factors be considered: (a) Prior work history; (b) Scholastic history; (c) Past and current labor market attachment; and (d) Past and present efforts to find work.

*2 The claimant's prior work history shows that other than work at Everett Plywood during the summer of 1972, his earnings have come from longshoring, an occupation which provided him with sporadic work compatible with school attendance. His scholastic history discloses that he

is in his senior year, within possibly two quarters of securing his degree in anthropology. His past attachment to the labor market shows that he was able to find work which had minimal conflict with schooling. His current attachment to the labor market indicates that he would prefer to find work enabling him to complete his degree. His past efforts to find work indicate that he needed only to await dispatch to longshoring jobs as they became available. He presently has little further prospect for longshoring work, and his efforts to find work have been limited principally to three prospective employers, one of which was not actively engaged in business due to personal problems, and another of which being a boat owner, would have a questionable amount of work while moored and work of an uncertain nature and duration while operating.

*3 Considering the foregoing, it is our conclusion that the claimant's situation is more indicative of a student attempting to find work compatible with schooling which would enable him to secure his degree, than of a worker who is only incidentally attending school and whose primary attachment is to the labor market. In this posture, we find that he has not established his eligibility for benefits by a preponderance of the evidence.

*3 IT IS HEREBY ORDERED that the decision of the Appeal Tribunal entered in this matter on the 16th day of December, 1977, shall be modified. The claimant has failed to establish his eligibility within RCW 50.20.____, Section 8, Chapter 33, Laws of 1977, 1st ex. sess., and is subject to disqualification provisions contained therein, beginning with the week ending October 1, 1977. He has also failed to establish his eligibility within the provisions of RCW 50.20.010(3), and is denied benefits for the weeks ending October 22, 1977 through November 26, 1977.

*3 DATED at Olympia, Washington, JAN 31 1978

*3 Daniel S. Bigelow

*3 Commissioner's Delegate

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WESTLAW

Washington State Employment Security Department Precedential Decisions of Commissioner

IN RE ELIZABETH FIELDS

Commissioner of the Employment Security Department
June 11, 1999

Empl. Sec. Comm'r Dec.2d 874 (WA), 1999 WL 33757747

Commissioner of the Employment Security Department

State of Washington

*1 IN RE ELIZABETH FIELDS

*1 June 11, 1999

*1

Review No.

*1

1999-1382

*1

Docket No.

*1

02-1999-04866

DECISION OF COMMISSIONER

*1 On May 19, 1999, BRANCH VILLA HEALTH CARE, by and through Helen Sikov, Administrator, petitioned the Commissioner for review of a decision issued by the Office of Administrative Hearings on May 4, 1999. Having reviewed the entire record, the undersigned does hereby enter the following

FINDINGS OF FACT

I

*1 On October 31, 1998, claimant voluntarily quit her employment with the interested employer's health care facility. As of that date, she had worked at the facility for approximately three years, all as a licensed practical nurse.

II

*1 Claimant opened a claim for unemployment benefits effective February 21, 1999. In the process of establishing her claim, she on February 22 informed the Department that her main reason for quitting was her desire to enter self-employment, stating further that this was the reason she had given her employer for her decision to quit. When asked by the Department about working conditions she would have wanted corrected, she responded that that question was not applicable. During an interview with the Department on March 2, 1999, she again stated that she quit to start her own business. In none of her prehearing statements did she mention objectionable working conditions.

III

*1 On the basis of claimant's statements, the Department on March 16, 1999, issued a determination disqualifying her for benefits for the reason that she had quit work without good cause. On April 7, 1999, she filed an appeal to that determination, again referring to her efforts to become self-employed. In her appeal, she did not mention working conditions.

IV

*1 At the hearing on her appeal, claimant for the first time raised the subject of objectionable working conditions, testifying extensively and in significant detail as to what she perceived to be an understaffing problem. The employer's testimony was that "we all knew she was going to go into business for herself."

ISSUE

*1 Whether claimant should be disqualified for benefits pursuant to RCW 50.20.050?

CONCLUSIONS OF LAW

I

*1 As claimant quit her employment, this case is properly adjudicable pursuant to RCW 50.20.050. For our purposes here, RCW 50.20.050 essentially provides for disqualification for unemployment benefits for leaving work without good cause. A claimant for unemployment benefits bears the burden of establishing his or her entitlement to them. See, e.g., In re Townsend, 54 Wn.2d 532, 534, 341 P.2d 877 (1959); Jacobs v. Office of Unemployment Comp. & Placement, 27 Wn.2d 641, 651, 179 P.2d 707 (1947). In order to establish good cause for quitting work, a claimant must show that he or she quit due to a work-connected factor; that such factor was so compelling as to cause a reasonably prudent person to quit; and that he or she exhausted all reasonable alternatives to quitting. RCW 50.20.050(3); WAC 192-16-009; Johns v. Employment Security Dep't, 38 Wn. App. 566, 569, 686 P.2d 517 (1984); In re Harden, Empl. Sec. Comm'r Dec.2d 843 (1994).

II

*2 In view of claimant's extensive and detailed testimony regarding the staffing situation, it is difficult to believe that if that was the reason for her decision to quit, she would not have mentioned it at some point in her prehearing interviews with the Department and particularly, following her initial denial, in her appeal. For the same reason, it is difficult to believe that she would tell the Department that its question about objectionable working conditions was not applicable. As noted, her prehearing statements spoke only to her desire to start her own business. These statements, because they were made at a time closer to the period of time in issue and before she was aware of the effect they might have on the adjudication of her claim, are entitled to great weight. See, e.g., Huquenin v. Employment Security Dep't, 32 Wn. App. 658, 661, 648 P.2d 890 (1982). Mindful of these considerations, and on the basis of findings Nos. II through IV, above, we conclude that claimant quit her employment not because of any working condition, but so that she could start her own business.

III

*2 A desire to enter self-employment is a personal reason for quitting employment. No personal reason, unless it is somehow work-connected, can constitute good cause for quitting work. RCW 50.20.050(3); Davis v. Department of Empl. Sec., 108 Wn.2d 272, 276, 737 P.2d 1262 (1987). In the case before us, claimant's desire to start her own business and be self-employed is not work-connected because it was not a condition caused by her employer. Terry v. Employment Security Dep't, 82 Wn. App. 745, 751, 919 P.2d 111 (1996). Moreover, aside from considerations having to do with whether a decision to enter self-employment is personal, we have held many times that a desire to enter self-employment does not constitute good cause for quitting employment. See, e.g., In re Machlis, Empl. Sec. Comm'r Dec.2d 813 (1990); In re Laase, Empl. Sec. Comm'r Dec.2d 759 (1984); In re Rasmussen, Empl. Sec. Comm'r Dec.2d 695 (1981); In re Jones, Empl. Sec. Comm'r Dec. 964 (1973); In re Calvert, Empl. Sec. Comm'r Dec. 895 (1972); In re Briggs, Empl. Sec. Comm'r Dec. 860 (1971); In re Walker, Empl. Sec. Comm'r Dec. 853 (1971); In re Noble, Empl. Sec. Comm'r Dec. 345 (1957).

IV

*2 Even had it been shown that claimant had quit because of working conditions, we would conclude that good cause was not established. Her testimony shows that she believed the nursing home was understaffed, but, having considered her former employer's testimony, we would not conclude that the evidence established the fact of understaffing.

*2 Now, therefore,

*2 IT IS HEREBY ORDERED that the decision of the Office of Administrative Hearings issued on May 4, 1999, shall be SET ASIDE. Claimant is disqualified pursuant to RCW 50.20.050(1) beginning October 25, 1998, and thereafter for five calendar weeks and until she has obtained bona fide work and earned wages equal to five times her weekly benefit amount. Benefits paid for weeks within this period of disqualification constitute an overpayment pursuant to RCW 50.20.190(1), and the case is REMANDED to the Department for a determination on the issue of liability for refund.

*3 DATED at Olympia, Washington, June 11, 1999.^{a1}

*3 Anthony J. Philippsen, Jr.

*3 Commissioner's Delegate

RECONSIDERATION/JUDICIAL APPEAL

*3 Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this order/decision, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant to WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if this office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives.

*3 The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review. (See attached letter for judicial appeal rights.)

Footnotes

^{a1} Copies of this decision were mailed to all interested parties on this date.

Empl. Sec. Comm'r Dec.2d 874 (WA), 1999 WL 33757747

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**Washington State Employment Security Department Precedential
Decisions of Commissioner**

IN RE RICHARD GATHERERS PETITIONER

Commissioner of the Employment Security Department

August 28, 1973

Empl. Sec. Comm'r Dec. 1026 (WA), 1973 WL 166660

Commissioner of the Employment Security Department

State of Washington

*1 IN RE RICHARD GATHERERS PETITIONER

*1 August 28, 1973

*1

Case No.

*1

1026

*1

Review No.

*1

11847

*1

Docket No.

*1

3-04115

DECISION OF COMMISSIONER

*1 RICHARD GATHERERS, by and through his representative, LEGAL SERVICES CENTER, ANN GREENBERG of counsel, having duly petitioned the undersigned Commissioner to review a Decision of an Appeal Tribunal entered in this matter on the 15th day of June, 1973, and the Commissioner, having carefully reviewed the entire record, thereby being fully advised in the premises, does hereby adopt the Findings of Fact and Conclusions of the Appeal Tribunal, with the addition of the following comments:

*1 We first note that the Appeal Tribunal Decision held the petitioner not subject to the disqualification of RCW 50.20.050, and the interested employer has not appealed this issue. Consequently, the only issue now before us is that of petitioner's availability within RCW 50.20. 010(3).

*1 Petitioner takes exception to the Appeal Tribunal finding that during the period in question he made "a maximum of five in-person contacts for employment." On the record, the petitioner named five prospective employers he contacted, and stated he had made other contacts but could not name them. Correction can be made accordingly, but we do not deem this is decisive in the instant case.

*1 Petitioner also argues that, although he is a junior in high school, attending classes during the morning hours each weekday, he is fully available for jobs which do not conflict with his schooling. Conceding this to be true, it is nevertheless a requirement in order to establish eligibility for benefits that the claimant be available for all-hours customary to the occupation. It is clear that most businesses from whom the petitioner has been seeking work operate during the morning hours. While petitioner has previously been successful in finding jobs which allowed him to continue his schooling, this does not operate to permit him limit his availability accordingly.

*1 Petitioner further argues that to deny his availability under the circumstances shown "raises serious problems of equal protection." We cannot agree. All claimants are held to the same standards of availability. In our view, it would raise a "serious problem of equal protection" if we were to allow benefits to the petitioner, who is admittedly not available for work during the morning hours on weekdays, and to deny benefits to other claimants who are not available during such hours. Accordingly,

*1 IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 15th day of June, 1973, shall be AFFIRMED. The petitioner is not subject to disqualification pursuant to RCW 50.20.050. Benefits shall be denied the petitioner for the calendar weeks ending April 28, 1973, through May 26, 1973, pursuant to the provisions of RCW 50.20. 010(3).

*2 DATED at Olympia, Washington, AUG 28 1973

*2 R.W. Hutt

*2 Acting Commissioner

Empl. Sec. Comm'r Dec. 1026 (WA), 1973 WL 166660

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**Washington State Employment Security Department Precedential
Decisions of Commissioner**

IN RE JERRY D. KLEIN PETITIONER

Commissioner of the Employment Security Department

August 9, 1974

Empl. Sec. Comm'r Dec. 1148 (WA), 1974 WL 177517

Commissioner of the Employment Security Department

State of Washington

*1 IN RE JERRY D. KLEIN PETITIONER

*1 August 9, 1974

*1

Case No.

*1

1148

*1

Review No.

*1

21163-F

*1

Docket No.

*1

4-02985-F

DECISION OF COMMISSIONER

*1 JERRY D. KLEIN, having duly petitioned the undersigned Commissioner to review a Decision of an Appeal Tribunal entered in this matter on the 29th day of May, 1974, and the Commissioner having carefully reviewed the entire record, thereby being fully advised in the premises, does hereby adopt the Findings of Fact and Conclusions of the Appeal Tribunal, and therefore

*1 IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 29th day of May, 1974, shall be AFFIRMED. Benefits shall be denied the petitioner for the calendar weeks ending April 13, 1974, through May 11, 1974, pursuant to the provisions of RCW 50.20.010(3).

*1 DATED at Olympia, Washington, AUG 9 1974

*1 Norward J. Brooks

*1 Commissioner

CASE HISTORY:

*1 --Appeal Tribunal affirmed by Commissioner, Review No. 21163-F (8-9-74).

*1 --Order of Dismissal entered by Superior Court for Spokane County, Cause No. 219985 (1-26-76).

*1 HEARING HELD 5-22-74

*1 PARTIES PRESENT: Claimant-Appellant

*1 DECISION MAILED: May 29, 1974 L. O. 180 - Spokane

*1 THIS DECISION IS FINAL UNLESS A PETITION FOR REVIEW IS FILED IN PERSON OR MAILED AND POSTMARKED TO THIS OFFICE, OR A LOCAL OFFICE OF THE EMPLOYMENT SECURITY DEPARTMENT ON OR BEFORE June 10, 1974.

STATEMENT OF THE CASE:

*1 The claimant filed an appeal from a Determination Notice denying benefits pursuant to RCW 50.20.010(3) for the calendar weeks ending April 13, 1974 through week ending May 11, 1974.

FINDINGS OF FACT:

*1 1. On April 11, 1974 claimant filed for unemployment benefits and on that occasion he was given printed instructions as to his duties and responsibilities. These included, among other things, the necessity to make an active search for work as well as to be available for work customary to his occupation.

*1 2. During the period in issue claimant was a Senior at EWSC where he was taking 18 credit hours. Classes were daily, from 7:30 a.m.-1:00 p.m. He expects to be graduated next month. Claimant still was attending the same classes as of the date of his appeal hearing. Claimant is single and lives with his parents, both of whom were employed.

*1 3. In the past, claimant has performed part-time work although during summers he has worked fulltime. Claimant made two contacts during the first week in issue; he made no contacts the following two weeks; he contacted three prospective employers during the fourth week and made one job contact during the fifth week. For the most part he was seeking administrative employment. Work of this kind normally is done during daytime business hours. Claimant testified that if the job were promising he would be willing to give up school as required by the needs of the job. He never has quit school for employment in the past.

CONCLUSIONS:

*2 1. The provisions of RCW 50.20.010(3) are applicable and will be found on the attachment.

*2 2. To be eligible for benefits, an individual must not only be actively seeking work but must be ready, able, and willing immediately to accept any offer of suitable work. This implies that an individual must be free from any restrictions on his availability that would seriously affect his chances of becoming employed, and his search must be active as well as realistic.

*2 3. It is reasonable to observe that fulltime pursuit of a college education may give rise to restrictions upon an individual's availability for work during those hours he is in class. The burden is on the student-claimant, as it is on any other claimant, to show a continuing labor market attachment. In the case at hand claimant was taking a full academic schedule both during the period in issue and at the time of his appeal hearing. Although it could be said that his work search during one of the weeks was active, for the most part his job search was minimal each week. We note his assertion that he would be willing to drop school if he found a suitable job but his overt actions, which are the best indicator of his actual intentions, more realistically are indicative of a fulltime student who is almost at the end of his college career than anything else. We conclude that during the weeks in issue this claimant did not meet the availability requirements of the statute.

DECISION:

*2 The determination under appeal is affirmed. Benefits are denied pursuant to RCW 50.20.010(3) for the calendar weeks ending April 13, 1974 through week ending May 11, 1974.

*2 Donald D. Knowles
*2 Appeal Examiner

Attachment A

Empl. Sec. Comm'r Dec. 1148 (WA), 1974 WL 177517

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**Washington State Employment Security Department Precedential
Decisions of Commissioner**

IN RE GREG L. PECHEOS PETITIONER

Commissioner of the Employment Security Department
February 6, 1978

Empl. Sec. Comm'r Dec.2d 385 (WA), 1978 WL 209159

Commissioner of the Employment Security Department

State of Washington

*1 IN RE GREG L. PECHEOS PETITIONER

*1 February 6, 1978

*1

Case No.

*1

385

*1

Review No.

*1

29740-X

*1

Docket Nos.

*1

7-15339-X

*1

7-15586-X

DECISION OF COMMISSIONER

*1 GREG L. PECHEOS duly petitioned the Commissioner for a review of a consolidated Decision of an Appeal Tribunal entered in this matter on the 1st day of November, 1977. The undersigned having carefully reviewed the entire record, thereby being fully advised in the premises, does hereby adopt Findings of Fact Nos. 1, 2 and 5 and Conclusions Nos. 1, 2, 3 and 5 of the Tribunal, subject to additional findings of fact and conclusions. Findings of Fact Nos. 1, 2 and 5 are hereinafter set forth from the Tribunal's Decision:

FINDINGS OF FACT

*1 "1. The claimant initially applied for unemployment compensation benefits on June 27, 1977. He was allowed waiting period credit and benefits in the amount of \$102 per week. The claimant last worked on June 14, 1976, when he was discharged from the United States Navy. The claimant reported regularly and received benefits until denied for the period in issue.

*1 "2. On October 5, 1977, the Department issued a Determination Notice denying benefits beginning September 18, 1977 pursuant to the aforementioned statute. The claimant appealed that Determination Notice on October 10, 1977, (see Docket No. 7-15586-X). The hearing of both appeals were [sic] consolidated pursuant to WAC 192-09-165 with the concurrence of the claimant who waived his right to sevens [sic] days of advance notice pursuant to the provisions of RCW 50.32.040. Both Appeal No. 7-15339-X and 7-15586-X are decided herein.

*1 "5. The claimant enrolled at Fort Steilacoom Community College on September 22, 1977, where he attends classes from 8:00 a.m. to 12:50 p.m., five days per week. The claimant is majoring in pre-dental hygiene and is carrying [sic] 15 credit hours. The claimant attends school under auspices of the G. I. Bill of Rights and receives \$439 per month for full-time attendance. The claimant intends to make his career in dentistry and desires a position with dental duties which would supplement his academic studies."

ADDITIONAL FINDINGS OF FACT

I

*1 The first Determination Notice was under RCW 50.20.010-(3) and denied benefits for the weeks ending September 10 and 17, 1977, and indefinitely based on matters such as: he intended to commence classes on September 22; his weekly contacts were insufficient; he was seeking work for which he was not qualified. The second Determination Notice denied under the new Section 8, Chapter 33, Laws of 1977, 1st Ex. Sess., amending Chapter 35, Laws of 1945 (individual registered in school instruction of 12 hours or more). The denial commenced on September 18, 1977. The two cases were consolidated at the hearing. We consider exhibits under either case to apply to the other.

II

*2 The petitioner, age 23, completed four years in the Navy in June 1977 (not 1976) as a dental technician, a military occupation description. His duties and training included chairside assistant, X-rays, supplies, administration, receptionist, teeth polishing, topical fluoride treatment, instruction in oral hygiene and some scaling work. In the state of Washington this would qualify him to perform duties under the state civilian equivalents or occupational titles of one person office or chair-side dental assistant and perhaps dental receptionist and book-keeper. He would not qualify in the state as a dental hygienist, although he did some of that work in the Navy, because he must be licensed in the state to remove calcareous deposits (scale).

III

*2 He sought jobs as a "chairside" or "one person" dental assistant, receptionist, or bookkeeper and as a "preventive dental technician", i.e., to include applying fluoride. His number of contacts insofar as the hearing indicated was satisfactory for most of the period. The lowest pay acceptable was \$4.75 per hour in a questionnaire of September 29, 1977. He stated \$4.90 per hour at the hearing. He testified he was entitled to the G. I. Bill at \$349 per month if married, and \$295 if single. He stated he would quit school or shift classes if offered a job. However, at one place he testified, "If I found a job, you know, that I wanted I would quit school right now . . . or at least change my hours."

IV

*2 The pamphlet, Prevailing Wage Information (Pierce County) Dental Office Occupations dated February 1976 from the Department's Wage Analysis Unit discloses the information condensed below: HLA Occupational Title Hourly Prevailing Hourly InterWage Rate Quartile Wage Range

*2 ____

*2 Dental Assistant, One Person Office

*2 Dental Assistant, Chairside

*2 Less than 1 Year 2.60 2.36 - 2.92

*2 Experienced 3.50 3.35 - 4.00

*2 Expanded Duty 3.79 3.17 - 4.04

*2 Dental Receptionist-Bookkeeper

*2 Less than 1 Year 3.00 2.97 - 3.38

*2 Experienced 3.70 3.58 - 4.25

*2 Lead Worker 4.50 4.47 - 6.00

*2 Dental Hygienist

*2 Experienced 8.12 7.50 - 8.54

*2 A synthesis of the 21-page pamphlet including descriptions indicates petitioner would probably qualify for the above except for hygienist. These pamphlets are of aid in a case, if in existence for an area and if reasonably recent.

V

*2 In line with Finding of Fact No. 5 above, he is a freshman in a two-year dental course. The first year is pre-dental with five hour courses in biology, chemistry and english, plus several hours of study per day. At the end of the second year he will be able to be licensed as a dental hygienist.

*2 From the foregoing Findings of Fact, the undersigned frames the following:

ISSUES

I

*2 Under RCW 50.20.010(3), was the petitioner available for and actively seeking work for the weeks ending September 10 through October 15, 1977?

II

*3 Is petitioner disqualified under the new Section 8, Chapter 33, Laws of 1977, 1st Ex. Sess. effective July 3, 1977, amending Chapter 35, Laws of 1975 (individual registered in school instruction of 12 hours or more)?

*3 From the Issues as framed, the undersigned draws the following:

CONCLUSIONS

I

*3 As to the first issue (Docket No. 7-15339-X), we concur with the Tribunal's Conclusion No. 1 citing and appending RCW 50.-20.010(3), RCW 50.20.100 as amended, effective July 3, 1977, and WAC 192-16-021, all applicable to this case. The burden is on the petitioner to establish his availability by a preponderance of evidence. In re Jacobs, 27 Wn.2d 641, 179 P.2d 707 (1941); In re Townsend, 54 Wn.2d 532, 341 P.2d 877 (1959).

*3 (A) For the weeks ending September 10 and 17, 1977, the petitioner's background and search disclose that he is available and actively seeking work for which he is qualified. His wage requirement may be a trifle high as to some of the occupations. However, when we take into account the age of the survey, his background, and the state of the evidence we are not prepared to state it was too high at that time.

*3 (B) For the weeks ending September 24 through October 15, 1977, the Determination Notice was "open-ended" in its denial, and the Tribunal should have covered those weeks in its decision. The fact that the second issue covered the same period of time here did not preempt the first issue. WAC 192-16-023, Section 6.

*3 The evidence indicates he was seeking work for which qualified. However, we consider that under the facts and circumstances, he was primarily a student; that his hours in class, plus study, plus the indication that he might not take every appropriate job while in school show that he is not "available" under RCW 50.20.010(3) for those weeks.

II

*3 The second issue (Docket 7-15586-X) is under Section 8, Chapter 33, Laws of 1977, 1st Ex. Sess., effective on July 3, 1977. Also WAC 192-16-023 (Disqualification of Students) is pertinent. We quote from NEW SECTION of "Rules, Regulations and Laws":

*3 "NEW SECTION, Sec. 8. There is added chapter 35, Laws of 1945 and to chapter 50.20 RCW a new section to read as follows:

*3 "Any individual registered at an established school in a course of study providing scholastic instruction of twelve or more hours per week, or the equivalent thereof, shall be disqualified from receiving benefits or waiting period credit for any week during the school year commencing with the first week of scholastic instruction or the week of leaving employment to return to school, whichever is the earlier, and ending with the week immediately before the first full week in which the individual is no longer registered for classes: PROVIDED, That this nonregistration will be for a period of sixty days or longer. The term 'school' included primary schools, secondary schools, and 'institutions of higher education' as that phrase is defined in RCW 50.44.030.

*4 "This disqualification shall not apply to any individual who:

*4 (1) Is in approved training within the meaning of RCW 50.20.043; or

*4 (2) Demonstrates to the commissioner by a preponderance of the evidence his or her actual availability for work, and in arriving at this determination the commissioner shall consider the following factors:

*4 (a) Prior work history;

*4 (b) Scholastic history;

*4 (c) Past and current labor market attachment; and

*4 (d) Past and present efforts to seek work."

III

*4 We think it is clear that the petitioner is disqualified under the new law. He is registered at an "established institution of higher education", as defined in RCW 50.44.030, as amended by Section 16, Chapter 292, Laws of 1977, 1st Ex. Sess. effective July 3, 1977. His course of study provides "scholastic instruction" (as defined in WAC 129-16-023) of 12 or more hours per week or the equivalent, which commenced on September 22, 1977. Nor has he demonstrated his actual availability for work by a preponderance of evidence. Now, therefore,

*4 IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 1st day of November, 1977, is hereby MODIFIED. As to Docket No. 7-15339-X under RCW 50.20.-010(3), the petitioner is not eligible for the weeks ending September 24 through October 15, 1977 (38-41/77). As to the weeks ending September 10 and 17, 1977 (36-37/77), the petitioner is eligible under RCW 50.20.010 (3). Benefits are allowed for those two weeks (36-37/77), provided he is otherwise eligible and qualified therefor. As to Docket No. 7-15586-X, benefits are denied beginning September 18, 1977, pursuant to Section 8 of Chapter 33, Laws of 1977, 1st Ex. Sess.

*4 DATED at Olympia, Washington, FEB 6 1978

*4 Thomas J. Moran

*4 Commissioner's Delegate

Empl. Sec. Comm'r Dec.2d 385 (WA), 1978 WL 209159

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**Washington State Employment Security Department Precedential
Decisions of Commissioner**

IN RE NORMAN D. PETERSON PETITIONER

Commissioner of the Employment Security Department
August 4, 1972

Empl. Sec. Comm'r Dec. 917 (WA), 1972 WL 131630

Commissioner of the Employment Security Department

State of Washington

***1 IN RE NORMAN D. PETERSON PETITIONER**

*1 August 4, 1972

*1

Case No.

*1

917

*1

Review No.

*1

10282

*1

Docket No.

*1

72-0935

DECISION OF COMMISSIONER

*1 NORMAN D. PETERSON, by and through LEGAL SERVICES CENTER, ROBERT TOBIN of counsel, duly petitioned the undersigned Commissioner to review a Decision of an Appeal Tribunal entered in this matter on the 11th day of April, 1972. Having now completed a thorough examination of the record and files herein, thereby being fully advised in the premises, the Commissioner hereby enters the following:

FINDINGS OF FACT

I

*1 The petitioner served in the Navy from 1959 to December of 1962, during which time he was assigned to work on diesel engines. Upon being discharged from the service he secured a temporary job working on a hot water tank assembly line. He then secured a job as a surveyor, which lasted over a year. Thereafter, he went into the merchant marine as an oiler. Both his work as a surveyor and in the merchant marine were intermittent, and he alternated his employment, working in the merchant marine when there was no work as a surveyor, and as a surveyor when there was no work in the merchant marine, until August of 1969. At that time he was unable to find work in either line, so attempted selling real estate for a short time, but then found work as a surveyor which continued until March 20, 1971. On March 22, 1971, he applied for unemployment benefits, which were paid to him for about a month, but he again secured employment as a surveyor, which lasted until July 30, 1971. He applied for unemployment benefits, which he received for about another month, after which he found further employment as a surveyor, which lasted until October 22, 1971. He then applied for unemployment benefits, which were paid to him through the week ending January 1, 1972. While working as a surveyor, the petitioner received \$6.48 per hour.

II

*1 The petitioner decided to attempt to improve his time by registering at Edmonds Community College as a first quarter freshman. At this time, he was 29 years of age and unmarried. He was still attempting to secure employment as a surveyor and in the merchant marine, but found the prospects for either were almost nonexistent at the time. He anticipated, however, being able to find work as a surveyor in the spring, but felt he could secure some education meanwhile. He registered for 15 credit hours, in English and Psychology, but at the suggestion of the college, shortly added another 5 hours in a math course which was designed to help improve his study habits. His classes were in the morning and early afternoon, and he usually spent the evenings studying. He was receiving financial assistance through the G.I. Bill, and was not in debt.

III

*1 The petitioner was a member of the Technical Engineers Union, Local #303, Seattle. The regular monthly dues in this union were \$17.00, but when a member was out of work, the dues were reduced to \$5.00 per month, with the provision that on securing employment he was to pay the difference to the union. Meanwhile, the petitioner was on a list whereby he would be called when work was available for him. This union was not on the Department union referral list, since employment was not available solely through the union, and the members were

allowed to attempt to find work on their own. The petitioner named several prospective employers he had contacted, but could not recall the names of all of them, though he states he contacted most firms employing surveyors in one way or another.

IV

*2 On January 13, 1972, the petitioner was interviewed in the Department's office in Seattle, at which time he signed a statement, reading in part as follows:

*2 "I would quit school to accept surveying work, but not something paying less than \$6.00 per hour.

*2 "Last week I made no search for work."

V

*2 The Department employee who issued the determination denying benefits to the petitioner was present at the hearing on his appeal and testified that she believed his statement that he would quit school to accept surveying work, but that she had denied him benefits based on his statement that he had made no search for work the previous week. While this was a continuing denial, until he had established his availability under the statute, there is no indication that the petitioner was subsequently interviewed in order to determine whether he was thereafter satisfying the statutory requirements.

VI

*2 The period involved in the petitioner's appeal begins with the week ending January 8, 1972, and continues through the week ending March 4, 1972. The petitioner asserts that during this time he was actively seeking employment in the same manner by which he had previously found work, and that if able to find work he would have changed his class hours so as to be able to continue his schooling, if possible, but otherwise would have quit school in order to accept the job.

ISSUE

*2 Was the petitioner available for work and actively seeking work within the meaning of RCW 50.20.010(3)?

CONCLUSIONS

*2 In order for any individual to be entitled to unemployment benefits he must establish his eligibility, which includes the requirements of RCW 50.20.010 (3). Under this section, he must show that "he is able to work, and is available for work in any trade, occupation, profession, or business for which he is reasonably fitted." The section further provides that:

*2 "To be available for work an individual must be ready, able, and willing, immediately to accept any suitable work which may be offered to him and must be actively seeking work pursuant to customary trade practices and through other methods when so directed by the commissioner or his agents."

*2 A full-time academic student has certain obligations to class preparation and attendance which raise a valid question as to whether he is available to immediately accept an offer of suitable work, and whether he is actively seeking work. It is interesting to note that the Department's determination did not question the petitioner's availability, but denied him on his statement that he had not searched for work during one week of the period in question. The Appeal Tribunal, on the other hand, appears to have denied benefits on the ground that "when there is no work in a person's usual occupation, it is customary to seek work in other fields and not to delete the most valuable work search hours by attendance at school."

*3 When a person's availability is in question by reason of school obligations, any such question can be resolved in his favor if he is willing to make him self available by quitting school. However, if he states he will quit school, his statement need not be accepted as a fact. All circumstances having a bearing on this question may be considered. The Department's employee who originally interviewed the petitioner states that she believed him when he said he would quit school if necessary to accept an offer of suitable work. We concur with her conclusion. The petitioner was a member of the labor force for approximately ten years. He enrolled in school during a period of unemployment of greater length than he had previously experienced. We feel that he has established that he is primarily an unemployed worker, and secondarily a student. It is, therefore, entirely credible that, under these circumstances, he would leave school for work in his regular employment.

*3 There remains for consideration the question as to whether claimant was "actively seeking work pursuant to customary trade practices and through other methods when so directed by the commissioner or his agents." While the record is not entirely clear on this point, we feel it adequately establishes that the petitioner was actively seeking work in his primary occupation as a surveyor, and in his secondary occupation as a merchant marine oiler, by the same methods he had used previously when he had been successful in finding such employment. He is not normally expected to look for work in other fields of employment unless there is little or no prospect of finding work in his customary field for an indefinite period of time. As the length of his unemployment increases, he is expected to expand his search to other areas of work, and to be willing to accept work paying less than he has previously received. But, the individual is not presumed to know all requirements which may be essential in establishing his eligibility for benefits. It is the duty of the Department to assist him where it appears he needs to change or expand his work search activities. This is normally accomplished by a Claimant Directive. No such directive was issued to the petitioner, nor does it appear he was given oral directions in this regard.

*3 It is shown that the petitioner stated he had not looked for work during one week of the period in question. We have no explanation as to the precise meaning or intent of this statement, but it appears that it was not entirely correct. Consideration must be given to the overall efforts of the individual to secure work. We believe that the petitioner was making an active and realistic effort to find employment according to the methods he had previously successfully used. In his particular circumstances we do not deem it significant, for instance, if he failed during

any one week to contact a specific prospective employer. His overall efforts were still designed to alert him to the first available employment. If the Department felt that these efforts were not adequate, it had a duty to so inform him and to direct him how to change his efforts so as to maintain his eligibility, before denying him benefits. It is therefore our conclusion th at the petitioner has successfully established both the fact of his availability for suitable employment, and his active search for such employment. Accordingly,

*4 IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 11th day of April, 1972, shall be SET ASIDE. Petitioner is not disqualified from receiving benefits pursuant to RCW 50.20.010(3). Benefits shall be allowed the petitioner for the calendar week beginning January 2, 1972, through the calendar week ending March 4, 1972, provided he is otherwise qualified and eligible therefor.

*4 DATED at Olympia, Washington, AUG 4 1972

*4 R.W. Hutt

*4 Acting Commissioner

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WESTLAW

Washington State Employment Security Department Precedential Decisions of Commissioner

IN RE BRIDGETTE A. WOLANSKI

Commissioner of the Employment Security Department
May 16, 1997

Empl. Sec. Comm'r Dec.2d 860 (WA), 1997 WL 33644587

Commissioner of the Employment Security Department

State of Washington

*1 IN RE BRIDGETTE A. WOLANSKI

*1 May 16, 1997

*1

Case No.

*1

860

*1

Review No.

*1

1997-1076

*1

Docket No.

*1

01-1997-01469

DECISION OF COMMISSIONER

*1 On April 21, 1997, BRIDGETTE A. WOLANSKI petitioned the Commissioner for review of a decision issued by the Office of Administrative Hearings on April 4, 1997. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), the undersigned adopts the Office of Administrative Hearings' findings of fact and conclusions of law, and enters the following:

FINDINGS OF FACT

I

*1 Claimant opened the claim here contested on January 15, 1997, informing the Department that she was attending school in the morning five days per week.

II

*1 Without issuing a written determination notice, the Department granted claimant waiting period credit for the week ending January 18, 1997, and allowed benefits for the weeks ending January 25, 1997, through February 22, 1997.

III

*1 On February 14, 1997, the Department mailed claimant forms to complete regarding her availability for work. She completed and returned these forms, but they either did not reach the Department or reached the Department and were misplaced.

IV

*1 On February 28, 1997, the Department issued a determination notice denying claimant waiting period credit for the week ending January 18, 1997, and denying benefits for the weeks ending January 25, 1997, through February 22, 1997, on the basis that claimant, being a student, was not available for work. The determination also held that all benefits paid constituted an overpayment for which claimant was liable because she was at fault, inasmuch as she had not returned the forms mailed to her on February 14, 1997.

V

*1 Claimant appealed the February 28, 1997, determination and her case was heard in due course. On April 4, 1997, the Office of Administrative Hearings issued a decision affirming the determination that claimant was unavailable for work. The decision did not deem claimant to have been at fault in the matter of her overpayment, but nonetheless held her liable for refund on the grounds that state regulation prohibited waiving the portion of her overpayment which consisted of benefits conditionally paid and that it would not be violative of principles of equity and good conscience to require refund of the portion consisting of benefits regularly paid.

VI

*1 During the weeks in issue, claimant sought data entry and receptionist work. The hours during which this type of work is customarily performed include hours during which she is in class. She is unwilling to leave school to accept employment.

ISSUES

I

*1 Whether claimant is ineligible pursuant to RCW 50.20.010(3)?

II

*1 Whether claimant is liable for refund of benefits?

CONCLUSIONS

I

*2 Upon applying for unemployment benefits, a claimant is required to meet the requirements of RCW 50.20.010(3) as a condition precedent to eligibility. In re LeCompte, Empl. Sec. Comm'r Dec. 525 (1963).

II

*2 In interpreting RCW 50.20.010(3), we have held that a claimant may place certain restrictions upon his or her availability for work and yet be eligible for benefits, but that a substantial restriction will render him or her ineligible. See, e.g., In re Skaggs, Empl. Sec. Comm'r Dec.2d 212 (1976); In re Bertram, Empl. Sec. Comm'r Dec. 1054 (1973). It follows that a claimant who is a student must demonstrate that his or her class attendance and studies do not constitute a substantial restriction. In re Klein, Empl. Sec. Comm'r Dec. 1148 (1974).

III

*2 Generally, a restriction is substantial if it renders a claimant unavailable for any hours customarily worked in his or her occupation. (Emphasis supplied.) See, e.g., In re Erickson, Empl. Sec. Comm'r Dec. 1253 (1975); In re Catterlin, Empl. Sec. Comm'r Dec. 362 (1957). This is true even if, as here, a claimant has been previously successful in finding work which allowed him or her to continue in school. See, e.g., In re Gatherers, Empl. Sec. Comm'r Dec. 1026 (1973). The evidence in this case shows that claimant's schooling renders her unavailable for work during a part of the day when the type of work she is seeking is customarily performed and, consequently, she is unavailable for work. As explained below, however, ineligibility pursuant to RCW 50.20.010(3) cannot be imposed in this case for the weeks ending January 18, 1997, through February 22, 1997.

IV

*2 A conditional payment is a payment made to a continued claim recipient whose eligibility is questioned. WAC 192-12-012. A continued claim recipient is a claimant who has been determined to be monetarily entitled to and nonmonetarily eligible for benefits, and who has been granted waiting period credit or benefits. WAC 192-12-011.

V

*2 In this case, it was not until February 14, 1997, that the Department questioned claimant's eligibility. Consequently, payments for weeks preceding February 14, 1997, were not conditional, but instead constituted a determination of allowance. See, e.g., In re Bailey, Empl. Sec. Comm'r Dec.2d 599 (1980); In re Clinton, Empl. Sec. Comm'r Dec.2d 532 (1979). It follows that the February 28, 1997, determination notice which deemed claimant ineligible was in fact a redetermination as to those weeks. See, e.g., In re Rundell, Empl. Sec. Comm'r Dec.2d 327 (1977); In re Pederson, Empl. Sec. Comm'r Dec.2d 139 (1976). As such, the determination could only be valid on a showing of fraud, misrepresentation, or nondisclosure. RCW 50.20.160(3); Bailey, Rundell, supra.

VI

*3 As claimant provided complete and accurate information regarding her student status at the time she opened her claim, we cannot conclude that fraud, misrepresentation, or nondisclosure has been established. It follows that the February 28, 1997, determination notice is invalid with respect to the weeks ending January 18, 1997, through February 8, 1997.

VII

*3 As for the weeks ending February 15, 1997, and February 22, 1997, the evidence shows that as of February 14, 1997, the Department questioned claimant's eligibility. However, this was unnecessary, since, as noted in the preceding conclusion, claimant had already provided all of the information the Department needed in order to determine whether her student status rendered her unavailable for work. Under these particular circumstances, we do not believe the benefit payments for the weeks ending February 15, 1997, and February 22, 1997, can properly be deemed conditional payments, and we conclude that they also constituted determinations of allowance.

*3 Now, therefore,

*3 IT IS HEREBY ORDERED that the decision of the Office of Administrative Hearings issued on April 4, 1997, is SET ASIDE. The redetermination of February 28, 1997, is invalid pursuant to RCW 50.20.160(3) and there is no overpayment pursuant to RCW 50.20.190.

*3 DATED at Olympia, Washington, May 16, 1997.^{a1}

*3 Anthony J. Philippsen, Jr.
*3 Commissioner's Delegate

RECONSIDERATION/JUDICIAL APPEAL

*3 Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this order/decision, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant to WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if this office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives.

*3 The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review. (See attached letter for judicial appeal rights.)

Footnotes

a1 Copies of this decision were mailed to all interested parties on this date.

Empl. Sec. Comm'r Dec.2d 860 (WA), 1997 WL 33644587

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