

NO. 35173-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT
SECURITY,

and

KASANDRA GERIMONTE,

Appellants,

v.

VALLEY PINES RETIREMENT HOME,

Respondent.

BRIEF OF APPELLANT EMPLOYMENT SECURITY
DEPARTMENT

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I. INTRODUCTION

In this unemployment benefits case, Valley Pines Retirement Home (Valley Pines) terminated Kasandra Gerimonte from her job as a caregiver after a background check revealed that she had pending theft charges related to conduct that occurred before she was hired. However, the Commissioner of the Employment Security Department found that Ms. Gerimonte honestly answered all background check authorizations, and the employer had no written or oral policies requiring her to affirmatively disclose that she was participating in a diversion program after she was charged. Because Valley Pines failed to prove Ms. Gerimonte's conduct amounted to misconduct under the Employment Security Act, the Commissioner correctly determined that she was eligible to receive unemployment benefits. RCW 50.04.294; RCW 50.20.066(1).

On judicial review, the Spokane County Superior Court reweighed the evidence, made new factual findings, and relied on evidence that was not admitted into the agency record. Because substantial evidence supports the Commissioner's decision, and it is free of errors of law, the Department respectfully requests that this Court reverse the superior court and affirm the Commissioner's decision awarding unemployment benefits to Ms. Gerimonte.

II. ASSIGNMENTS OF ERROR

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

1. The superior court erred in reweighing the evidence and concluding that substantial evidence did not support finding of fact 14.

2. The superior court erred in reversing the Commissioner's decision that concluded Ms. Gerimonte did not commit work-connected misconduct and was thus entitled to unemployment benefits.

3. The superior court erred in making new findings of fact and relying on evidence that the Commissioner did not consider to support its findings of fact and conclusions of law.

III. STATEMENT OF THE ISSUES

1. Does substantial evidence in the record support the Commissioner's finding that Ms. Gerimonte did not know she was being

¹ This is a judicial review under the Washington Administrative Procedure Act, Chapter 34.05 RCW, where the Court of Appeals sits in the same position of the superior court and reviews the Commissioner's decision. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Accordingly, the Respondent, Valley Pines, must assign error to the Commissioner's findings and conclusions it challenges. See RAP 10.3(h); RCW 50.32.120 (judicial review of the Commissioner's decision is governed by the Administrative Procedure Act). "Assignment of error to the superior court findings and conclusions are not necessary in review of an administrative action." *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994).

investigated for theft when the testimony supported this finding and there was no documentary evidence to support a different conclusion?
(Assignment of Error 1)

2. Does substantial evidence support the Commissioner's finding that Ms. Gerimonte was unaware of any rule or policy that required her to report to her employer that she was participating in a diversion program when she testified that she did not know of any such rule or policy, and the owner of Valley Pines admitted that no company rule or policy existed? (Assignment of Error 1)

3. Did the Commissioner correctly conclude that Ms. Gerimonte did not commit misconduct under the Employment Security Act, RCW 50.04.294, when she truthfully answered all background check authorizations, the employer had no written or oral policies requiring her to affirmatively disclose pending charges or her participation in a diversion program, and the conduct that led to her theft charges occurred before she was hired by the employer? (Assignment of Error 2)

4. Under the Washington Administrative Procedure Act, the superior court sits in an appellate capacity, and judicial review is limited to reviewing the record for substantial evidence to support the findings of fact actually made by the Commissioner. Did the superior court err in

relying on documents that the Commissioner did not consider as evidence and in making new findings of fact? (Assignment of Error 3)

IV. STATEMENT OF THE FACTS

Ms. Gerimonte worked as a caregiver for Valley Pines from March 2014 through April 26, 2016. Commissioner's Record (CR)² 26-27, 89, 113 (Finding of Fact (FF) 2). Employees of Valley Pines who might have unsupervised access to vulnerable adults or minors may not have any criminal convictions or pending charges that would disqualify them from working with vulnerable adults. CR 114 (FF 3); RCW 74.39A.056; WAC 388-113-0020; WAC 388-76-10180. Disqualifying convictions and pending charges include various degrees of theft. CR 114 (FF 3); WAC 388-113-0020. Ms. Gerimonte is a Nursing Assistant Certified (NAC) and completed the required trainings in order to obtain this certification. CR 114 (FF 5); RCW 18.88A. Valley Pines does not have written workplace policies or an employee handbook, so it does not provide written documentation of these regulatory requirements to its employees. Instead, it relies on the NAC training process to inform individuals of any applicable requirements. CR 47-49, 63, 114 (FF 5).

² The superior court transmitted the Commissioner's Record (CR) as a stand-alone document. See Index to Clerk's Papers (CP). Because the administrative record is separately paginated from the Clerk's Papers, this brief cites to the commissioner's record as "CR."

When Valley Pines hired Ms. Gerimonte, she authorized the employer to conduct a background check. CR 110, 114 (FF 6). On the background check authorization form, she indicated that she had not been convicted of any crimes and that she did not have any charges pending against her for any crimes. CR 110, 114 (FF 7, 8). The background check did not show any disqualifying crimes pending charges, or negative actions related to theft.³

Two years later, Ms. Gerimonte completed another background check authorization form, as required by state regulation. CR 49, 114 (FF 10); see WAC 388-76-10165. This time, she indicated on the form that she had charges pending against her for theft. CR 49, 94, 114 (FF 12). The background check results confirmed that she had three disqualifying pending charges: one first degree theft charge and two identity theft charges. CR 95, 114-115 (FF 13). The pending charges were based on conduct from early January 2014, but they were not filed until after she had completed the initial background check form in 2014. CR 68, 95-96, 114-115 (FF 13).

³ The background check results did show that she had two past negative actions. CR 102-105, 114 (FF 9). One negative action was for an “arrest/fingerprinting” in 2013. CR 102. The other negative action was an arrest for assault in 2004 when Ms. Gerimonte was fifteen years old. CR 101-102. Neither of these are automatically disqualifying. WAC 388-76-10180. Jim Lowell, the manager at Valley Pines, investigated those negative actions further and performed an employment suitability determination in which he determined that according to adult family home regulations, she was not disqualified from employment based on either of these negative actions. CR 101, 114 (FF 9); WAC 388-76-10181.

Shortly after Ms. Gerimonte was charged, she entered into a court authorized diversion program. CR 55-56, 115 (FF 14). Upon successful completion of the program, charges would be dropped and Ms. Gerimonte would have no criminal convictions on her record. CR 55-56, 115 (FF 14). Because Ms. Gerimonte was unaware of any rule or policy which required her to report her involvement with the diversion program to her employer, she did not notify her employer when she was charged. CR 115 (FF 14). But because she had not yet completed the diversion program at the time of the 2016 background check, she truthfully indicated that she had charges pending against her when she authorized the background check. CR 56-58, 115 (FF 14).

After receiving the April 2016 background check results, Valley Pines terminated Ms. Gerimonte. CR 50, 83-89, 115 (FF 15). With the disqualifying information on Ms. Gerimonte's current background check, Valley Pines could not allow Ms. Gerimonte unsupervised access to vulnerable adults. WAC 388-113-0020; WAC 388-76-10180.

Ms. Gerimonte applied for unemployment benefits. CR 50, 83-89, 115 (FF 15). The Department initially determined that she was terminated for work-connected misconduct and denied her application. CR 78, 113 (FF 1). Ms. Gerimonte appealed the initial determination, and an administrative hearing was held before the Office of Administrative

Hearings. CR 2, 113 (FF 18). An Administrative Law Judge (ALJ) reversed the initial determination and allowed Ms. Gerimonte unemployment benefits. CR at 117.

At the hearing, witness testimony conflicted on material points. One conflict was regarding the timeline for when Ms. Gerimonte was charged with theft. James Lowell, the manager for Valley Pines, testified that Ms. Gerimonte was charged with theft in January 2014, before she was hired. CR at 43. Conversely, Ms. Gerimonte testified that was when the conduct occurred and that she was not charged until “just about a year later.” CR 44, 52-53. And her mother, Kristine Labelle testified that she “wasn’t officially charged until seven to eight months later.” CR 68. The other conflict in testimony was on whether Valley Pines informed Ms. Gerimonte about the regulatory requirements for criminal and pending charges. Mr. Lowell testified that, while there was no written policy or handbook, he was sure they reviewed the regulatory requirements when she was hired. CR 47-49. But Ms. Gerimonte testified that she was never informed, verbally or in writing, about these requirements upon hire. CR 52, 61.

The ALJ considered this conflicting testimony and resolved the two issues in Ms. Gerimonte’s favor. Specifically, the ALJ found that Ms. Gerimonte was truthful on both her background checks. CR 116

(CL 10). The ALJ determined that Ms. Gerimonte had no pending charges and was unaware she was being investigated when she completed the 2014 background check authorization form and that she did not learn of the charges until 2015. CR 115 (FF 14), 116 (CL 10). Additionally, despite Mr. Lowell's conflicting testimony, the ALJ concluded that "the claimant was unaware of any employer policy or rule requiring her to divulge her participation in a diversion program. Indeed, the employer provides no oral or written policies ... to its new employees." CR 116-117 (CL 11). Regarding the diversion program, the ALJ found that Ms. Gerimonte had entered the program and that the charges would be dropped when she completed it. CR 115 (FF 14). Accordingly, the ALJ found that Ms. Gerimonte's actions were not misconduct that disqualified her from unemployment benefits because they were not in willful or wanton disregard of the rights, title, and interests of the employer. RCW 50.04.294(1); CR 117 (CL 11, 12).

Valley Pines petitioned the Commissioner for review of the initial order, attaching to its petition the first page of a police incident report on Ms. Gerimonte's theft, evidence that had not presented to the ALJ. CR 126-130.⁴ The Commissioner declined to consider this new document as evidence, noting that "[t]he newly raised matters, being unsworn and

⁴ Only one page was submitted because, together with the petition, the rest of the document exceeded the five-page limit. CR 130.

not amenable to inquiry by either the administrative law judge or the other parties, must constitute argument rather than evidence.” CR 134.⁵ The Commissioner then considered the record that had been before the ALJ, adopted the ALJ’s findings of fact and conclusions of law, and affirmed the initial order. CR 134-35.

Valley Pines petitioned the Commissioner for reconsideration, attaching additional documents not previously offered or admitted into evidence: the full police incident report on Ms. Gerimonte’s theft; multiple documents Valley Pines obtained from the police relating to the theft investigation and charges; the 2014 background authorization form; and a declaration from Kneeley Bartels, a care manager at Valley Pines. CR 140-44, 146-172. The Commissioner denied the petition because there was no obvious clerical error in the decision, and Valley Pines had not been denied a reasonable opportunity to present or respond to argument, the only grounds that allow for reconsideration of a final order under the Department’s rule, WAC 192-04-190(2).⁶ CR 176.

⁵ Decisions on petitions for Commissioner review are made by review judges in the Commissioner’s review office but are treated as decisions of the Commissioner due to statutory delegation. See RCW 50.32.070; WAC 192-04-020(5).

⁶ Under WAC 192-04-190(2), reconsideration may only be granted if it is clear from the face of the petition that “(a) there is obvious material, clerical error in the decision 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.”

Valley Pines appealed to the Spokane County Superior Court. CP 1-12. The superior court reversed the Commissioner's decision and held that Ms. Gerimonte was discharged from work for statutory misconduct and was, therefore, ineligible for unemployment benefits. CP 40-43 (CL 7). Specifically, the court determined that Ms. Gerimonte's actions constituted "willful or wanton disregard of the rights, title, and interest of the employer." RCW 50.04.294(1)(a); CP 43 (CL 6). The superior court made new findings of fact and relied on the documents that Valley Pines submitted with its petition for reconsideration, which were not admitted or considered by the Commissioner since they were never presented to the ALJ. The Department and Ms. Gerimonte appeal. CP 44-51, 53-59.

V. STANDARD AND SCOPE OF REVIEW

Washington's Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final decision by the Department's Commissioner. RCW 34.05.030(5); RCW 34.05.510; RCW 50.32.120. Although this is an appeal from the superior court order reversing the Commissioner's decision, this Court "sits in the same position as the superior court" and reviews the Commissioner's decision, not the superior court's, applying the APA standards "directly to the record before the agency." *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494

(1993); *Emps. of Intalco Aluminum Corp. v. Emp't Sec. Dep't*, 128 Wn. App 121, 126, 114 P.3d 675 (2005) (“The appellate court reviews findings and decision of the commissioner, not the superior court decision or the underlying ALJ order.”).

The Court reviews the decision of the Commissioner, not of the ALJ, except to the extent that the Commissioner adopted the ALJ’s findings or conclusions. *Campbell v. State Employment Sec. Dept.*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014); *Tapper*, 122 Wn.2d at 405-06. This Court’s review is limited to the agency record. *Devine v. Emp't Sec. Dep't*, 26 Wn. App. 778, 781, 614 P.2d 231 (1980).

The Commissioner’s decision is prima facie correct, and it is Valley Pines’s burden to demonstrate its invalidity. RCW 34.05.570(1); RCW 50.32.150; *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). Under the APA, a reviewing court may reverse the Commissioner’s decision only if, among other things, the decision is not supported by substantial evidence or is based on an error of law. RCW 34.05.570(3). If the Court determines that the Commissioner has acted within his power and has correctly applied the law, the Commissioner’s decision should be affirmed. RCW 50.32.150.

A. Review of Factual Matters

Findings of fact will be upheld when supported by substantial evidence. RCW 34.05.570(3)(e). 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); *Campbell*, 180 Wn.2d at 571. Evidence may be substantial even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). The Court may not reweigh conflicting evidence or substitute its judgment on the credibility of witnesses. *Tapper*, 122 Wn.2d at 403; *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996); *Smith*, 155 Wn. App. at 35-36. Unchallenged findings are verities on appeal. *Tapper*, 122 Wn.2d at 407.

B. Review of Questions of Law

Although questions of law are reviewed de novo, the Court should afford substantial weight to the agency’s interpretation, especially when the law is in the agency’s area of expertise. RCW 34.05.570(3)(d); *Tapper*, 122 Wn.2d at 407. An agency’s interpretation of its regulations is entitled deference as “it has expertise and insight gained from administering the regulation that the reviewing court does not possess.”

Swedish Health Servs. v. Dep't. of Health, 189 Wn. App. 911, 914, 358 P.3d 1243 (2015) (quoting *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 56, 239 P.3d 1095 (2010)).

C. Mixed Questions of Law and Fact

Whether an employee's actions constitute statutory misconduct is a mixed question of law and fact. *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 9, 259 P.3d 1111 (2011). This Court must: (1) determine whether substantial evidence supports the Commissioner's factual findings, (2) make a de novo determination of the correct law, and (3) apply the law to the applicable facts. *Tapper*, 122 Wn.2d at 403.

VI. ARGUMENT

The Employment Security Act, RCW Title 50, was enacted to provide compensation to individuals who are "involuntarily" unemployed "through no fault of their own." RCW 50.01.010; *Tapper*, 122 Wn.2d at 409. The Legislature has directed that the Act be liberally construed "for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum." RCW 50.01.010; *see Tapper*, 122 Wn.2d at 407-08. Thus, unemployed workers are generally eligible for unemployment benefits, absent a statutory disqualification. *Griffith*, 163 Wn. App. at 8. Construing the benefits statute in a manner that narrows the coverage of unemployment compensation laws is viewed "with caution."

Id. (quoting *Shoreline Comm. College Dist No. 7 v. Emp't Sec. Dep't*, 120 Wn.2d 394, 406, 842 P.3d 938 (1992)).

Employees who are discharged from employment are generally eligible for unemployment benefits unless the employer proves they have been discharged for “misconduct” under the Act. RCW 50.20.066(1); *Griffith*, 163 Wn. App. at 8. The question is whether the Commissioner properly concluded that Ms. Gerimonte did not engage in misconduct under the Act, not whether Valley Pines was justified in terminating her. *Ciskie v. Emp't Sec. Dep't*, 35 Wn. App. 72, 76, 664 P.2d 1318 (1983) (“Good cause for discharge is not to be equated with misconduct disentitling the worker to benefits.”).⁷

Here, the Commissioner weighed the evidence in the record and found that Valley Pines failed to establish by a preponderance of the evidence that it discharged Ms. Gerimonte for misconduct. Substantial evidence supports the finding that she was truthful on each of her background checks. While she did not immediately disclose charges filed against her or her entry into a diversion program, there was no written or

⁷ As the Commissioner concluded, “This decision does not question the employer’s right to discharge claimant, nor the wisdom of that act. Under these facts discharge may have been an appropriate course of action for employer. It is decided only that the evidence presented will not support a denial of benefits under the misconduct statute.” CR 117. Similarly, the Commissioner wrote, “we do not question the employer’s right to discharge the claimant, but do hold the evidence does not support a denial of benefits under the Employment Security Act.” CR 135.

oral employer policy requiring her to divulge this information between background checks. The Commissioner properly applied the law to these facts and concluded that Ms. Gerimonte's actions did not amount to a willful or wanton disregard of her employer's rights, title, and interests. RCW 50.04.294(1)(a). This Court should reverse the superior court's order and affirm the Commissioner's decision awarding unemployment benefits to Ms. Gerimonte.

A. Substantial Evidence Supports the Commissioner's Findings

At the superior court, Valley Pines only challenged two parts of finding of fact 14: "The claimant was unaware that she was being investigated for theft until sometime late in 2015," and "Claimant was unaware of any rule or policy which required her to report to her employer her involvement with the diversion program." CR 115 (FF 14). Because substantial evidence in the record supports these finding, this court should uphold finding of fact 14.

First, substantial evidence supports the finding that Ms. Gerimonte was unaware she was being investigated for theft until sometime late in 2015.⁸ At the administrative hearing, Ms. Gerimonte testified that she was

⁸ It appears that the Commissioner made a clerical error in writing 2015, rather than 2014. The conduct underlying the theft took place in January 2014, and Ms. Gerimonte completed the first background check authorization in April 2014. At the hearing, Ms. Gerimonte testified that "these charges didn't come up for a year later." CR 52. And her mother Ms. Labelle testified that the charges weren't officially filed until

unaware of the charges when she completed her background check authorization form in April 2014 because the charges were not filed for a year or so after the incident, which occurred in January 2014. CR 52-53. Ms. Labelle, Ms. Gerimonte's mother, confirmed Ms. Gerimonte's testimony, stating that Ms. Gerimonte had no idea she would be criminally charged and that the charges were not officially filed until seven or eight months after the incident. CR 68.

Conversely, Mr. Lowell asserted that Ms. Gerimonte must have known of the theft charges when signing the background authorization because the background check results showed the charges were filed on January 3, 2014. CR 43, 95. However, as Ms. Gerimonte correctly pointed out in her testimony, the background check results clearly identify that date as the date of the violation, not the date the charges were filed. CR 43-44, 53, 95. The Commissioner considered all the evidence and then resolved conflicts in favor of Ms. Gerimonte when making his factual findings. Viewing the evidence in the light most favorable to the Department, substantial evidence supports the finding that Ms. Gerimonte

seven or eight months after the act. CR 68. Importantly, this clerical error does not prejudice the employer because it does not change that fact that in April 2014, when Ms. Gerimonte completed the initial background check authorization, Ms. Gerimonte did not have pending charges against her and was truthful on her background check, which is what is material in this case. See RCW 34.05.570(1)(d) (Court should grant relief only if "it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d)).

was unaware that she was being investigated for theft until after she filled out the first background check authorization form. CR 115 (FF 14). The Court should uphold this finding. CR 115 (FF 14).

Second, substantial evidence supports the other part of finding of fact 14 that Valley Pines challenged—that Ms. Gerimonte was unaware of any rule or policy requiring her to report to her employer her involvement with the diversion program. CR 115 (FF 14). Ms. Gerimonte consistently testified she was unaware of the need to affirmatively report pending charges or her participation in a diversion program in between background checks. CR 52, 61. She testified that no one at Valley Pines provided her a handbook with this policy or reviewed this requirement with her. CR 52. Although Mr. Lowell asserted he was confident that, consistent with standard procedure, an employer representative had reviewed the reporting requirement with Ms. Gerimonte when she was hired, he also admitted that there was no written policy requiring Ms. Gerimonte to affirmatively report pending charges. CR 47-48, 62. Further, he testified that their internal policies should not matter because she should have known of the requirement through her NAC training and past employment, but he provided no evidence that this was covered in her training. CR 47, 63. The ALJ considered the parties' conflicting testimony, weighed the credibility of the witnesses, and found that the evidence supported Ms. Gerimonte's

position that she was unaware of any policy requiring her to affirmatively report changes between background checks. CR 115 (FF 14).

This ruling is consistent with WAC 192-150-210(5) which reads:

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

The employer admitted there was no written rule or policy and provided no evidence that this unwritten rule was discussed in an employee orientation. Thus, based on the Department's regulation, it was a reasonable inference that Ms. Gerimonte was unaware of a company rule or policy.

The superior court judge erred in determining that substantial evidence did not support finding of fact 14. Ms. Gerimonte's testimony supports the Commissioner's finding that Ms. Gerimonte was unaware that she was being investigated for theft when she completed the first background check authorization and of any rule or policy requiring her to report to her employer her involvement with the diversion program. In reviewing the Commissioner's finding, it does not matter if the Court would have made a different decision; it only matters if "any fair-minded person" could have ruled the way the Department did. *See Callecod v.*

Washington State Patrol, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997).

The Court should uphold the entirety of the Commissioner's finding.

B. The Commissioner Correctly Concluded That Ms. Gerimonte Did Not Commit Misconduct under the Employment Security Act, RCW 50.04.294

The Commissioner correctly applied the law to the facts and concluded that Ms. Gerimonte did not commit misconduct and was thus eligible for unemployment benefits. CR 117 (CL 11, 12). At the administrative hearing, the burden was on the Valley Pines to establish that Ms. Gerimonte was discharged for disqualifying work-related misconduct. *See Nelson v. Department of Employment Sec.*, 98 Wn.2d 370, 374-75, 655 P.2d 242 (1982). On appeal, the burden is on the party asserting the invalidity of agency action—again, Valley Pines—to establish that the Commissioner's decision was in error. RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32.

A claimant is disqualified from unemployment benefits if she has been discharged for misconduct connected with her work. RCW 50.20.066(1). "Misconduct" includes "[w]illful or wanton disregard of the rights, title, and interests of the employer or a fellow employee." RCW 50.04.294(1)(a). The statute goes on to list seven specific acts that are considered per se misconduct "because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a

fellow employee.” RCW 50.04.294(2); *Daniels v. Dep’t of Empl Sec.*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012) . These examples include “[d]eliberate acts that are illegal, provoke violence or violation of laws, or violate the collective bargaining agreement” and “[v]iolations of law by the claimant while acting within the scope of employment that substantially affect the claimant’s job performance or that substantially harm the employer’s ability to do business.” RCW 50.04.294(2)(e), (g). The definition of misconduct excludes ordinary negligence and good faith errors in judgment or discretion. RCW 50.04.294(3).

1. Ms. Gerimonte’s actions did not amount to willful misconduct under RCW 50.04.294(1)

In order for an act to be in willful or wanton disregard of an employer’s rights, the employee must act intentionally and with an awareness that she is violating or disregarding the employer’s rights. WAC 192-150-205. “Willful” means “intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer or a co-worker.” WAC 192-150-205(1). And “wanton” means “malicious behavior showing extreme indifference to a risk, injury, or harm to another that is known or should have been known to you.” WAC 192-150-205(2). Washington cases have held that an employee’s actions are in willful disregard of an employer’s

rights when the employee: “(1) is aware of his employer’s interest; (2) knows or should have known that certain conduct jeopardizes that interest; but (3) nonetheless intentionally performs the act, willfully disregarding its consequences.” *Hamel v. Emp’t Sec. Dep’t*, 93 Wn. App. 140, 146-47, 966 P.2d 1282 (1998).

Courts have held that in order for an employee to willfully disregard an employer’s rights, the employee must be aware that she is disregarding those rights. In *Kirby v. Department of Employment Security*, 179 Wn. App. 834, 837–41, 320 P.3d 123 (2014), a security guard refused to fill out an incident report because she had already filled out multiple reports on the same incident, was unaware that the employer had never received them, and was skeptical about why she was being asked to submit new reports without explanation. The Court of Appeals agreed with the Commissioner’s conclusion that the claimant’s actions did not amount to willful or wanton disregard of her employer’s interest because she acted out of confusion and apprehension, rather than an intent to harm the employer. *Id.* at 847. The Court reasoned:

a showing of misconduct must be established by evidence that the employee was aware that he or she was disregarding the employer’s rights [T]he facts do not establish that she was aware she was disregarding the rights and interests of her employer; therefore, she did not intentionally jeopardize those interests by refusing to write the report.

Id. Thus, an employee's actions do not amount to misconduct when the employee acts without intent to perform an act the employee knows will harm the employer's interest.

When an employee acts against the employer's interests but has no reason to know that her actions violate the employer's policies or harm the employer's interests, the employee actions generally amount to negligence, rather than misconduct. In *Wilson*, a jewelry store employee twice lost loose diamonds when he mistakenly failed to immediately log them into the stock and place them in the safe. *Wilson v. Emp't Sec. Dep't*, 87 Wn. App.197, 199, 940 P.2d 269 (1997). But because there was no specific company policy requiring diamonds to be logged or placed in the safe within a certain amount of time, the Court of Appeals determined that the employee's actions constituted negligence, not disqualifying misconduct. *Id.* at 203. The Court reasoned, "Had such a policy existed and Wilson chosen not to act within the time specified because, for example, he disputed the necessity of so acting, then a finding of misconduct under the statute would be easier to make." *Id.* at 203 But, the Court continued, "Actions or failures to act that are simply negligent, *and not in defiance of a specific policy*, do not constitute misconduct in the absence of a history of repetition after warnings." *Id.* (emphasis added). An employee cannot be considered to have committed misconduct for

failing to abide by a specific workplace expectation that was not communicated to them.

Ms. Gerimonte's actions do not amount to misconduct under the law. The findings—which are supported by substantial evidence—in turn support that she did not intentionally behave knowing that she was violating her employer's interests. She was unaware of any rule or policy requiring her to divulge her participation in a diversion program and did not believe that her participation in the program or her pending charges would disqualify her from her employment. CR 53, 59, 115 (FF 14). Ms. Gerimonte's conduct could not be willful if she was unaware of the requirement. If Valley Pines expected their employees to immediately notify it of any pending charges, convictions, or other disqualifying actions, then it should have implemented a company rule with that requirement. But, since no rule existed, Ms. Gerimonte's actions were in accordance with known workplace expectations. And, Ms. Gerimonte knew that she had to respond truthfully on the background check authorization forms, which she did. CR 114 (FF 7, 8). At most, her actions amounted to a good faith error in judgment in that she should have realized that disqualifying pending charges at any time would need to be reported or it would pose a risk to the facility's license. However, since she did not *know* she was putting her employer's interest at risk or that she

was not doing what her employer expected, she did not commit statutory misconduct. The Commissioner correctly concluded that “[c]laimant’s actions do not equate to a willful or wanton disregard of the rights, title, and interests of the employer.” CR 117 (CL 11).

2. Ms. Gerimonte’s actions did not amount to misconduct per se under RCW 50.04.294(2)

Similarly, Ms. Gerimonte’s preemployment conduct does not constitute misconduct per se. In addition to finding misconduct under the general definition in RCW 50.04.294(1), the superior court erred in finding that Ms. Gerimonte was discharged for misconduct per se under RCW 50.04.294(2)(e) and (g). CR 42 (CL 4).

First, Ms. Gerimonte’s actions were not “deliberate acts which are illegal and provoke violation of the law.” RCW 50.04.294(2)(e). Here, there are no findings about the circumstances that led to Ms. Gerimonte’s pending charges and thus no finding that she committed deliberate, illegal acts, or that she provoked a violation of the law. The absence of a finding on a matter generally implies a finding against the proponent of that finding. *Stuewe v. Dep’t of Revenue*, 98 Wn. App. 947, 952, 991 P.2d 634 (2000). Moreover, to find misconduct under RCW 50.04.294, “[t]he action or behavior that resulted in your discharge or suspension from employment must be connected with your work to constitute misconduct

or gross misconduct.” WAC 192-150-200(1). An action is connected to your work if “it results in harm or creates the potential for harm to your employer’s interests.” WAC 192-150-200(2). Ms. Gerimonte’s conduct that led to the criminal charges occurred before she was hired by Valley Pines. Actions cannot be harmful to an employer if a company is not yet your employer and you have no knowledge of any workplace requirements.

Second, Ms. Gerimonte did not commit a “violation of the law while acting in the scope of employment, substantially harming the employer’s ability to do business.” RCW 50.04.294(2)(g). Department regulations further define when an individual is acting within the “scope of employment” and require that the employee be acting at the direction of their current employer. WAC 192-150-210(6).⁹ Again, because the incident that led to charges against Ms. Gerimonte occurred before she was employed by Valley Pines, it could not have occurred “while acting in the scope of employment” or “at the direction of [her] current employer.” CR 114-115 (FF 7, 14). Ms. Gerimonte’s conduct was not misconduct per se under RCW 50.04.294(2)(g).

⁹ WAC 192-150-210(6): “You are considered to be acting within your ‘scope of employment’ if you are: (a) Representing your employer in an official capacity; (b) On your employer’s property whether on duty or not; (c) Operating equipment under your employer’s ownership or control; (d) Delivering products or goods on behalf of your employer; or (e) Acting in any other capacity at the direction of your employer.”

Valley Pines failed to meet its burden to establish that Ms. Gerimonte committed disqualifying misconduct under RCW 50.04.294. The Commissioner found that Ms. Gerimonte was truthful in her answers on both background check authorization forms and was unaware of a rule requiring her to disclose any pending charges or participation in a diversion program. CR 115 (FF 14). Based on the factual findings, she did not knowingly or intentionally mean to harm her employer or take any action she knew would do so. The Commissioner correctly determined that Ms. Gerimonte did not commit misconduct under the law, and the superior court erred in concluding otherwise.

C. The Superior Court Erred in Making Additional Findings of Fact and Relying on Evidence Not Admitted into the Agency Record

Finally, the superior court committed two material errors in its review of the agency action that should be reversed. First, instead of engaging in an appellate review, it made additional findings of fact, some of which had no evidentiary basis in the record. Second, it relied on evidence that was not admitted into the agency record. Both of these errors exceeded the permissible scope of judicial review under the APA and require reversal by this Court.

Judicial review is limited to review of the Commissioner's decision, and courts must apply the specific standards laid out in the APA

directly to the agency record. *Tapper*, 122 Wn.2d at 402. Under the APA, the superior court is to review the findings of fact made by the Commissioner and determine whether there is substantial evidence in the record to support them. RCW 34.05.570(3). There are only limited circumstances when a court may receive new evidence after the administrative hearing. RCW 34.05.562.¹⁰ Without falling into one of these limited circumstances, the evidence is not properly before the Court and cannot be a basis for the Court's decision.

Instead of following this standard of review, the superior court made new findings of fact, including some findings that the Commissioner had not broached and which had no evidentiary support in the record. CR 41-42 (FF 1-10). For example, the superior court found, "Diversion programs do not dismiss any pending charges until the entire program and all its conditions are satisfied." CP 42. The Commissioner had not made this finding, there was no evidence in the record about how the diversion program works, and how the program works was not material to whether Ms. Gerimonte knew she was violating her employer's interests. Ignoring

¹⁰ The APA will allow new evidence to be taken by the court or by the agency only

if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

- (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
- (b) Unlawfulness of procedure or of decision-making process; or
- (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

its limited appellant role, the superior court made new findings that were not based on evidence in the record and that were not relevant to the ultimate issues. This was an error and should be reversed.

Further, the superior court erroneously relied on evidence that was not admitted into the record when making its decision. The superior court found:

At the time she signed her background check, she knew she had been investigated by Numerica Credit Union for alleged forgery for passing bad checks on January 3, 2014, and was later interviewed by Spokane Police Department. She knew at said time that the police were recommending the filing of charges against her, and charges were ultimately filed against her.

CP 41 (FF 3). It also found “At hearing, Appellant provided documentation of a criminal investigation of Ms. Gerimonte beginning at or before January 16, 2014, as documented by a copy of the RMS incident report.” CP 42 (FF 9). Both of these findings were based on the narrative police reports that Valley Pines first submitted in full with its Petition for Reconsideration to the Commissioner. CR 153-163.¹¹ These documents

¹¹ Valley Pines did not submit the details of the investigation into evidence until after the administrative hearing—submitting one page of the incident report with the petition for Commissioner’s review and then submitting the entire, five-page incident report with the petition for reconsideration, along with other police documents, the 2014 background authorization form, and a declaration from a care manager at Valley Pines. CR 129, 140-44, 146-172. The RMS report (police incident report) relied on by the superior court was part of this later submitted evidence. CP 42 (FF 9), 129, 146-47. The only evidence Valley Pines submitted at hearing regarding the theft timeline was the 2016 background check results, which only showed that the conduct that led to the pending charges occurred on January 3, 2014. CP 95.

were not admitted at the administrative hearing and could not be used to support factual findings by the trier of fact. See RCW 34.05.461(4) (findings of fact must be based exclusively on the evidence of record). The Commissioner properly refused to consider it as evidence, as it was unsworn, unauthenticated, and not subject to cross-examination. CR 134 (“The newly raised matters, being unsworn and not amenable to inquiry by either the administrative law judge or the other parties, must constitute argument rather than evidence. *In re Wolstenhome*, Empl. Sec. Comm’r Dec. 2d 349 (1977).”) Without analysis or recognizing that these documents were not in the agency record, the superior court explicitly relied upon them to make new findings of fact, in violation of the APA. CP 41-42; RCW 34.05.558.

The superior court erred in making new factual findings and relying on the untimely submitted, unadmitted evidence in reaching its decision. This Court should reverse the superior court’s order and reinstate the Commissioner’s decision finding Ms. Gerimonte eligible for unemployment benefits.

VII. CONCLUSION

The Commissioner correctly concluded that Ms. Gerimonte was not discharged for statutory misconduct and thus qualified to receive unemployment benefits. The Commissioner’s decision is supported by

substantial evidence and is free of errors of law. The Department asks the Court to reverse the superior court's decision and affirm the Commissioner's decision awarding Ms. Gerimonte unemployment benefits.

RESPECTFULLY SUBMITTED this 29th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing **Brief of Appellant Employment Security Department** to be filed with the Clerk of the Court, and I certify that I served all parties, or their counsel of record, a true and correct copy of this document by United States Mail, postage prepaid, at the following addresses:

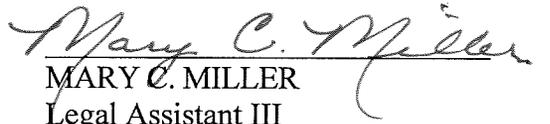
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29th day of June, 2017 at Spokane, WA.


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