

71708-1

COURT OF APPEALS
DIVISION ONE
71708-1
AUG -8 2014

NO. 71708-1

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

JEFF KIRBY and PUGET SOUND SECURITY PATROL, INC.
Appellant-Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT
SECURITY,
Respondent.

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS
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I. Introduction

Claimant Robert Bolling was fired for misconduct, and the Employment Security Department initially denied benefits. Bolling repeatedly refused to obey work rules, expectations, and instructions of his supervisor. When he got an answer he didn't like, he just asked someone else, which meant bothering the client. The client compared this to a child going back and forth between mommy and daddy to get the answer he wanted. Bolling's disobedience included pushing buttons at a power plant for a military base. His defiance frustrated both the employer and the client until he was no longer welcome by either. He was out of control and rightly terminated for misconduct.

Two disinterested client witnesses wrote to provide their perspective:

On occasion Robert Bolling would do a task and then ask us if it was ok. Later, we were informed that his site supervisor, Don Peters, had instructed him not to perform those tasks or enter certain locker [to get batteries]. It was a matter of concern to us that it appeared he was knowingly using us to disregard the site supervisor's instructions.

The tribunal admitted the evidence, yet erroneously omitted it from the record.

Following a hearing, the tribunal erred by improperly granting benefits by expecting the employer to prove extra knowledge of the employer's interests and specific intent to harm or malice. This is not the law; the law only requires that the claimant intend his actions, which violate an

instruction, expectation, or a reasonable company rule, and potentially harm the employer. When the law is applied correctly, this court should determine that the claimant is disqualified from benefits because of his misconduct under RCW 50.04.294. Benefits unfairly granted are paid through higher taxes on the employer. Petitioners request that this court reverse the order granting benefits.

Exhibits to this brief are the initial order, the omitted letter, and RCW 50.04.294.

II. Assignments of Error

1. Finding of fact 20, which determined Bolling “did not intend to cause harm,” was in error and error if considered determinative.
2. Conclusion of Law 10, which determined the employer failed to prove misconduct under RCW 50.04.294, and erroneously awarded unemployment benefits, which the employer pays for through higher employment security taxes.
3. It was error to omit the letter from client witnesses from the administrative record.

III. Issues Pertaining to Assignment of Error

1. Under RCW 50.04.294, does a claimant commit disqualifying misconduct when he continues a pattern of refusing to comply with the employer’s written rules and oral instructions, risks damaging client

property and disrupting power supply to key customers, and disrupts and damages the employer's relations with the client by bothering the client playing the mommy-daddy game to get a better answer, which undermines the employer's credibility with the client?

2. If the claimant knew the company rule or supervisor's instruction and his actions were purposeful, must the employer also prove that he had extra knowledge of the employer's interests and criminal *mens rea* by intending specific harm to the employer?

3. If the employer proves the claimant's actions were disruptive, could undermine the employer-client relationship, and that the rules and supervisor's instructions were reasonable, must the employer also prove additional specific damage in order to prove misconduct?

4. Whether this court should supplement the record pursuant to RCW 34.05.562 or RAP 9.11 to add evidence that was erroneously omitted?

IV. Statement of the Case

A. Security guards are trained and provided rules.

Puget Sound Security Patrol is a local provider of private security services. Companies hire private security guards, not only to safeguard their sites by deterring, observing, and reporting, but also to outsource issues relating to employee performance, discipline, and personal issues.

AR 234. One of Puget Sound Security's clients was a power utility provider. AR 453 (FOF 13). We say "was," because after the hearing the client failed to renew the contract.

Because clients are sensitive about the security they've outsourced, Puget Sound Security imposes a number of rules and standards of performance it expects from each of its employees to keep its clients secure and satisfied. AR 378-381.

During employee orientation, the company trains its guards to always complete a detailed incident report every time there is a verbal or physical event, and to never displace client property. AR 380. Mr. Bolling acknowledged reading and receiving each of these company rules. AR 378-81; AR 239.

At the time of his termination Mr. Bolling was guarding a power plant and a power house. AR 453 (FOF 13). These facilities provide power to Joint Base Lewis McChord, among others, and are therefore important and critical infrastructure. AR 519. Homeland Security monitors the sites. Homeland Security, terrorism, and surveillance are all mandatory training to maintain a state license as a security guard. WAC 308-18-240(2)(e).

B. Mr. Bolling's decisions to repeatedly and knowingly ignore his employer's chain of command are statutory misconduct.

Puget Sound Security offered nine separate instances of Mr. Bolling's refusal to follow rules or instructions. AR 320.

1. A guard's mission is to observe and report.

The mission of a security guard could be summed up as to observe and report. AR 163. Guards are heavily trained on the importance of prompt incident reports, as reporting is an important part of the job. AR 156; AR 163; AR 392-94. It is so important that report writing is required training to obtain a state license to become a security guard. WAC 308-18-240(2)(e).

The employer trained Bolling on report writing. Puget Sound Security trains all of its guards on the importance of prompt incident reports, as reporting is an important part of the job. AR 378-381; AR 392-94. The reports are critical to Puget Sound Security and the client in assessing an incident and future handling of security at the facility. AR 156; AR 163; AR 392-94.

Bolling signed a form that summarized the training: "Everything you see and do goes into the report," and "Always complete a detailed incident report anytime there is theft, damage, verbal or physical events." AR 56. Writing activity reports and incident reports, according to training, "are the second most important half of your job that we are contracting

with clients to accomplish and you and us are getting paid for doing – observing and reporting what you are observing and finding,” and that the report “is your work product to prove you did the job.” As Bolling’s supervisor pointed out, “If we are writing reports and showing the client that we are doing what they hired us to do, that’s how we get raises.” AR 163. In other words, Bolling, his peers, and his employer could all make more money, in part, by writing good reports.

2. Bolling refused to write three reports.

In an early instance, Mr. Bolling failed to write out an incident report promptly after observing an event. AR 453 (FOF 17). He had observed a group of youths rolling logs down a hill. *Id.*; AR 154-156. Bolling thought the incident was important enough to call the sheriff, who apprehended the youths, *id.*, yet he did not notify his supervisor or anybody at Puget Sound Security about this incident. AR 158. Bolling was trained, “You never know what information is necessary to write down or if a seemingly innocent situation may turn into a major event, ‘If in doubt write it out.’” AR 68. Yet, Bolling stated that there “was no reason to” because he had already taken care of it. AR 155-156. He was reprimanded.

In a second example, Mr. Bolling again bucked the chain of command by refusing to write a report he deemed unimportant. AR 158. Despite his training, “Start your log the second you arrive and keep it

current from minute to minute; Do not wait until later,” AR 56, and to write it “right away before you forget the details,” AR 68, Mr. Bolling failed to submit a report. His supervisor gave him a direct order to fill out an incident report while on shift and to leave a copy for his review. AR 80. Seven days went by, so his supervisor told him to sit down and write the report in his presence. AR 157; AR 453-454 (FOF 17). Mr. Bolling resistance to writing reports were against his work rules and supervisor’s instructions.

In a third example about report-writing, Mr. Bolling was coming on duty shortly after the well-publicized murder of a park ranger on Mt. Rainier. AR 454 (FOF 18). He had been advised to be extra alert. AR 169. Mr. Bolling suddenly called to mind a vehicle he had seen on the way to work, which he could not describe, but that he thought looked suspicious. AR 171. He took it upon himself to tell the client about the non-descript vehicle. *Id.* The client brought the issue to the supervisor’s attention: “Was I supposed to call the sheriff and say my guard said he saw something but doesn’t know what?” AR 172. Mr. Bolling then authored a report containing admitted inaccuracies, which had to be amended. AR 454 (FOF 18). He disregarded the rules regarding client contact as well as report writing.

3. Bolling uses the client about the cabinets.

Bolling was trained and counseled about not going into the client's storage cabinets. Yet, his goal one day was to get new batteries for his radio. AR 454 (FOF 19). He took it upon itself to look inside a cabinet owned by the client, and to use the batteries he found in the cabinet. AR 172. His supervisor reprimanded him for getting into client property without permission. *Id.* He didn't like being reprimanded, so Bolling brought the issue up with his own higher management. Management reinforced that Mr. Bolling needed to follow his supervisor's instructions. AR 221. He didn't like management's answer either.

Guards are trained (and sign a warning) not to bring their personal issues to the client. Yet, following the reprimand, Mr. Bolling again defied and undermined his supervisor, bringing the issue to the client, and asking for permission to look through the client property to find batteries. AR 174. Overhearing this, another client employee intervened, stating that the supervisor and the client already discussed this and stating that guards are not allowed to go into client property without permission. AR 174-175. Bolling's effort to use the client to undermine his supervisor backfired. The disinterested clients knew Bolling went into the cabinet before asking permission and felt used when he tried to bring them into the dispute.

4. Bolling uses the client about climbing on an elevator.

Mr. Bolling found a set of keys on top of an elevator. AR 166. It was contrary to company rule to be climbing on the property, because if the guard was injured, no one would find him for hours. AR 166-67. He was reprimanded. AR 166. Again, he brought the issue to his client. *Id.*

5. Bolling pushes buttons on the power equipment.

The same day that Bolling climbed up on the equipment, there was another incident. *See* AR58. Bolling's job at the power plant and power house involved the periodic inspection of the generators and governors to check for smoke, burning wires, oil spills, alarms, etc., and to observe and report any problems. AR 242-43.

An exception to the observe-and-report requirement of the job existed when a piece of equipment was up for scheduled maintenance. AR 147. This client instructed guards not to look at, not to investigate, not to go inside, and not to write up equipment on scheduled maintenance on their logs. AR 148. When units are down for maintenance, it is unnecessary to log alarms or unlit lights because the unit is disassembled and the client knows that the equipment is not working. AR 148.

Violating the instruction with regard to units down for maintenance is obvious, and it gives the client the impression that Puget Sound Security does not know what it is doing, and could therefore

undermine its credibility with the client. AR 453 (FOF 16). This credibility is important; when Puget Sound Security calls the client to inform it that there is something wrong with its facility, the client must believe them. AR 152.

Work rules inform Bolling not to touch client equipment unless instructed to do so. AR 378-381. Bolling was reminded orally on August 10th not to write up equipment that was offline for maintenance. AR 81. Mr. Bolling's supervisor explicitly instructed him the same thing before he started his shift on August 12, 2012. AR 453 (FOF 12); AR 150; AR 328-29 ("We are not electricians.")

One particular piece of equipment ("Unit 12") was up for its annual maintenance between July 30 and August 24. AR 147-48. During his rounds on August 12th, Mr. Bolling investigated the unlit Unit #12. AR 453 (FOF 15). He wrote it up in his daily log for the client. AR 152.

Not only did Bolling log what he thought was an issue, he also pressed buttons. Guards are not responsible for fixing or testing the equipment. AR 146. Under no circumstances were they authorized to press buttons on the million-dollar equipment, as they were not qualified and could cause serious damage and a loss of power to the military base. AR146-47; 316-17. This is reinforced by a work rule, in training, and by the site supervisor's instruction.

Bolling contends that he pressed what he called the “test light” to see if he could get it working again. AR 152. The unit at issue had several lights, including a “start” and a “stop” light that were less than two inches apart. No light was designated a “test light.” AR 317. His confusion about which button he was pushing is the very reason guards are instructed not to push buttons on the client’s equipment at the power station.

Bolling conceded that he had not been instructed to press buttons, but argued that he thought of it as a “courtesy.” AR 243-244. In fact, he insisted that pushing buttons on the equipment was common practice and could not possibly cause any damage. AR 209-210; AR 303. He was unapologetic; he would do it again.

6. Bolling responds to attempts at correction.

The supervisor wrote a report about Mr. Bolling’s refusal to follow orders. AR 453 (FOF 16). Mr. Bolling resented being written up, and threatened to go directly to corporate headquarters to have his supervisor fired. *Id.*; AR 150-151. Bolling was threatening to go to his supervisor’s supervisor, and this was a heated discussion. AR 453 (FOF 16). The supervisor submitted the report.

Rather than keeping the intra-company problems within the employer, Mr. Bolling took the issue to the client, asking the client electrician and mechanic for their approval to push the buttons. AR 146;

AR 453 (FOF 16). Instead of approving, those client contacts brought the issue to the supervisor's attention. AR 453 (FOF 16). They were concerned that Bolling was pushing buttons at a power station. AR 146. Bad things can happen when a person without the right training decides for himself to push buttons at a power station. Those bad things could be damage to the client's equipment, or to the military base to which power is supplied.

The supervisor responded that he no longer tolerate Mr. Bolling's defiance of his authority, of the chain of command, and his crossing the line that separated the client from the guards' issues. AR 206.

7. Bolling's supervisor was at his wits' end.

Mr. Bolling was expected to follow the chain of command. AR 153. He routinely breached it. AR 154. His disregard affected the morale of his co-workers: "I tell him, but he does whatever he wants. I'm at a loss as what to do now ... I'm helpless. What am I a supervisor for?" AR 205. His actions undermined the employer and his supervisor. His actions cast doubt on whether the client can trust the security staff, and gave the client the impression that the company was unprofessional. AR 225.

The employer's headquarters investigated the matter, and Mr. Bolling was terminated. During the conversation relaying his

termination, Bolling “started interrupting and denied ever having done anything wrong at all....” AR 61. His attitude proves his actions were purposeful and that he would not change his behavior.

C. Evidence Was Erroneously Omitted

During the administrative hearing, Puget Sound Security introduced a letter bearing the signature of two of employees of the client. The letter describes some of the issues they had with Mr. Bolling and his inability to follow company rules. The letter was admitted by the ALJ, but does not appear in the record. AR 287-288; 299-302; 351-352. Puget Sound Security has attached the letter and requests that the record be supplemented to include this document. RCW 34.05.562; *see also* RAP 9.11. The letter corroborates the motive and intent of Bolling, and the disruption of the employer-client relationship.

V. Argument

A. Standard of Review

Appellate review is pursuant to Washington’s Administrative Procedure Act. *See* RCW 50.32.120; RCW 34.05.510. The court considers the entire agency record. RCW 34.05.558. The court may reverse the commissioner’s decision if it is based on an error of law, substantial evidence does not support the decision, or it was arbitrary or capricious. RCW 34.05.570(3)(d),(e),(i). This court reviews the Commissioner’s

findings of fact for substantial evidence in the administrative record to support them. *Smith v. Employment Security Department*, 155 Wn. App. 24, 32 (2010). Substantial evidence is that evidence which “would persuade a fair-minded person of the truth or correctness of the matter.” *Id.* at 33.

In reviewing the agency’s conclusions of law, the court is not bound by the agency’s interpretation. *Tassoni v. Department of Retirement Systems*, 108 Wn. App. 77, 84, 29 P.3d 63 (2001). The court reviews determination of the correct law *de novo*. *Henson v. Employment Security Department*, 113 Wn.2d at 377.

In understanding whether Bolling’s actions were misconduct, the court should consider the policy behind the Employment Security Act is to provide for “the insurance principle of sharing the risks” of unemployment between the employer and employee, and funds should be used “for the benefit of persons unemployed **through no fault of their own**[.]” RCW 50.01.010 (emphasis added). This fault principle preserves the use of the state’s resources for “innocent” workers, who are involuntarily unemployed and more deserving. *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 409 (1993).

B. The ALJ committed legal error

1. Purposely violating rules, directions, or expectations is misconduct.

Claimants are disqualified from benefits if they are discharged for misconduct connected with their work. RCW 50.20.066(1). “Misconduct” is defined by statute. RCW 50.04.294. The statute provides examples of misconduct under subsections (1) and (2), and examples of conduct that fall short of misconduct in subsection (3). Generally, a claimant is disqualified if he disregards the rights, title, and interests of his employer, or if he disregards standards of behavior which the employer has a right to expect of its employees. RCW 50.04.294(1)(a) and (b).

RCW 50.04.294 also provides examples of actions that are deemed to be misconduct *per se*. Insubordination showing a purposeful refusal to follow the reasonable directions or instructions of the employer is the first example of *per se* misconduct provided in the statute.

RCW 50.04.294(2)(a). That is, upon a showing of insubordination, misconduct is established and the claimant is disqualified.

2. The Initial Order uses the wrong legal standard.

The administrative law judge makes findings in an Initial Order, which are adopted by the Commissioner’s Review Office. In the Initial Order, the ALJ found that Claimant Bolling “did not intend to cause harm,” (CR 454, FOF #20), and, “Based on the above findings ... the employer has not

met its burden of proof with respect to misconduct.” (CR 456 Conclusion of Law 10). After all, the claimant’s behavior was not “malicious behavior showing extreme indifference to risk, injury, or harm to another that is known or should have been known.” *Id.* That standard essentially requires the employer to prove that the claimant had criminal *mens rea*: a specific intent to harm. This is not the correct standard. The correct standard only requires that he act on purpose, which he did.

In *Griffith v. State Dept. of Emp’t Security*, 163 Wn. App. 1 (2011), the claimant was discharged after making a disparaging comment about the ethnicity of a customer. The court found that he was disqualified because he “engaged in intentional conduct by commenting to the customer ... Whether he understood that he was behaving in an offensive manner is irrelevant. He intentionally behaved in a manner that offended the customer.” *Id.* at 10. Because he acted intentionally, and because his actions harmed the employer, he was disqualified. In our case, the agency erred by requiring the employer to prove specific intent to harm.

In Conclusion of Law 10, the ALJ found that “while the employer’s frustration with the claimant is real and understandable, the claimant’s actions do not exhibit the kind of willful or wanton disregard of the employer’s interests that constitutes misconduct under the statute.” Purposeful action satisfies the test, yet the standard was not applied.

Sometimes negligence also satisfies the test, yet it was not correctly analyzed. Further, the ALJ found “this was not intentional behavior done deliberately or knowingly with the awareness that the claimant was violating or disregarding the rights of the employer.”

Work rules and supervisor’s instructions inform the employee what the employer’s interests are. So does common sense. Purposeful action against the employer’s interest is all that is required.

a. Carelessness or negligence can be misconduct.

Disqualifying misconduct also occurs in this circumstance:

“Carelessness or negligence of such degree or recurrence to show [either] an intentional or substantial disregard of the employer’s interest.” RCW 50.04.294(1)(d). Similarly, it is professional misconduct for a security guard to show “[i]ncompetence, negligence, or malpractice that results in harm or damage to another or that creates an unreasonable risk of harm or damage to another.” RCW 18.235.130(4). A security guard employer has the right to expect no professional misconduct from its employees. The employer posits that the claimant’s behavior is disqualifying misconduct.

b. Mr. Bolling’s violation of reasonable company rules regarding the chain of command is misconduct.

“Violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule” is a per

se example of misconduct. RCW 50.04.294(2)(f). Regulations provide that a “company rule is reasonable if it is related to your job duties, is a normal business requirement or practice for your occupation or industry” WAC 192-150-210(4). An employee knew or should have known about a company rule if she was “provided an employee orientation on company rules, ... [was] provided a copy or summary of the rule in writing, or the rule is posted in an area that is normally frequented by [the employee] and the rule is conveyed or posted in a language that can be understood” by the employee. WAC 192-150-210(5).

In order to constitute misconduct, an employee's violation of an employer's rule “must be intentional, grossly negligent, or continue to take place after notice or warnings.” *Wilson v. Employment Sec. Dep't*, 87 Wn. App. 197, 202 (1997) (citing *Tapper v. Employment Sec. Dep't.*, 122 Wn.2d 397, 409 (1993)). Mr. Bolling's conduct meets these standards.

Mr. Bolling chose to violate work rules, expectations, and instructions of his superior, leading to his termination. He unapologetically refused to follow the orders of his direct supervisor, then threatened to go over his supervisor's head, yet ultimately went to the client with his “concerns” (in purposeful violation of another rule). These actions, when considered in light of his past warnings, amount to a purposeful disregard of his employer's rules and expectations. Bolling's repeated refusal to follow the

basic rules and expectations amounts to misconduct. The conclusion to the contrary is in error.

VI. Conclusion

The essence of agency is control of the agent. Bolling could not be controlled. He violated his work rules and oral instructions by pushing a button on client equipment at a power station that supplies power to a military base and other customers. Mr. Bolling's attempt to undermine his supervisor by going to the client backfired because the client was horrified that a security guard was pushing any buttons—especially when there is no “test” light on the equipment. When faced with opposition, he would ignore rules and bother the client to get an answer he liked. Undermining his employer and his supervisor like that is a purposeful choice. His supervisor, his employer, disinterested client witnesses, and the first decision-maker at the department all saw it. Only when the appeal was removed from people with first-hand knowledge was there ever a question. The tribunal erred in awarding benefits, and the employer is unfairly taxed when unemployment benefits are unfairly awarded.

Respectfully submitted this 8th day of August, 2014.

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Declaration of Service

I caused a copy of the foregoing Appellant's Opening Brief to be served on the following in the manner indicated below:

Via US Mail to

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April Benson Bishop
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on today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 8th day of August, 2014, at Seattle, Washington.



Sarah Borsic, Legal Assistant

APR 11 2014
11:11 AM
COMMUNICATIONS SECTION

Exhibit 1

To whom it may concern:

On occasion Robert Bolling would do a task and then ask us if it was ok. Later, we were informed that his site supervisor, Don Peters, had instructed him not to perform those tasks or enter certain lockers. It was a matter of concern to us that it appeared he was knowingly using us to disregard the site supervisors instructions.

This information was conveyed to Don Peters and to Bill Cottringer during one of his site visits some time ago.




Exhibit 2

RCW 50.04.294**Misconduct — Gross misconduct.**

With respect to claims that have an effective date on or after January 4, 2004:

(1) "Misconduct" includes, but is not limited to, the following conduct by a claimant:

- (a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee;
- (b) Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee;
- (c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or
- (d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

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

- (a) Insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer;
- (b) Repeated inexcusable tardiness following warnings by the employer;
- (c) Dishonesty related to employment, including but not limited to deliberate falsification of company records, theft, deliberate deception, or lying;
- (d) Repeated and inexcusable absences, including absences for which the employee was able to give advance notice and failed to do so;
- (e) Deliberate acts that are illegal, provoke violence or violation of laws, or violate the collective bargaining agreement. However, an employee who engages in lawful union activity may not be disqualified due to misconduct;
- (f) Violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule; or
- (g) Violations 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.

(3) "Misconduct" does not include:

- (a) Inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity;
- (b) Inadvertence or ordinary negligence in isolated instances; or
- (c) Good faith errors in judgment or discretion.

(4) "Gross misconduct" means a criminal act in connection with an individual's work for which the

individual has been convicted in a criminal court, or has admitted committing, or conduct connected with the individual's work that demonstrates a flagrant and wanton disregard of and for the rights, title, or interest of the employer or a fellow employee.

[2006 c 13 § 9. Prior: 2003 2nd sp.s. c 4 § 6.]

Notes:

Retroactive application -- 2006 c 13 §§ 8-22: See note following RCW 50.04.293.

Conflict with federal requirements -- Part headings not law -- Severability -- 2006 c 13: See notes following RCW 50.20.120.

Conflict with federal requirements -- Severability -- Effective date -- 2003 2nd sp.s. c 4: See notes following RCW 50.01.010.

Exhibit 3

**STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE EMPLOYMENT SECURITY DEPARTMENT**

IN THE MATTER OF:

Robert E. Bolling

Claimant

DOCKET NO: 01-2012-25154 S

INITIAL ORDER

ID: [REDACTED]

BYE: 08/17/2013

UIO: 790

Hearing: This matter came before Administrative Law Judge Valerie A. Carlson on March 29, 2013, April 1, 2013, and April 08, 2013, at Tacoma, Washington, after due and proper notice to all interested parties.

Persons Present: the claimant-appellant, Robert E. Bolling; and the employer, Puget Sound Security Patrol Inc, represented by William Cottringer, Vickie Brown, Donald Peters, and Christina Hickman.

Exhibits: The following Exhibits were admitted into evidence:

- Exhibit 1, pp. 1 - 93
- Exhibit 2, pp. 1 - 11
- Exhibit 3, pp. 1 - 7
- Exhibit 4, pp. 1, 2, & 5 - 9
- Exhibit 5, pp. 1 - 3
- Exhibit 6, pp. 1 - 3

STATEMENT OF THE CASE:

The claimant filed an appeal on October 29, 2012, from a Decision of the Employment Security Department dated September 27, 2012.

At issue in the appeal issue is whether the appellant/claimant has good cause for filing a late appeal (to be timely an appeal must be filed in writing within 30 days after the Determination Notice was mailed).

Also at issue is whether the employer had good cause for failure to appear at a previously scheduled hearing,

INITIAL ORDER - 1

Also at issue is whether the claimant was discharged from employment for a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee as defined in RCW 50.04.294(1)(a), or other misconduct pursuant to RCW 50.20.066, or voluntarily quit without good cause pursuant to RCW 50.20.050.

Also at issue is whether the claimant was able to, available for, and actively seeking work during the weeks at issue.

Having fully considered the entire record, the undersigned Administrative Law Judge enters the following Findings of Fact, Conclusions of Law and Initial Order:

FINDINGS OF FACT:

Late Appeal

1. The September 27, 2012 Determination Notice said that appeals needed to be postmarked or received on or before October 29, 2012. Exhibit 1, p. 5.
2. The claimant's letter requesting the appeal was postmarked on October 29, 2012. Exhibit 1, pp. 9, 16, .

Employer's failure to appear at November 27, 2012 hearing

3. On November 19, 2012, the Office of Administrative Hearings (OAH) mailed the parties a notice that the claimant's appeal would be heard at 1:00 p.m. on November 27, 2012. OAH sent the notice to the employer at 67 Skagit KY, Bellevue, WA 98006, the address that the Department had been using in its correspondence with the employer. Exhibit 1, pp. 9, 11, & 17. The employer had responded to the Department's requests for information sent to that address and had not asked for a change of address. This is the company owner's home address. He was out of town during the latter part of November 2012, and the Notice was not sent to the employer's business office until after the hearing had occurred.
4. On November 29, 2012, the employer faxed a cover letter and copy of page 1 of the Notice to the Office of Administrative Hearings and asked for a rehearing. Exhibit 1, pp. 57 - 58. OAH did not reschedule the hearing because an initial order had already been issued on November 28, 2012. The claimant had attended the hearing, and since it was his appeal, the administrative law judge had conducted the hearing and issued an initial order that set aside the Department's Determination and found that the claimant was eligible for unemployment benefits.
5. On December 27, 2012, the employer mailed a timely Petition for Review of the November 28, 2012, Initial Order. Exhibit 1, pp 70 - 72.

6. The claimant opposed the employer's Petition for Review on the basis that he had faxed documents to the employer at either 11:45 a.m. or 12:45 p.m. just before the 1:00 p.m. hearing on November 27, 2012. He had called to confirm that the fax had been received. He spoke to a secretary at the employer's office and gave her the fax number of the WorkSource office where he was in case the employer wished to fax additional documents before the hearing.

7. The testimony of the parties conflicted on whether the employer's Executive Vice President for Employee Relations was in the office at that time. Both the Vice President and the secretary credibly testified that he was not there, while the claimant testified that the secretary had told him that he was there. I carefully considered and weighed all of the evidence, including the demeanor and motivations of the parties, the reasonableness and consistency of testimony, and the totality of the circumstances presented. I resolved conflicting testimony in favor of the employer because both the secretary and the Vice President had first-hand knowledge, while the claimant was relying on hearsay. After I had ruled that the employer had good cause for missing the November 27, 2012, hearing, the Secretary submitted an affidavit that somewhat contradicted her earlier testimony. However, I did not find the contradictory information sufficient to change my earlier ruling.

Employer's failure to appear at February 4, 2013 hearing

8. On January 18, 2013, the Chief Review Judge remanded the case to OAH for a hearing on whether the claimant had good cause for missing the November 27, 2012, hearing, and if good cause was found, then for a hearing on the merits of the case. Exhibit 1, p. 77.

9. On January 28, 2013, the Office of Administrative Hearings (OAH) mailed the parties a notice that the claimant's appeal would be heard at 9:30 a.m. on February 4, 2013. OAH sent this notice to the employer's business address at 13417 NE 20th St. Suite 200, Bellevue, WA 98005. Exhibit 1, p. 2.

10. The employer did not appear at the remand hearing on February 4, 2013, and the Administrative Law Judge issued an Order Reinstating Previous Initial Order. This order was mailed to the employer at their business office address. Exhibit 1, pp. 80 - 82.

11. At 5:45 p.m. on Friday, February 1, 2013, the claimant faxed a letter to the employer providing the WorkSource fax number that the employer could use if they had any additional documents to submit prior to the hearing scheduled for 9:30 a.m. on February 4, 2013. Exhibit 1, p. 91.

12. The employer credibly testified that they did not receive the Notice for the February 4, 2013, hearing, and they did not see the claimant's fax before the 9:30 a.m. hearing on February 4, 2013.

Job Separation

13. The claimant worked as a Security Guard for Puget Sound Security from June 5, 2010, through August 23, 2012. This was a part-time, permanent, nonunion position that paid \$10.50 per hour. He worked graveyard shifts on Friday night-Saturday morning and Saturday night - Sunday morning at the Tacoma Public Utilities (TPU) LaGrande Power Plant and Alder Power House. TPU is a client of Puget Sound Security.

14. The employer discharged the claimant for repeatedly failing to follow his supervisor's instructions and then making threatening comments toward the supervisor. Exhibit 1, p. 18.

15. The final incident occurred on August 12, 2012, when the claimant logged that a light on the #12 Governor Generator was out after his supervisor had reminded him that Unit #12 was offline for maintenance and repair. Exhibit 1, p. 46. While making his rounds, the claimant checked as he usually did and saw that Unit #12's start light was out. He noted that on a maintenance lot at the facility, as he usually did.

16. When the claimant next came to work on August 17, his supervisor gave him a written warning for disregarding his orders and writing up Unit #12 even though there was no need. The claimant disagreed with the warning and said he would take his objections to the supervisor's supervisors. While the testimony of the parties differed over what was said, this was a heated discussion. On Sunday, August 19, 2012, the claimant asked the head mechanic and the electrician if it was okay for him to have logged the burned out bulb. The mechanic and electrician notified the claimant's supervisor of the claimant's inquiry later that morning after the claimant had gone home. The claimant had previously sought a second opinion from the client. These actions could give the client the impression that the employer did not know what they were doing and could undermine the employer's credibility with the client. The client's on-site manager had previously referred to the claimant's seeking second opinion as playing the mommy--daddy game.

17. The claimant had received a written warning once before on September 5, 2011, for not filling out an incident report while on the same shift during which the incident had occurred. Exhibit 1, p. 45. On that occasion, the claimant had observed two young men throwing a roadside barrier log down a hill at Alder Park. The log caught in some brush before it got all the way down to where people often stand to view the dam. The youths the started to dislodge another log. The claimant called Security at the Park, and they contacted the Sheriff. The two young men were apprehended, and the claimant was asked to come to the scene and identify them. He asked Park Officials to notify the client, which they did. The claimant got back to his office at 7:15 p.m., finished his log entries, and secured the office. His shift was over at 7:30 p.m.. The supervisor called him the next morning and asked him to come in then and write the report. The claimant did so, but he did not have all the information so he wrote a supplemental report at home, which he faxed to the employer's main office rather than to his supervisor, because he thought te employer was in a hurry to get the report. The employer criticized his

failure to follow the chain of command.

18. The employer also cited some other incidents, for which the claimant was not disciplined at the time, as examples of the claimant's failure to respect his supervisor and follow his supervisor's instructions. On one occasion, the claimant had written an incident report about a vehicle that acted strangely when a police car was going by when he was on his way to work on January 1, 2012. He didn't think anything of it at the time, but after he arrived at work, his supervisor told him about the murder of a Par Ranger 28 miles away and told him to be especially watchful and a little paranoid during his shift that night. After learning this news, the claimant was concerned that the vehicle he had seen might be involved. He called the client's manager and asked for a description of the suspect in the Park Ranger incident. It turned out that this description did not match the man he had seen, but he told the client's manager all about it and wrote an incident report on it. In the report he said his supervisor was paranoid and had put him on high alert. The supervisor objected to those characterizations of himself and asked the claimant to rewrite the report, which he did. Exhibit 1, pp. 38 - 39 and Exhibit 3, pp. 2 - 6.

19. On another occasion, the claimant had looked in a cupboard belonging to the client for some rechargeable batteries. His supervisor told him he should not have done so. When he saw the client's manager a few days later, he apologized for getting into the cabinet. They did not know what he was talking about, so he explained and asked if he needed to contact them before getting into the cabinet, and the on site supervisor said no.

20. The claimant tended to give elaborate explanations for why what he had done was appropriate or justified, and intended to serve the best interests of the employer. He did not intend to cause harm, but his actions were seen as disruptive and possibly damaging to the employer's relations with the client.

21. During the weeks at issue the claimant was willing and able to accept any offer of suitable work and sought work as directed by the Department. He looked for full time work during all weeks he made claims and was available to work any day or shift. The claimant had no transportation problems during the weeks claimed and no limitations on his availability to work or look for work. He made at least 3 job search contacts weekly and kept the required job search log.

CONCLUSIONS OF LAW:

The employer has established good cause for not appearing at the previous two hearings based on the facts set forth above.

1. The provisions of RCW 50.32.020, 50.32.025, 50.32.075 and WAC 192-04-090 apply.
2. Pursuant to RCW 50.32.075 the thirty (30) day time limitation on an appeal may be

waived if good cause for the late-filed appeal is shown. A three prong test is applied in determining whether a claimant has established good cause for a late-filed appeal. The criteria considered are as follows: ". . . (1) the shortness of the delay; (2) the absence of prejudice to the parties; and (3) the excusability of the error." *Wells v. Employment Security Dep't*, 61 Wn. App. 306, 809 P.2d 1386 (1991); *Devine v. Employment Security Dep't*, 26 Wn. App. 778, 614 P.2d 231 (1980). With regard to the shortness of the delay and the excusability of the error, the analysis is based upon a sliding scale in which a short delay requires a less compelling reason for the failure to file a timely appeal than does a longer delay. *Wells*, supra.

3. Based on the relevant Findings of Fact set forth above, I conclude that the appellant has established that the appeal was timely.

4. The record in this case establishes that the employer discharged the claimant. The provisions of RCW 50.04.294, RCW 50.20.066, WAC 192-150-085, WAC 192-150-200, WAC 192-150-205, and WAC 192-150-210 apply.

5. According to RCW 50.04.294(1), misconduct includes, but is not limited to, a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee; deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee; carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

6. According to RCW 50.04.294(2)(a)-(g), examples of a willful and wanton disregard of the interests of the employer or a fellow employee are: insubordination, repeated and inexcusable tardiness after warnings, dishonesty related to employment, repeated and inexcusable absences, deliberate and illegal acts, deliberate acts that provoke violence or a violation of the law or collective bargaining agreement, violation of reasonable company rules, and violations of the law while acting within the scope of employment.

7. WAC 192-150-200(1) and (2), provide that the action or behavior must be connected with the claimant's work and result in harm or create the potential for harm to the employer's interests. This harm may be tangible, such as damage to equipment or property, or intangible, such as damage to the employer's reputation or a negative impact on staff morale.

8. Misconduct does not include inadvertence or ordinary negligence in isolated instances, good-faith errors in judgment, inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity. See RCW 50.04.294(3).

9. The burden of establishing work-related misconduct is on the employer. Misconduct must be established by a preponderance of the evidence. *In re Murphy*, Empl. Sec. Comm'r Dec. 2d 750 (1984). A preponderance of the evidence is that evidence which, when fairly

considered, produces the stronger impression, has the greater weight, and is the more convincing as to its truth when weighed against the evidence in opposition thereto. *Yamamoto v. Puget Sound Lbr. Co.*, 84 Wash. 411, 146 Pac. 861 (1915).

10. Based on the above findings and pursuant to the above referenced authority, the employer has not met its burden of proof with respect to misconduct. While the employer's frustration with the claimant is real and understandable, the claimant's actions do not exhibit the kind of willful or wanton disregard of the employer's interests that constitutes misconduct under the statute. This was not intentional behavior done deliberately or knowingly with the awareness that the claimant was violating or disregarding the rights of the employer. Nor was it malicious behavior showing extreme indifference to a risk, injury, or harm to another that is known or should have been known. The claimant's acts here were at worst the kind of unsatisfactory conduct or inability to perform well that the statute states is not misconduct. Accordingly, the claimant is not subject to disqualification under RCW 50.20.066.

11. RCW 50.20.010(1)(c) requires each claimant to be able and willing to work, available for, and actively seeking work. The claimant was able and willing, available, and actively seeking work during the weeks at issue, has met the requirements, and is not subject to denial under the above-cited statute and related regulations.

Now therefore it is ORDERED:

The claimant filed a timely appeal of the Employment Security Department's September 27, 2012, Determination Notice.

The employer has established good cause for failing to appear at a previously scheduled hearing, and the Initial Order dated November 28, 2012, and reinstated on February 4, 2013, are **VACATED**.

The Decision of the Employment Security Department under appeal is **SET ASIDE**.

The claimant was not discharged due to a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee as defined in RCW 50.04.294(1)(a), and is therefore not subject to disqualification pursuant to RCW 50.20.066(1).

There is no evidence upon which to redetermine the claimant's eligibility under the availability statute, RCW 50.20.010(1)(c) during the weeks at issue.

Employer: If you are a base year employer for this claimant, or become one in the future, your experience rating account will be charged for any benefits paid on this claim or future claims based on past wages you paid to this individual. If you are a local government or reimbursable employer, you will be directly liable for any benefits paid. Benefit charges or liability will accrue unless this decision is set aside on appeal. See RCW 50.29.021. If you

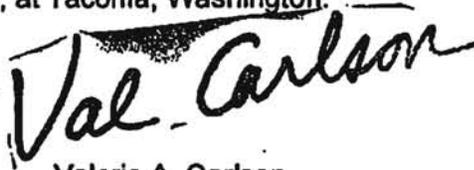
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pay taxes on your payroll, any charges for this claim could be used to calculate your future tax rates.

Notice to Claimant: Your former employer has the right to appeal this decision. If this decision is reversed because it is found you committed misconduct connected with your work, all benefits paid as a result of this decision will be an overpayment. State law says you will not be eligible for waiver of the overpayment, nor can the department accept an offer of compromise (repayment of less than the total amount paid to you). The benefits must be repaid even if the overpayment was not your fault. See RCW 50.20.066(5).

Dated and Mailed on April 15, 2013, at Tacoma, Washington.



Valerie A. Carlson
Administrative Law Judge
Office of Administrative Hearings
949 Market Street, Suite 500
Tacoma, WA 98402

Certificate of Service

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. 

PETITION FOR REVIEW RIGHTS

This Order is final unless a written Petition for Review is addressed and mailed to:

**Commissioner's Review Office
Employment Security Department
PO Box 9555
Olympia, Washington 98507-9555**

and postmarked on or before **May 15, 2013**. All argument in support of the Petition for Review must be attached to and submitted with the Petition for Review. The Petition for Review, including attachments, may not exceed five (5) pages. Any pages in excess of five (5) pages will not be considered and will be returned to the petitioner. *The docket number from the Initial Order of the Office of Administrative Hearings must be included on the Petition for Review.* Do not file your

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