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NO. 59993-3-I

COURT, OF APPEALS FOR DIVISION ONE
STATE OF WASHINGTON

VERIZON NORTHWEST, INC.,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

A worker is disqualified from receiving unemployment benefits if he or she voluntarily leaves work without good cause. RCW 50.20.050(1). One variation in this rule is the employer initiated layoff rule, WAC 192-150-100, which provides that after a layoff has been announced, an employee may volunteer to be among those laid off, and still be eligible for benefits if certain other criteria is met.

In the present case, Verizon "was the moving party in announcing the reduction in force, selecting the employees to whom the announcement was made, and then automatically accepting the employees' participation .. while retaining the power to reject those employees who were not eligible for such participation." Commissioner's Record (CR) at 1089. Verizon's reduction in force was staged amid a backdrop of coercion inherent in statements offered by senior management. CR at 849, 889, 1088-1089. As such, the inescapable factual finding reached by the Commissioner was that Verizon would have involuntarily reduced its work force had the specifically targeted "volunteers" not participated in Verizon's reduction in force.

The employees who participated in the reduction in force, therefore, met the , requirements of WAC 192-150-100 and are entitled to unemployment benefits. The Department respectfully requests that the Commissioner's decision be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

- A. When Verizon announced layoffs in writing, which were found to be inevitable, that targeted a specific class of employees and, through coercion, thereby retained control over who participated, was the Commissioner correct in finding that the "Voluntary Separation Program for Management Employees" (MVSP) offered by Verizon met the requirements of WAC 192-150-100 and was an employer initiated layoff?
- B. Was WAC 192-150-100, which clarifies but does not modify a provision of law, properly promulgated and applied?

III. COUNTERSTATEMENT OF CASE

On July 21, 2003 Verizon announced plans to reduce its total 220,000 workforce by 5000 employees. Commissioner's Record (CR) at 869. The 5000 employee reduction, according to Verizon CEO Ivan Seidenberg, was "the same target we've had since the beginning of the year. The arbitration decision earlier this month that required us to hire back 3,400 associates complicated this task a little bit, but doesn't change our goal." CR at 869. According to Verizon's manager for Employee Services, before the "Voluntary Separation Program for Management Employees" (MVSP) was announced, most of the 5000 target reduction in force was achieved, and as of September, 2003, Verizon had no plans to reduce its workforce in Washington State) CR at 936. Verizon intended to backfill some of these

Between September 2003 and November 17, 2003, Verizon posted and filled 37 openings for management positions in Washington State. CR at 925.

positions with "new hires who have skills focused on newer technologies; such as fiber optics and Internet protocol. Telecom will also replace some management positions by promoting associates into vacant positions." CR at 1015.

On September 17, 2003, Verizon's vice president for human resources sent out an email to "All Management Employees." CR at 879. The email announced Verizon's MVSP. CR at 879. In the email, the vice president stated:

[The MVSP] is one of many steps the company is taking to reposition itself to remain successful . . . Given the current environment, a voluntary program is appropriate . . . it is better for morale, and the organization rebounds faster than it would under an involuntary program . . . This program allows *retirement eligible* employees an opportunity to take advantage of historically low interest rates when receiving a lump sum cash out of their pension.

CR at 880 (emphasis added).

On October 1, 2003, Verizon's vice president for human resources sent out a "Notification Letter" to a group of employees selected to participate in the [MVSP](#). CR 843. The letter states:

We are pleased to inform you that you are among a group of employees who are eligible to volunteer for a reduction in force (RIF). You have 45 days to consider volunteering with all volunteer founs required by 11:59 pm on November 14, 2003.

CR at 843.

The letter goes on to add the following:

If you decide to volunteer for the program, you must submit the Volunteer Form Additionally, you are required to sign and submit the Separation Agreement and Release (Release) in order to receive the pension enhancement and separation benefits The [Older Workers Benefit Protection Act of 1990] also provides you with seven (7) calendar days from the date you sign the Release to revoke it. If you revoke the Release, you will also revoke your decision to volunteer and will remain on the payroll[.]

CR at 844.

Finally, the notification letter explicitly defines the subset of employees who are eligible for the MVSP. [CR](#) at 845. Eligible employees were able to accept the MVSP offer by faxing a complete Volunteer Form or completing the form online. CR at 844. If an employee volunteered online, he or she would receive the following confirmation:

Acceptance of your voluntary separation received

Kindly note the following:

1. The online acceptance of your voluntary separation has been received. Electronic confirmation of your voluntary acceptance will appear . . . within the next 48 hours.
2. The confirmation number for your acceptance of voluntary separation is
3. You will also receive an e-mail notification on your acceptance in the next few minutes

CR at 847 (emphasis in original).

The Separation Agreement and Release, which employees had 45 days to consider, stated: "I am voluntarily leaving the employment of [Verizon] e f f e c t i v e November 21, 2003 because of a Reduction in Force [I] understand I can revoke this Release within seven (7) days of signing, and this Release will not become effective until the end of that seven (7) day period." CR at 1002.

On a Q & A. document available to employees was the following response to whether MVSP participants were eligible for unemployment benefits:

This separation program is voluntary, and there are no caps or restrictions on the numbers of employees who can volunteer An employee's decision is based on personal circumstances and is strictly voluntary Unemployment compensation is not an absolute benefit, and the fact that this is a voluntary program will disqualify employees in most states.

CR at 842.

According to a former Verizon employee who chose to participate in the MVSP, the vice president of human resources stated in an email to employees that he "could not live with himself" if an employee missed out on the money due to a subsequent involuntary RIF. CR at 889. About 10% of all Verizon employees (approximately 20,000) participated in the MVSP and the company expected to back fill some of those positions with new hires. CR at 849.

The participating employees filed for benefits in late 2003 with the Department initially denying benefits stating that the participating-employees were disqualified from receiving unemployment compensation pursuant to the voluntary quit provisions of RCW 50.20.050 on the basis that each had left work voluntarily without good cause. CR at. 63. After reversing its initial determination, the Department then issued Individual Redetermination Notices holding that the claimants were not subject to disqualification.. CR at 63. Verizon then filed an appeal in each of the 244 redetermination notices. CR at 63.

The appeals were consolidated before a single Administrative Law Judge. After taking argument and weighing evidence contained in the administrative record,² the Administrative Law Judge (ALJ) found that the requirements of WAC 192-150-100 were met.³ The ALJ ruled. that through

² A motion for summary judgment was filed on May 27, 2004 by the attorney representing the 92 claimants. CR at 64.

³ WAC 192-150-100 provides:
Employer-initiated layoffs or reductions in force. (1) You will not be considered to have been separated from employment for a disqualifying reason when:
(a) Your employer takes the first action in the separation process by announcing in writing to its employees that:
(i) The employer plans to reduce its work force through a layoff or reduction in force, and
(ii) That employees can offer to be among those included in the layoff or reduction in force;
(b) You offer to be one of the employees included in the layoff or reduction in force; and
(c) Your employer takes the final action in the separation process by accepting your offer to be one of the employees included in the layoff or reduction. in force, thereby ending your employment relationship.
(2) This section does not apply to situations where an employer modifies benefits or

the October 1; 2003 notification letter indicating that a particular class of Verizon employees were eligible to volunteer for a reduction in force (RIF), WAC 192-150-100(1)(a)(i) and (ii) were met. CR at 70. These targeted employees then "offered to be included in the reduction in force, thereby satisfying the requirements of WAC 192-150-100(1)(b)." CR at 70. The ALJ additionally ruled that the requirements of WAC 192-150-100(1)(c) were met:

Verizon argues that the claimants have failed to satisfy the final requirements of WAC 192-150-100(1)(c) because Verizon did not take the final action in the separation process. That argument is not persuasive Verizon took the final action when it determined the initial eligibility group, and provided for automatic acceptance of all qualified employees who offered to participate in the VSPME (MVSP), thereby terminating the employment relationship. Accordingly, the remaining requirements of WAC 192-150-100(1)(c) are met.

CR at 71.

Verizon appealed this decision to the Commissioner. The Commissioner largely affirmed the findings and conclusions of the initial decision while at the same time distinguishing the facts and circumstances of the present case from the then recently released case of *Broschart v. Employment Security*

otherwise encourages early retirement or early separation, but the employer and employee do not follow the steps in subsection (1)(a) through (c).

Dep't, 123 Wn. App. 257, 95 P.3d 356 (2004), *review denied* 153 Wn.2d 1024, 110 P.3d 755 (2005):

In response to the petition for review, the case is distinguishable from [*Broschart*], where the employer therein did not announce a reduction in force, but rather simply told its employees about an early retirement program and voluntary furlough programs.... we conclude that the reduction in force in this case was implicitly an involuntary one. . . .wherein the employer's executive vice president, human resources, contrasts the employer's [VSPME (MVSP)] with the only alternative, an involuntary program, acknowledging in the alternative program, the employees "might not have otherwise been eligible" for the separation benefits offered by the VSPME (MVSP). The executive vice president's statements evoke the coercion inherent in any involuntary reduction in force. Additionally it is clear that the reduction in force was inevitable and was required to 'allow Verizon to remain competitive. Exhibit No. 14-I at p. 3 (CR 1015)

CR at 1088-89.

The Commissioner ordered that the Order Granting Summary Judgment (in Favor of the Claimants) be affirmed. The Commissioner ruled that the claimants were not disqualified pursuant to RCW 50.20.050 and were entitled to an award of unemployment benefits. CR at 1089. Verizon appealed to Snohomish County Superior Court and Judge Kurtz affirmed. Verizon now appeals to this Court.

IV. ARGUMENT

A. Standard of Review

The Washington Administrative Procedures Act governs judicial review of the Commissioner's decision. RCW 34.05.510, 50.32.120; *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Although this is an appeal from the superior court order affirming the Commissioner's decision, an appellate court "sits in the same position as the superior court" and reviews the Commissioner's decision, applying the APA standards "directly to the record before the agency." *Tapper*, 122 Wn.2d at 402; *Employees of Intalco Aluminum Corp. v. Empl. Sec. Dep't*, 128 Wn. App. 121, 126, 114 P.3d 675 (2005) ("[t]he appellate court reviews the findings and decisions of the commissioner, not the superior court decision or the underlying ALJ order").

The APA directs the court to affirm the Commissioner's decision if supported by substantial evidence and in accord with the law. RCW 34.05.570(3). Review is limited to the agency record. RCW 34.05.558. The Commissioner's decision is "prima facie correct'.". RCW 50.32.150. To obtain relief, Verizon must prove the invalidity of the decision and substantial prejudice. RCW 34.05.570(1)(a) and (1)(d).

The court must uphold the Commissioner's factual determinations if supported by substantial evidence. RCW 34.05.570(3)(e). Evidence is

substantial if sufficient to "persuade a fair-minded person of the truth of the declared premises." *Heinmiller v. Dep 't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). Evidence maybe substantial enough to support a finding of fact 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). Unchallenged findings of fact will be treated as verities on appeal. RAP 2.5(a). Verizon has not challenged any factual findings, thus, they are verities on appeal.

The court reviews legal conclusions *de novo* but, when there is ambiguity, must give substantial deference to the Commissioner's interpretation of the Employment Security Act in light of the Department's expertise in adminstennng the law. *Western Ports Transp., Inc. v. Employment Sec. Dept'*, 110 Wn. App. 440, 449-450, 41 P.3d 510 (2002); *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).

The Commissioner Correctly Concluded That The Employees' Separation In This Case Was An Employer-Initiated Layoff

Substantial evidence supports the finding that Verizon targeted who would be eligible for the reduction in force and, in essence, sent the coercive message that employees should retire or risk a reduction in force. The facts show that layoffs were inevitable. Thus, the Commissioner

properly found that this was an employer initiated lay-off and that Verizon's 92 employees were entitled to benefits.

The Employment Security Act (Act) was enacted to provide compensation to individuals who are "involuntarily" unemployed "through no fault of their own." RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. The Act "shall be liberally construed for the purpose of reducing involuntary unemployment . and the suffering caused thereby to a minimum." RCW 50.01.010. Generally, unemployed workers are eligible for benefits unless they are disqualified by statute. *Safeco*, 102 Wn.2d at 392. A worker is disqualified from receiving unemployment benefits if he or she voluntarily leaves work without good cause. RCW 50.20.050(1). One regulation flowing from the Act is the employer initiated layoff rule, which provides that after a layoff has been announced, an employee may volunteer to be among those laid off, and still be eligible for benefits. See WAC 192-150-100 *infra*.

Voluntary participation in an early retirement program does not constitute good cause for quitting work 'under RCW 50.20.050(1). *Goewert v. Anheuser Busch, Inc.*, 82 Wn. App. 753, 758, 919 P.2d 106 (1996), *review denied*, 131 Wn.2d 1005, 932 P.2d 644 (1997) (to qualify for benefits after participating in an early retirement program requires that an employer announce an involuntary layoff or a reduction-in-force; to

hold otherwise would contravene the purpose of the Employment Security Act to provide benefits to those unemployed through "no fault of their own" and its purpose of reducing "involuntary unemployment"); *Read v. Employment Sec. Dep't*, 62 Wn. App. 227, 236-37, 813 P.2d 1262 (1991) (participation in an early retirement plan does not satisfy the meaning of good cause).

This is not a case of voluntary participation because substantial evidence supports the specific finding that the RIF in this case was implicitly an involuntary one and was being done to allow Verizon to remain competitive. CR at 1015, 1088-89. These facts' clearly demonstrate that the claimants in this case left their employment for "work-connected factors" as required by statute. As such, the test set forth in WAC 192-150-100 is entirely consistent with RCW 50.12.010 and RCW 50.20.050.

1. The Commissioner's order is a proper application of WAC 192-150-100 and its predecessor, WAC 192-16-070

Prior to passage of WAC 192-150-100, two cases addressed whether a claimant was eligible for unemployment benefits under WAC 192-16-070⁴ *Ortega v. Employment Sec. Dep't*, 90 Wn. App. 617, 953

WAC 192-16-070 provided:

A layoff or reduction-in-force will not be considered to be a voluntary quit pursuant to RCW 50.20.050, if: (1) The employer announced a layoff or reduction-in-force; and

P.2d 827, *review granted*, 136 Wn.2d 1028, 972 P.2d 464 (1998) (request for review withdrawn due to settlement between the parties); *Nielsen v. Employment Sec. Dep't*, 93 Wn. App. 21, 966 P.2d 399 (1998).

Ortega involved a claimant who resigned from Westinghouse Hanford after signing a release stating that she was voluntarily electing to participate in the employer's Special Voluntary Reduction of Force incentive program. *Ortega*, 90 Wn. App. at 618-19. The Ortega court found that the phrase "reduction-in-force" in former WAC 192-16-070 was limited to programs where the employer reduced the work force by imposing an involuntary reduction-in-force. *Id.* at 624. The court further stated that for an employee to receive unemployment benefits under former WAC 192-16-070, the employee had to volunteer to participate in a "mandatory phase" of a layoff or reduction-in-force program. *Id.* at 625. The court denied benefits because the claimant did not demonstrate good cause for quitting and found that WAC 192-16-070 did not apply. *Id.* at 626.

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- (2) The claimant volunteered to be one of the people included in the layoff or reduction-in-force; and
 - (3) The employer determines which individuals are laid off or released through a reduction-in-force; and
 - (4) The employer accordingly laid off or released the claimant due to a reduction-in-force.

Nielsen involved the same Special Voluntary Reduction of Force incentive program in *Ortega Nielsen*, 93 Wn. App. at 24-5. *Nielsen*, however, concluded that Ortega's interpretation "effectively adds the term "involuntary" to WAC 192-16-070(1), resulting in a narrow construction of a regulation that disqualifies large numbers of workers, contrary to the overriding mandate of liberal construction." *Id.* at 36 ("[w]e add language to a statute only where its omission creates a contradiction that renders the statute absurd and undermines its sole purpose"). Nielsen concluded that Ortega's addition to the rule created a contradiction and undennined the remedial purpose of the statute; accordingly, the court applied the rule more broadly. *Id.* Nielsen noted that because Westinghouse mandated 4,800 employees would be-terminated if enough people did not participate in the voluntary severance program, Westinghouse's action equaled compulsion. *Id.* at 36, 38. In addition, the court noted that Westinghouse made it clear the layoffs were inevitable and that the worker's specific job categories were targeted. *Id.* at 37. Based on these facts, Nielsen concluded that WAC 192-16-070 was applicable. *Id.* at 44. In addition, the court concluded that even if WAC 192-16-0.70 was inapplicable, the claimant established good cause to leave because of Westinghouse Hanford's announcement that it would be terminating 4,800 people. *Id.* at 42.

2. The post-WAC 192-16-070 legal landscape

After the *Ortega* and *Nielsen* decisions came down; the Department repealed WAC 192-16-070 and adopted WAC 192-150-100, the employer-initiated layoffs and reduction-in-force rule. Under the new rule, a claimant is eligible for benefits if the following conditions are met:

- (1) You will not be considered to have been separated from employment for a disqualifying reason when:
 - (a) Your employer takes the first action in the separation process by announcing in writing to its employees that:
 - (i) The employer plans to reduce its work force through a layoff or reduction in force, and
 - (ii) That employees can offer to be among those included in the layoff or reduction in force;
 - (b) You offer to be one of the employees included in the layoff or reduction in force; and
 - (c) Your employer takes the -final action in the separation process by accepting your offer to be one of the employees included in the layoff or reduction in force, thereby ending your employment relationship.
- (2) This section does not ,apply to situations where an employer modifies benefits. or otherwise encourages early retirement or early separation, but the employer and employee do .not follow the steps in subsection (1)(a) through (c).

WAC 192-150-100

Two cases recently interpreted this rule. *Broschart*, 123 Wn. App. 257, and *Intalco*, 128 Wn. App. 121.

In *Broschart*, a claimant was denied benefits after she chose to participate in a program that severed her employment with Intalco

Aluminum Corporation. *Broschart*, 123 Wn. App. at 260. Intalco curtailed its production and reduced its work force in response to price pressure in the electricity market. *Id.* at 260. Intalco entered into an agreement with its employees' union to involuntarily lay off employees with less than two years seniority, which did not include the claimant. *Id.* at 261. Intalco and the union also agreed that Intalco would offer voluntary severance programs to all employees. *Id.* at 261. The agreement provided that Intalco would not involuntarily terminate employees during the curtailment period; however, the agreement recognized that involuntary termination might be necessary. *Id.* at 261. Intalco expected 24 employees with less than two years experience to be laid-off involuntarily. *Id.* at 261-62. Intalco did not know whether any further reduction in force, voluntary or involuntary, would be required. *Id.* at 262.

Intalco distributed a memorandum to all employees that announced voluntary severance programs; subsequent communications about the program emphasized its voluntary nature. *Id.* at 261. To accept the voluntary severance program offer, employees had to sign a separation agreement and mark the appropriate box; participants then had seven days after signing the agreement to change their minds. *Id.* at 261-62. Claimant agreed to enter into the program and sought unemployment

benefits; but, she was denied benefits because she failed to demonstrate good cause for voluntarily quitting her job. *Id.* at 262.

The *Broschart* court determined that in applying the employer initiated lay-off rule (1) the Department did not intend for benefits to be paid where an employer made no formal, written announcement of layoffs; (2) the rule was only intended to apply to a situation where the employer had announced a layoff; and (3) the rule did not apply where there was "a potential for a layoff at some unknown time." *Id.* at 266. In sum, the court found that rule applicable where a "layoff or reduction in force is inevitable." *Id.* at 267 (emphasis added). Furthermore, for the rule to apply, "the employer must announce a layoff in writing and offer its employees an opportunity to be included in the layoff." *Id.* at 267.

Broschart held that the claimant failed to establish the necessary requirements of WAC 192-150-100. Although Intalco announced its curtailment plan, there was no formal written notice that layoffs or reductions were inevitable (WAC 192-150-100(1)(a)(i)). *Id.* at 260, 268, 270-71. In addition, Intalco had no power to decide who would participate in the program. *Id.* Nor did Intalco take the final action to end an employee's employment because participants had seven days to change their minds and decide to stay with the company and their decision became final after seven days. *Id.*

Intalco involved , the exact same record as that in *Broschart*. *Employees of Intalco*, 128 Wn. App. at 125 n. 1. In *Intalco*, this Court agreed with the analysis and conclusion in *Broschart*. *Id.* at 127. In reaching its decision, *Intalco* determined that eligibility for benefits under WAC 192-150-100 requires that the employer must take the first action in the separation process by announcing in writing its plans to reduce its work force through a layoff or reduction in force. *Id.* at 127.

The *Intalco* court . determined that "[n]othing in the record constitute[d] a written 'layoff announcement'" because the word "reduction" in the "voluntary reduction options" was designed to encourage people to take early severance or early retirement; the word "reduction" was not a layoff and the document at issue was not the equivalent of a written layoff announcement portending an inevitable reduction in force.⁵ *Id.* 128-29.

In addition, *Intalco* determined that "clerical paperwork is not the final action contemplated by the regulation." *Id.* - at 130. Under Washington law, an offer is accepted and becomes contractually binding by the actions of a person signing an agreement presented as an offer. *Id.*

⁵ The *Intalco* court stated: "The documents and memos merely describe the three voluntary options, which were not layoffs, and the phrase 'reduction of the work force' described a 'design [] to encourage people to take early severance or early retirement' . . . [t]he voluntary severance options in fact achieved a reduction in the work force, but not by means of layoff . . . [t]he documents were not the equivalent of a written layoff."

at 130. This Court concluded, like *Broschart*, Intalco retained no control over who elected to participate in the voluntary program because once Intalco's offer was formally accepted the deal was binding on Intalco. *Id.* at 130. Because there was no written layoff announcement and the employer did not take the final action to grant the severance, *Intalco* concluded that the claimants did not qualify for benefits under WAC 192-150-100. *Id.* at 121.

C. The Commissioner Properly Found That The "Voluntary Separation Program For Management Employees" Offered By Verizon Met The Requirements Of WAC 192-150-100

The Commissioner properly construed the requirements of the employer initiated layoff rule, WAC 192-150-100, when it found that the MVSP offered by Verizon met the criteria of the rule. There was a written announcement of layoffs, the layoffs were found to be inevitable, Verizon targeted a specific class of employees and, through coercion, thereby retained control over who participated. In affirming the Commissioner's decision, Judge Kurtz ruled that, unlike *Broschart* and *Intalco*, "It was a different situation here. Verizon did offer this 'opportunity' to many employees, but certainly not all. Verizon was in control. Verizon determined largely in advance who would or would not be eligible for this program." Report of Proceedings (RP) (May 11, 2007) at 7.

Just as with statutes, interpretation of the requirements of subsection (1) must be made in light of the overall intent of the regulation to provide compensation to individuals who are involuntarily unemployed through no fault of their own. See *Anderson v. Weyerhaeuser Co.*, 116 Wn. App. 149, 154, 64 P.3d 669, 672 (2003); *Children's Hosp. v. Dep't of Health*, 95 Wn. App. 858, 864, 975 P.2d 567 (1999), *review denied*, 139 Wn.2d 1021, 994 P.2d 847 (2000). Based upon the record developed at their administrative level there was a showing that all of the elements of WAC 192-150-100(1) were met.

- 1. WAC 192-100-150 was satisfied because Verizon took the first step in the separation process by announcing in writing its plans to reduce its workforce through a layoff or reduction-in-force**

As was discussed earlier, Verizon's Notification Letter of October 31, 2003, stated: "We are pleased to inform you that you are among a group of employees who are eligible to volunteer for a reduction in force (RIF)." CR at 843. The ALJ ruled that, through this letter indicating that a particular class of Verizon employees were ' eligible to volunteer for a reduction in force (RIF), WAC 192-150-100(1)(a)(i) and (ii) were met. CR 70. These targeted employees then "offered to be included in the reduction in force, thereby satisfying the requirements of WAC 192-150-100(1)(b)." CR at 70. In rejecting Appellant's, argument to the contrary, the

AU additionally ruled that the requirements of WAC 192-150-100(1)(c)

were met:

Verizon argues that the claimants have failed to satisfy the final requirements of WAC 192-150-100(1)(c) because Verizon did not take the final action in the separation process. That argument is not persuasive. . . . Verizon took the final action when it determined the initial eligibility group and provided for automatic acceptance of all qualified employees who offered to participate in the VSPME (MVSP), thereby terminating the employment relationship. Accordingly, the remaining requirements of WAC 192-150-100(1)(c) are met.

CR at 71.

Contrary to Appellant's assignments of error B and C, the Commissioner properly found that "reduction in force was inevitable and was required to allow Verizon to remain competitive." CR at 1015, 1089. Appellant argues that Verizon's willingness to "backfill some of the positions left vacant by volunteers is clear evidence that Verizon would not have involuntarily reduced its workforce had the employees not participated." Appellant's brief at 25. What Appellant neglects to point out is that, while it may be true Verizon may have wanted to keep approximately the same number - of positions; substantial evidence supports the fact that Verizon did not want to retain the *current* occupants of these positions. Verizon intended to backfill some of these positions with "new hires who have skills focused on newer technologies, such as fiber

optics and Internet protocol. Telecom will also replace some management positions by promoting associates into vacant positions." CR at 1015.

2. Verizon took the final action by selecting the employees to participate in the voluntary separation process and coercing them to participate

Verizon offered the MVSP to a specific subset of employees and, once an election to participate took place, Verizon retained no control over who elected to participate. As such, Appellant's assignment of error E is misplaced. This pattern is admittedly superficially similar to *Intalco* as once the offer was formally accepted, it was binding on *Intalco*. The court found that it was the employees who took the final action. *Intalco* at 130.

In the present case, however, there are two fundamental differences between the facts established in the Verizon RIF and *Broschart* and *Intalco*.⁶ First, Verizon automatically accepted the offers from eligible employees to participate in the program by sending them an automated electronic acceptance. CR at 1089. The ALI found that this was "tantamount to an abdication by the employer of the right to later decline the acceptance of employees." CR at 70. The Commissioner found Verizon's argument "disingenuous," since Verizon retained the power to reject employees simply by not making them eligible in the first place.

⁶ The Commissioner properly conclude that *Broschart* is distinguishable to the present case. Appellant's assignment of error A is without merit.

CR at 1089. In finding that substantial evidence supported the Commissioner's decision, Judge Kurtz agreed, "To be truly voluntary, it seems that severance packages would need to be essentially available to everyone, but they weren't here." RP at 7.

The second main distinguishing feature of the present case was the finding that the RIF was implicitly involuntary; "the reduction in force in this case was implicitly an involuntary one." CR at 1088-89. In support of its decision, the Commissioner cited an executive vice president contrasting the voluntary program with the only alternative, an involuntary one. CR at 1088-1089. The vice president of human resources stated in an email to employees that he "could not live with himself" if an employee missed out on the money due to a subsequent involuntary RIF. CR at 889. To that end, the Commissioner found that, "it is clear that the reduction in force was inevitable and was required to allow Verizon to remain competitive." CR at 1015, 1089. Like Intalco, Verizon did fail to specify that the layoff would otherwise occur if there were insufficient volunteers, however, unlike Intalco, there was a specific target number of reducing 5,000 jobs. CR at 73. Moreover, in contrast to Appellant's argument that the MSVP was voluntary, the Commissioner properly found that the only alternative to the Voluntary Separation Program for Management

Employees was an involuntary one in which employees might not receive separation benefits. ". . . [W]e conclude that the reduction in force in this case was implicitly an involuntary one." CR at 1088. As was discussed earlier, the Commissioner also found that Verizon accepted all RIF volunteers, "leading to an inescapable conclusion that the employer would have involuntarily reduced its workforce, if those employees had not participated." CR at 1089. The Commissioner's decision is supported by substantial evidence.

The Commissioner's decision specifically found that "it is clear that the reduction in force was inevitable" for business reasons. CR at 1098. This finding is supported by Verizon's own admissions "we have the obligation to reduce expenses and preserve our operating margins." CR at 1015. This finding is much stronger than the "no certainty that a layoff would occur" in the Intalco situation. *Broschart* at 271. In *Intalco* and *Broschart*, there was "no conclusive evidence that Intalco would either have to lay off people or reduce its labor force if people did not take part in the voluntary severance program." *Id.* at 272. In contrast, the Commissioner's decision specifically concluded that Verizon would have involuntarily reduced its workforce if employees did not volunteer. Finally, Verizon chose the term "reduction in force" which minors the

WAC 192-150-100 language. A RIF also connotes a mandatory layoff for budgetary reasons and is more a term-of-art than the general voluntary reduction options such as "voluntary severance, early retirement, and furlough" employed in the *Intalco* and *Broschart* cases. *Intalco* at 125.

Appellant cites *In re Adoption of N.J.A Code § 12:17-9.6 ex rel. State Dept of Labor, 395 N.J. Super. 394, 928 A.2d 956 N.J.Super.A.D: (2007)* as supportive authority for its position in the present case. However, *In re Adoption* is quite different in that Verizon challenged the facial validity of N.J.A.C. 12:17-9.6 which allowed, in part, employees who leave their employment to participate in "written voluntary layoff and/or early retirement incentive policy or program . . . so that another employee may continue to work." *In Re Adoption* at 2. Washington has no such statutory or regulatory scheme. Moreover, in the case at hand, Verizon specifically targeted and then automatically accepted a precise subset of employees to be separated from their employment. CR at 1089. Here, the administrative law judge, the Commissioner, and Judge Kurtz all found that the RIF. announced by Verizon was implicitly involuntary and that the elements of WAC 192-150-100(1) were met. CR at 1088. Indeed, in affirming the Commissioner's ruling, Judge Kurtz agreed, holding that, "These Verizon employees were not born yesterday, nor was the judge below, nor was I. I am not a cynical person, but when Verizon deliberately

chose the RIF word, they chose, intentionally or not, to send a coercive message." RP at 8.

D. WAC 192-150-100 Is Consistent With The Employment Security Act And Therefore Was Properly Promulgated

The intent of the Employment Security Act is to provide unemployment benefits for "persons unemployed through no fault of their own, and that this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum." RCW 50.01.010. To that end, the Commissioner is given the authority to promulgate such rules- as deemed necessary to carry out the Act. RCW 50.12.010.

Our Supreme Court has held that under the Act, the reason for job separation must be "external and apart from the claimant." *Safeco*, 102 Wn.2d at 392. In addition, under the voluntary quit statute applicable at the time of this case, an individual was disqualified for voluntarily leaving work without good cause. RCW 50.20.050(1)(a) The statute goes on to describe how to good cause is to be defined:

In determining under this subsection whether an individual has left work voluntarily without good cause, the commissioner shall only consider *work-connected factors* such as the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness for the work, the individual's ability to perform the work, and such other *work connected factors* as the commissioner

may deem pertinent, including state and national emergencies.

RCW 50.20.050(1)(c) (emphasis added).

The Commissioner promulgated the narrowly tailored employer-initiated layoffs and reduction-in-force rule. Under this rule, a claimant is only eligible for benefits if he meets the specific requirements of WAC 192-150-100. The practical result of the regulation is that workers who are targeted in an employer initiated lay-off are "involuntarily" unemployed "through no fault of their own" and are, therefore, entitled to benefits. RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. Nothing in this code provision is inconsistent with the intent or meaning of the Employment Security Act.

V. CONCLUSION

For the foregoing, the Department respectfully requests that the Court affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 2 day of October, 2007.

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