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NO. 71708-1

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

JEFF KIRBY, an individual and sole
shareholder and founder of, PUGET SOUND
SECURITY PATROL, INC., a Washington
Corporation,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT
OF EMPLOYMENT SECURITY,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant Puget Sound Security Patrol, Inc. (“Puget Sound Security”), fired employee Robert Bolling for failing to follow instructions to its satisfaction. Specifically, Puget Sound Security fired Bolling, a security guard, because he noted on a routine maintenance log that a light bulb was burned out on a piece of the client’s electrical equipment. Bolling had been informed that the equipment was offline, so he did not need to make such a note. In the single previous incident in which Puget Sound Security disciplined Bolling, it reprimanded him for failing to write an incident report immediately after the incident, even though Bolling only had 15 minutes to write the report before his shift ended, he wrote the report the next day upon his supervisor’s request, and he then drafted and faxed a supplemental report from home that evening when he had more information. In these and other noted instances of Bolling’s conduct, Bolling believed he was doing his work appropriately and intended to serve the best interests of Puget Sound Security.

The Commissioner of the Employment Security Department properly determined that Bolling was not discharged from work for “willful” “misconduct” under the Employment Security Act and, therefore, was not disqualified from receiving unemployment benefits.

Bolling's conduct is more appropriately characterized as unsatisfactory conduct or failure to perform well as the result of inability or incapacity. The Court should decline to address those issues that Puget Sound Security raises for the first time on appeal. The Department respectfully requests that the Court affirm the Commissioner's decision.

II. COUNTERSTATEMENT OF THE ISSUES

1. The only factual finding to which Puget Sound Security assigns error is Finding of Fact 20. Where substantial evidence in the administrative record supports the challenged factual finding, should this Court uphold that finding on appeal?
2. Did the Commissioner apply the appropriate legal standards from the Department's regulations and relevant case law to conclude Bolling did not commit willful misconduct when the record shows he was unaware that any of his conduct would jeopardize his employer's interests?
3. Did the Commissioner appropriately conclude that the conduct for which Bolling was discharged from work was "unsatisfactory conduct" or "failure to perform well as the result of inability or incapacity," and therefore not disqualifying misconduct under RCW 50.04.294, when Bolling reasonably believed his actions were appropriate or justified and Puget Sound Security failed to prove facts necessary to establish misconduct?

III. STATEMENT OF THE CASE

The Department presents this counterstatement of the facts, drawn from the Commissioner's findings of fact.¹ *See* Certified Administrative

¹ Puget Sound Security's statement of facts cites the administrative record without due regard to whether the point in the record is reflected in a finding of fact. As discussed more thoroughly below, the Court's role with respect to the facts on judicial review is limited to a determination of whether the Commissioner's actual factual

Record² (AR) at 451-54 (findings of fact in initial order), 497 (adopted by Commissioner).

Robert Bolling worked as a part-time security guard for Puget Sound Security from June 5, 2010, through August 23, 2012. AR at 141-42, 453 (Finding of Fact (FF) 13). He was assigned to work graveyard shifts on Friday and Saturday nights at the Tacoma Public Utilities (TPU) LaGrande Power Plant and Alder Power House. AR at 148, 453 (FF 13).

Puget Sound Security discharged Bolling in August 2012 after he noted a burned-out generator light on a maintenance log, as he usually did. AR at 241-45, 250, 303, 332, 371-72, 388, 396, 453 (FF 15). Bolling's supervisor had previously reminded him that this particular generator was offline for maintenance and repair. AR at 148-49, 203-04, 405, 453 (FF 15). The supervisor gave Bolling a written warning for disregarding orders by recording the burned-out light. AR at 150, 371, 388, 396, 405, 453 (FF 16). Bolling and his supervisor engaged in a heated discussion about the incident, during which Bolling disagreed with the warning and said he would take his objections to the supervisor's supervisors. AR at 150-53, 203-04, 248, 453 (FF 16).

findings are supported by substantial evidence in the record. RCW 34.05.570(3)(e); *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993).

² King County Superior Court transmitted the certified administrative record (entitled "Commissioner's Record") to this Court under a separate cover from the remaining clerk's papers, cited herein as "AR."

Two days later, when Bolling ran into TPU's head mechanic and electrician, he asked them if it was okay for him to have logged the burned-out bulb. AR at 145, 241-42, 453 (FF 16). The mechanic and electrician notified Bolling's supervisor of Bolling's inquiry later that morning. AR at 145-46, 453 (FF 16). This was not the first time that Bolling had sought a second opinion from the client. AR at 174, 395, 453-54 (FF 16, 19).

Puget Sound Security had given Bolling a written disciplinary warning once before, approximately one year earlier in September 2011, for not completing an incident report while on the same shift during which the incident occurred. AR at 154, 161, 239, 404, 453 (FF 17). In this incident, while monitoring Alder Park via security camera, Bolling observed two young men throwing a log down a hill near the park's dam, ending in an area where people often stand to view the dam. AR at 252, 395, 399, 453 (FF 17). Bolling called park security, who contacted the sheriff. AR at 399, 453 (FF 17). The two young men were apprehended, and Bolling was asked to come to the scene to identify them. AR at 253, 399, 453 (FF 17). Bolling asked park officials to notify the client, which they did. AR at 399, 453 (FF 17).

Bolling got back to his office at 7:15 p.m.,³ finished his log entries, and secured the office. AR at 399, 453 (FF 17). His shift was over at 7:30 p.m. AR at 399, 453 (FF 17). The supervisor called Bolling the next morning and asked him to come in and write a report about the incident. AR at 154-56, 158, 255, 453 (FF 17). Bolling did so, but he did not have all of the information he thought necessary at the time, so he wrote a supplemental report at home. AR at 159-60, 254-56, 264, 372, 389, 395, 400, 453 (FF 17). Bolling, believing Puget Sound Security was in a hurry to get the report, faxed his supplemental report to Puget Sound Security's main office rather than to his supervisor. AR at 161, 257-58, 266-67, 453 (FF 17). Puget Sound Security then criticized Bolling's failure to follow the chain of command. AR at 161, 267, 404, 453-54 (FF 17).

At the administrative hearing challenging Bolling's application for unemployment benefits, Puget Sound Security cited other incidents as examples of Bolling's failure to respect his supervisor and follow instructions. AR at 143-77, 199-237, 316-44, 454 (FF 18). Puget Sound Security did not discipline Bolling at the time of these incidents, however. AR at 161, 454 (FF 18).

³ Though Bolling's normal assignment was the graveyard shift, he testified that he was working a 12-hour shift on the date of the Alder Park incident at his supervisor's request, because another security guard's truck had broken down. AR at 148, 251-52.

For instance, on one occasion, Bolling had written an incident report about a vehicle he noticed acting strangely when a police car went by while on his way to work. AR at 193-94, 397-98, 454 (FF 18). He did not think anything of it at the time, but after he arrived at work, his supervisor told him about the murder of a park ranger nearby and told him to be especially watchful and a little paranoid during his shift that night. AR at 169, 193-95, 309, 397-98, 454 (FF 18). After learning this news, Bolling was concerned that the vehicle he had seen might be involved, so he called the client's manager to discuss it. AR at 196, 259-60, 310-11, 397-98, 454 (FF 18). It turned out that the suspect's description did not match the description of the man Bolling had seen. AR at 258-60, 397-98, 454 (FF 18). In his incident report, Bolling said his supervisor was paranoid and had put him on high alert. AR at 201, 317-18, 383, 454 (FF 18). The supervisor objected to those characterizations and asked Bolling to rewrite the report, which he did. AR at 193-94, 201-02, 261, 454 (FF 18).

On another occasion, Bolling looked in a cupboard belonging to TPU for some batteries for his radio. AR at 304-05, 395, 409, 454 (FF 19). His supervisor told him he should not have done so. AR at 174-75, 395, 409, 454 (FF 19). When Bolling saw the client's manager a few days later, he apologized for getting into the cabinet. AR at 174-75, 395, 454 (FF 19). The client's manager did not know what Bolling was talking about, so

Bolling explained and asked if he needed to contact TPU before getting into the cabinet. AR at 174-75, 395, 454 (FF 19). The client's manager said "no." AR at 174, 395, 454 (FF 19).

Puget Sound Security discharged Bolling on August 23, 2012, following the incident with the light bulb. AR at 376-77, 388, 453 (FF 13-15). Bolling then applied for unemployment benefits. AR at 364, 450. The Department denied his application based on information from Puget Sound Security that Bolling had been discharged from work for misconduct. AR at 364-65, 450. Bolling appealed this decision, and the Department referred the appeal to the Office of Administrative Hearings. AR at 369-73, 450. After a series of hearings and remands that are not pertinent to the merits of this appeal,⁴ the parties participated in a three-day hearing before an administrative law judge (ALJ) regarding the reasons for Puget Sound Security's discharge of Bolling. AR at 83-357. After considering testimony from Bolling and three of Puget Sound Security's witnesses, as well as the exhibits submitted by the parties, the ALJ concluded that Bolling's behavior showed unsatisfactory conduct or an inability to perform his job well, but not

⁴ Puget Sound Security did not appear at the first two scheduled administrative hearings in this matter, but the ALJ later determined that Puget Sound Security had good cause for not appearing. AR at 451-52, 454. Because Puget Sound Security prevailed in this regard and the ALJ conducted a hearing on the merits of the job separation, the portions of the administrative record relating to earlier scheduled hearings are not in issue. Substantive testimony on the issue of Bolling's job separation begins on page 140 of the administrative record.

“misconduct” that would disqualify him from receiving unemployment benefits. AR at 453-56.

Puget Sound Security petitioned the Department’s Commissioner for review, and Bolling filed a response. AR at 480-91. The Commissioner⁵ issued an order adopting the ALJ’s findings of fact and conclusions of law in all relevant respects, affirming the ALJ’s decision. AR at 497-99. Puget Sound Security petitioned for reconsideration, but the Commissioner denied the petition. AR at 501-07.

Puget Sound Security appealed the Commissioner’s decision to King County Superior Court. Clerk’s Papers (CP) at 1-18. The Honorable Palmer Robinson affirmed the Commissioner’s decision. CP at 75-77. Puget Sound Security now appeals to this Court.⁶

IV. SCOPE AND STANDARD OF REVIEW

Washington’s Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final decision by the Department’s

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 In its Statement of the Case, Puget Sound Security has made one objection to the administrative record, asking the Court to supplement the record to include a document that does not appear in the certified record. Br. of Appellant at 13 & Ex. 1. RCW 34.05.566(7) gives the Court discretion to permit corrections or additions to the agency record for judicial review. Puget Sound Security appears to be correct that the ALJ admitted the document as part of exhibit 6. AR at 300 (identifying the document as page 3 of exhibit 6), 302 (admitting the document), 450. The Department has no objection to the Court correcting the administrative record by adding the document attached as Exhibit 1 to Puget Sound Security’s opening brief. RCW 34.05.566(7).

Commissioner. RCW 50.32.120; RCW 34.05.510; *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

The Commissioner's decision is *prima facie* correct, and the party asserting the invalidity of an agency action—here, Puget Sound Security—bears the burden of demonstrating such invalidity. RCW 34.05.570(1)(a); RCW 50.32.150; *Anderson v. Emp't Sec. Dep't*, 135 Wn. App. 887, 893, 146 P.3d 475 (2006).

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 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 the findings and decisions of the commissioner, not the superior court decision or the underlying ALJ order.”).

The standard of review is significant in this case because Puget Sound Security references evidence that it argues contradicts the Commissioner's findings of fact, asserts facts that are outside the record, and asks this Court to reweigh the evidence.⁷ But on judicial review of disputed issues of fact, the APA limits the Court's review to the agency

⁷ Puget Sound Security also makes assertions without citation or reference to the record, violating RAP 10.3(a)(5) and (6).

record. RCW 34.05.558. The Court's authority is to review the Commissioner's findings of fact for substantial evidence in the agency record, not to make new findings from evidence in the record. RCW 34.05.570(3)(e) ("The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that . . . [t]he order is not supported" by substantial evidence in the record (emphasis added)); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996); *Tapper*, 122 Wn.2d at 403 (agency's findings of fact are critical on judicial review, as court may not substitute its judgment for that of the agency as to the facts). Evidence is substantial if it 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).

In reviewing the Commissioner's factual findings, the Court must view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed at the administrative proceeding below—here, the Department. *William Dickson Co.*, 81 Wn. App. at 411. Significantly, an appellate court may not re-weigh evidence, witness credibility, or demeanor. *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002); *William Dickson Co.*, 81 Wn.

App. at 411. Unchallenged factual findings are verities on appeal. *Tapper*, 122 Wn.2d at 407.

The Court reviews questions of law de novo. *Tapper*, 122 Wn.2d at 407. However, because the Department has expertise in interpreting and applying unemployment benefits law, the Court should accord substantial weight to the agency's decision. *Markam Group, Inc. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 561, 200 P.2d 748 (2009); *William Dickson Co.*, 81 Wn. App. at 407. Specifically in relation to misconduct, the Court has indicated that it will "give substantial weight to the commissioner's interpretation of 'misconduct,' as it is defined under the Employment Security Act because of the agency's special expertise." *Markam Group*, 148 Wn. App. at 561.

Whether a claimant engaged in misconduct is a mixed question of law and fact, in that it requires the application of the definition of "misconduct" to the factual circumstances of the employee's discharge. *Kirby v. Dep't of Emp't Sec.*, 179 Wn. App. 834, 845, 320 P.3d 123, review denied, ___ Wn.2d ___, 332 P.3d 985 (2014). To resolve a mixed question of law and fact, the Court must engage in a three-step analysis in which it: (1) determines whether the factual findings are supported by substantial evidence in the record; (2) makes a de novo determination of the law; and (3) applies the law to the applicable facts. *See Tapper*, 122

Wn.2d at 403. Characterizing ‘misconduct’ as a mixed question of law and fact does not mean that a reviewing court is free to substitute its judgment for that of the agency as to the facts; instead, the factual findings of the agency are entitled to the same level of deference which would be given under any other circumstance. *Kirby*, 179 Wn. App. at 845.

V. ARGUMENT

The question before the Court is whether the Commissioner properly concluded that Bolling was eligible for unemployment benefits after his termination from work, not whether Puget Sound Security was justified in terminating Bolling’s employment. *See Tapper*, 122 Wn.2d at 412; *Johnson v. Emp’t Sec. Dep’t*, 64 Wn. App. 311, 314-15, 824 P.2d 505 (1992); *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.”).

Unemployed workers are generally eligible for unemployment benefits, absent a statutory disqualification. *Griffith v. Dep’t of Emp’t Sec.*, 163 Wn. App. 1, 8, 259 P.3d 1111 (2011). The Employment Security Act, Title 50 RCW, 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. Construction of the benefits statute which would narrow the coverage of unemployment

compensation laws is viewed ““with caution.”” *Griffith*, 163 Wn. App. at 8 (quoting *Shoreline Comm. College Dist. No. 7 v. Emp’t Sec. Dep’t*, 120 Wn.2d 394, 406, 842 P.3d 938 (1992)). The Legislature has directed that the Employment Security Act be liberally construed in favor of granting benefits to unemployed claimants. RCW 50.01.010; *Tapper*, 122 Wn.2d at 407-08.

Employees who are terminated from employment for statutorily-defined “misconduct” are ineligible for benefits. RCW 50.20.066(1); *Griffith*, 163 Wn. App. at 8. Here, it was Puget Sound Security’s burden to establish by a preponderance of the evidence that it discharged Bolling for disqualifying misconduct, and it failed to meet this burden. *Nelson v. Emp’t Sec. Dep’t*, 98 Wn.2d 370, 374-75, 655 P.2d 242 (1982); *In re Pluma Verner*, Emp’t Sec. Comm’r Dec.2d 617 (1980).⁸ Instead, after weighing the evidence, the Commissioner properly characterized Bolling’s conduct as either “unsatisfactory conduct” or “failure to perform well as the result of inability or incapacity,” which the Legislature has determined are not misconduct. RCW 50.04.294(3). Bolling’s conduct did not constitute a willful or wanton disregard of the rights and interests of Puget Sound Security. RCW 50.04.294(1)(a). The Commissioner therefore

⁸ Under RCW 50.32.095, the Commissioner may designate certain Commissioners’ decisions as precedent, which serve as persuasive authority for this Court. *Martini v. Emp’t Sec. Dep’t*, 98 Wn. App. 791, 795, 990 P.2d 981, 984 (2000).

properly determined Bolling was eligible for benefits. The Court should affirm.

A. Substantial Evidence in the Record Supports Finding of Fact 20, the Only Factual Finding Challenged by Appellants

Puget Sound Security raises only one express challenge to the Commissioner's factual findings: a challenge to Finding of Fact 20. Br. of Appellant at 2, 15. Because Puget Sound Security has not challenged the remaining findings of fact, the Court should uphold them and consider them verities. *See Tapper*, 122 Wn.2d at 407 (unchallenged findings are verities on appeal); RAP 10.3(g) and (h); *In re Disciplinary Proceeding Against Petersen*, 180 Wn.2d 768, 780, 329 P.3d 853 (2014) (the burden is on the party challenging the findings of fact to properly assign error and to establish that specific challenged findings are not supported by the record).

Finding of Fact 20 states: "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." AR at 454 (FF 20). Substantial evidence in the record supports this finding.

At the administrative hearing, Bolling gave explanations for each of his actions that were in issue. With respect to the burned-out light bulb, Bolling testified that he was checking the unit as part of his routine and that he wrote down any bulbs that did not light up in a maintenance log. AR at 242-43. He described his testing of the bulbs as a “minor routine” that he did as a “matter of habit,” AR at 243, 247; that the specific incident was a “very minor incident,” AR at 243-45; that he had been acting according to an “understood rule” to test the lights, AR at 244; that he believed he was required, and had been trained, to test and write down any non-functioning lights, AR at 249, 314, 396, 405; that he understood that he was supposed to continue to check offline equipment, AR at 303; and that while he had been told not to report *alarms* while the equipment was offline, he had never been instructed not to write down anything with regard to the lights or light bulbs, AR at 249-50, 332, 371, 396.

Further, Bolling testified that his action “wasn’t with the idea that I’m going to disobey [the supervisor’s] command or I had no element of disobeying a direct order or anything else . . . mentioned about the buttons.” AR at 336. He went on to state, “I wasn’t defying – I wasn’t deliberately disobeying his orders.” AR at 337. Bolling explained that he only contacted the electrician about the light because he happened to see the electrician when opening gates for TPU employees, that he “didn’t

deliberately hunt [the electrician] down for that specific reason,” and that he “wasn’t trying to break chain of command or anything. They just happened to be coming by[.]” AR at 241-42.

Similarly, with respect to the Alder Park incident, Bolling explained that he did not write an incident report immediately upon returning to his work site because he ran out of time at the end of his 12-hour shift and he was aware of a rule prohibiting two security guards from being on duty at the same time. AR at 251, 253-54 (“You can be fired if you stay there. You have got to leave the site.”), 399. He had returned to the work site at 7:15 p.m. and had additional tasks to complete before his shift ended at 7:30 p.m. AR at 253-55, 399, 453 (FF 17). Additionally, he had “very little free time” while on duty, he was tired, and “didn’t have all the facts I needed to do . . . the report,” so he went home to start it. AR at 254-55, 395. Bolling explained that he wrote the report “as quick as I could,” he “did the best I could” with respect to the report, and nothing in Puget Sound Security’s materials said that the report had to be done immediately. AR at 255-56, 372, 395. He wanted to make sure his report met Puget Sound Security’s report guidelines and requirements. AR at 255-56, 372, 395. Additionally, Bolling testified that he “was led to believe that corporate had to have the report right away” and “thought corporate was putting pressure on them,” so he faxed his supplemental

report to Puget Sound Security's headquarters from home rather than sending it to his supervisor first. AR at 257-58, 266-67.

Regarding Bolling's report of a strange vehicle he noticed on his way to work on the day a park ranger was killed nearby, Bolling's supervisor, Donald Peters, testified that he instructed Bolling at shift change to "be a little paranoid" that day, and that if Bolling saw anything unusual, he should call the client contact, Stan Strand, "and see what he wants to do about it." AR at 169. Peters told Bolling to let the client decide whether to call the police or do something about it; "as would be our normal is to contact the client first and await instructions from him." AR at 169. Bolling testified that Peters had instructed him, "if anything suspicious comes up, call the officer . . . in charge, Stan [Strand]; don't call the police. Call Stan [Strand] first." AR at 194. After receiving this instruction and being told to "be paranoid about security," AR at 194, he thought about what Peters had said and realized that he had seen someone acting suspiciously, so he called Strand. AR at 195-96, 309-11. Peters confirmed that he asked Bolling to write an incident report after this event. AR at 317.

Finally, with respect to the battery incident, Bolling testified that he did not go to the "cabinets and go around and do things I shouldn't have done." AR at 304. Bolling believed he was following instructions

from Vickie Brown—another supervisor—in looking for batteries for the communications radio in a TPU cabinet. AR at 304, 395, 409. Specifically, when he called in to Brown, she asked him to check the spare batteries, but he did not know where they were. AR at 304, 395. Brown told him that the batteries ““will be back there. Go find them,”” so he went and found them and tested them. AR at 304, 395 (“Vickie asked me to find the spare batteries”), 409.

The Court should conclude that the testimony and statements described above are sufficient to support Finding of Fact 20. Though Puget Sound Security disagrees with certain aspects of the finding, the Commissioner considered all of the testimony and resolved conflicts in favor of Bolling. While there was not a specific credibility finding, the findings of fact demonstrate that the Commissioner found Bolling’s explanations credible. An appellate court may not substitute its judgment of the facts for that of the agency and may not re-weigh evidence. *Tapper*, 122 Wn.2d at 403; *W. Ports Transp.*, 110 Wn. App. at 449. Thus, the Court should uphold Finding of Fact 20, along with all of the unchallenged findings, and next conclude that the Commissioner drew appropriate legal conclusions from those findings. *See Tapper*, 122 Wn.2d at 403 (after establishing the relevant facts, the court determines the applicable law and then applies that law to the facts).

B. The Commissioner Correctly Concluded that the Conduct for Which Bolling Was Discharged Was Not “Misconduct” as That Term Is Defined by RCW 50.04.294

An individual will be disqualified from benefits if the employer proves that it discharged the individual for misconduct connected with his or her work. RCW 50.20.066(1). “Misconduct” is defined in RCW 50.04.294, and includes:

- (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.

RCW 50.04.294(1). The definition of misconduct also identifies numerous acts as *per se* misconduct. RCW 50.04.294(2); *Daniels v. Dep’t of Emp’t Sec.*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012) (“Certain types of conduct are misconduct *per se*.”). These acts are deemed misconduct under subsection (a) above “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).

Notably, subsection (3) of RCW 50.04.294 excludes certain types of conduct from the definition of misconduct. “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.

RCW 50.04.294(3).

In this case, the Commissioner applied the correct legal standards in determining whether Bolling committed “willful” misconduct under RCW 50.04.294(1)(a). *See* Br. of Appellant at 15-17. The Commissioner correctly concluded that Bolling’s conduct was not disqualifying misconduct because Puget Sound Security did not establish that Bolling’s conduct was willful, as Bolling was not aware that he was potentially violating or disregarding Puget Sound Security’s interests. AR at 453-54 (FF 15-20), 456 (Conclusion of Law (CL) 10). Furthermore, as the Commissioner determined, Bolling’s conduct is most appropriately characterized as “unsatisfactory conduct” or “failure to perform well as the result of inability or incapacity,” neither of which constitute misconduct under the plain language of RCW 50.20.294(3). AR at 456 (CL 10).

Finally, at the administrative level, Puget Sound Security only argued that it discharged Bolling for insubordination, which falls within the statutory definition of misconduct under RCW 50.04.294(2)(a). AR at 345-47 (closing argument to ALJ), 482-84 (petition for Commissioner’s review). For the first time on appeal, Puget Sound Security raises additional bases in RCW 50.04.294(1) and (2) on which it asks this Court to conclude that Bolling was discharged for misconduct.⁹ As further described below—based on statute, case law, and principles of judicial economy and application of agency expertise—the Court should decline to address those issues raised for the first time on appeal and conclude that Puget Sound Security failed to establish disqualifying misconduct in this case. The Court should affirm the Commissioner’s decision.

1. The Commissioner applied the correct legal standard and correctly concluded Bolling did not commit “willful” misconduct.

In arguing that establishing misconduct only requires proof of purposeful action, Puget Sound Security misconstrues the Commissioner’s decision and misstates the law. Br. of Appellant at 15-17. Puget Sound

⁹ Puget Sound Security may argue that it also cited violation of a company rule under RCW 50.04.294(2)(f) at the administrative level. See AR at 377. While Puget Sound Security cited a rule violation on a claimant separation statement that was part of the hearing exhibits, it did not make this express argument to the ALJ or the Commissioner. AR at 345-47, 482-84.

Security's argument is inconsistent with the Department's regulations and this Court's previous decisions.

First, while the Commissioner did find, as Puget Sound Security emphasizes, that Bolling "did not intend to cause harm," AR at 454 (FF 20), the Commissioner's decision did not turn on this finding alone. The Commissioner further and more importantly concluded Bolling's conduct "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." AR at 456 (CL 10). Puget Sound Security neglects to note that the Commissioner's ultimate conclusion rested on the fact that Bolling acted without "the awareness that the claimant was violating or disregarding the rights of the employer." *Id.* The Commissioner's conclusion accurately reflects the Department's regulations and relevant case law.

Under the Department's regulations, "'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). "'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. It includes a failure to act when there is a duty to do so, knowing that injury could result.” WAC 192-150-205(2). Conclusion of Law 10 shows that the Commissioner directly considered and applied these definitions. *Compare* AR at 456 (CL 10) with WAC 192-150-205(1), (2).

Washington appellate courts also have held that an employee acts with willful disregard of an employer’s interest 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.” *Kirby*, 179 Wn. App. at 844 (quoting *Hamel v. Emp’t Sec. Dep’t*, 93 Wn. App. 140, 146-47, 966 P.2d 1282 (1998)). This Court recently addressed the intent necessary for there to be willful misconduct in a case involving a different unemployment benefits claimant who was a former employee of Puget Sound Security. *Kirby*, 179 Wn. App. at 847. This Court concluded that while “subjective motivations and intent to harm the employer are irrelevant, a showing of misconduct must be established by evidence that the employee was aware that he or she was disregarding the employer’s rights.” *Id.* Contrary to Puget Sound Security’s argument, merely showing the claimant “act[ed] on purpose” is insufficient. *See* Br. of Appellant at 16. The claimant must have known or should have known

that that the conduct would jeopardize the employer's interest. *Kirby*, 179 Wn. App. at 844.

Griffith does not support Puget Sound Security's position that intentional conduct is sufficient to demonstrate willfulness. *See* Br. of Appellant at 16. The claimant in *Griffith* was discharged after making offensive comments to a customer and then visiting her at her store while he was suspended from work. *Griffith*, 163 Wn. App. at 5. He had previously received warnings that he must represent his employer in a positive light and that any further unacceptable conduct could result in termination. *Id.* at 4-5, 10. The court applied the standard for willful disregard established in *Hamel*: the employee is (1) 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 probable consequences. *Griffith*, 163 Wn. App. at 9-11 (citing *Hamel*, 93 Wn. App. at 147). The court concluded that Griffith acted willfully under this standard, and it is the same standard the Court should apply here. *Id.* at 10-11.

Here, Finding of Fact 20 and the evidence supporting that finding demonstrate that Bolling was not aware that he was potentially violating or disregarding his employer's rights and interests. AR at 454 (FF 20). The Commissioner found that Bolling had explanations as to why his

actions were appropriate or justified, and that Bolling “intended to serve the best interests of the employer. He did not intend to cause harm” *Id.* Though Bolling may have made mistakes in his actions and misunderstood what was required of him, the record shows that Bolling believed he was doing his work correctly. *See, e.g.*, AR at 242-47, 303, 314, 332, 371, 388, 396 (explaining that he was following usual procedures and instructions in reporting the burned-out generator light bulb); AR at 253-58, 266-67, 372, 395, 399 (explaining that he ran out of time on shift to complete Alder Park incident report up to Puget Sound Security’s standards and believed he was faxing supplemental report to appropriate recipient); AR at 304, 395, 409 (explaining that he believed he was following superior’s instructions in looking for batteries in a TPU cabinet). Because Bolling was not aware that he was potentially disregarding Puget Sound Security’s rights and interests, Puget Sound Security did not establish misconduct. *See Kirby*, 179 Wn. App. at 847.

While Puget Sound Security disagrees with the Commissioner’s characterization of the evidence relating to Bolling’s intent, for purposes of this appeal this Court must review the evidence and the reasonable inferences therefrom in the light most favorable to the Department. *William Dickson Co.*, 81 Wn. App. at 411. Taken in the light most favorable to the Department, Bolling’s conduct does not meet the standard

of a willful or wanton disregard of Puget Sound Security's interests. The Commissioner applied the appropriate legal standard and came to the correct conclusion.

2. Bolling's conduct was unsatisfactory or he failed to perform well as a result of inability or incapacity.

Under subsection (3) of RCW 50.04.294, an employee's unsatisfactory conduct or failure to perform well as the result of inability or incapacity is not misconduct, even if the employee made several errors. RCW 50.04.294(3)(a); *Griffith*, 163 Wn. App. at 10 (citing *Markam Group*, 148 Wn. App. at 564). For example, in *Markam Group*, the court concluded that the claimant, a paralegal, did not commit misconduct even though she made several serious errors in managing cases for her employer. *Markam Group*, 148 Wn. App. at 563-64. The findings did not suggest the claimant deliberately or even knowingly failed to perform her job duties correctly, and her behavior was not malicious. *Id.* Instead, the claimant "was unable to perform her job to Markam's standards because she lacked the skills she needed to properly manage a case." *Id.* at 564. For these reasons, the court determined that the Commissioner correctly concluded that the claimant was not discharged for misconduct. *Id.*

Similarly, the court concluded that a claimant did not commit misconduct where he attempted, but failed, to comply with his employer's

rules in *Ciskie*.¹⁰ *Ciskie*, 35 Wn. App. at 76-77. In that case, an employer warned the claimant that any additional unexcused absences would cost him his job. *Ciskie*, 35 Wn. App. at 74. After receiving news of a family crisis, the claimant attempted to notify an appropriate supervisor before leaving the worksite, but was unsuccessful. *Id.* The court concluded, “Not every deviation from the reasonable demands of an employer bars unemployment benefits,” but instead, “[t]he deviation must be such as to evince a willful or wanton disregard of the employer’s interest.” *Id.* at 76. Looking at all the facts and circumstances as found by the Commissioner, the court concluded that *Ciskie*’s failure to comply with the proper notification procedure “was not sufficiently culpable to constitute a willful or wanton disregard of the employer’s interests.” *Id.* at 77.

In the present case, as in *Markam Group* and *Ciskie*, the findings of fact and record do not suggest that Bolling deliberately or knowingly failed to perform his job duties correctly. Rather, they demonstrate that Bolling’s conduct was unsatisfactory or that he failed to perform his job well as the result of inability or incapacity. Although he made mistakes with respect to his work, including making unnecessary notes on a maintenance log and not submitting timely incident reports, he explained

¹⁰ Though *Ciskie* was decided before the Legislature enacted the current statutory definition of misconduct in 2004, the underlying principles of the decision are consistent with RCW 50.04.294, and the case remains persuasive authority.

why his actions were appropriate and that he had intended to serve the best interests of his employer. AR at 453-54 (FF 15-20). The fact that Puget Sound Security did not find his actions to be satisfactory does not mean that Bolling committed misconduct. *See Ciskie*, 35 Wn. App. at 76 (“Not every deviation from the reasonable demands of an employer bars unemployment benefits.”). As in *Markam Group*, the record demonstrates that Bolling simply was unable to perform his job to his employer’s standards because he lacked the skills or judgment necessary to live up to those standards—not because he was intentionally violating or disregarding Puget Sound Security’s interests.

Based on the record and factual findings, the Commissioner properly concluded that Bolling’s conduct was unsatisfactory conduct or a failure to perform well as the result of inability or incapacity. AR at 453-56 (FF 15-20, CL 5-10). For that reason, Bolling’s conduct was not misconduct as defined by statute, and the Court should affirm the Commissioner’s decision. *See* RCW 50.04.294(3)(a).

If the Court agrees that Bolling’s conduct is properly characterized as falling within RCW 50.04.294(3)(a), it need not reach the remaining arguments with respect to misconduct under subsections (1) and (2) of the statute, because Bolling’s conduct was not misconduct. *See*

RCW 50.04.294(3). Nonetheless, the Department will address Puget Sound Security's remaining arguments.

3. Puget Sound Security did not establish that Bolling's conduct was otherwise misconduct under RCW 50.04.294(1) or (2).

The misconduct statute defines several circumstances in which a claimant commits misconduct. RCW 50.04.294(1), (2). Puget Sound Security did not establish that any of these circumstances apply.

Puget Sound Security argues, as it did at the administrative level, that that Bolling committed *per se* misconduct of “[i]nsubordination showing a *deliberate, willful, or purposeful* refusal to follow the reasonable directions or instructions of the employer.” RCW 50.04.294(2)(a) (emphasis added); Br. of Appellant at 15; AR at 345-47 (closing argument to ALJ that Bolling committed misconduct under RCW 50.04.294(2)(a)), 482-84 (petition for Commissioner's review arguing that Bolling committed misconduct due to acts of insubordination). Puget Sound Security did not establish that Bolling committed insubordination. Significantly, the findings of fact do not reflect any specific “reasonable directions or instructions of the employer,” or that Bolling deliberately, willfully, or purposefully refused to follow any such instructions. *See* AR at 453-54 (FF 13-20). Instead, the findings illustrate that Puget Sound Security was unsatisfied with

Bolling's performance. The Court is limited to applying the law to the facts as found by the Commissioner and should not re-weigh the evidence to conclude that Bolling committed insubordination. *See Tapper*, 122 Wn.2d at 403. The Court should conclude that Puget Sound Security did not establish that Bolling committed misconduct under RCW 50.04.294(2)(a).

For the first time on appeal, Puget Sound Security argues that Bolling committed misconduct as defined in other provisions within RCW 50.04.294(1) and (2), including negligence under RCW 50.04.294(1)(d), deliberate violation or disregard of a standard of behavior that it had the right to expect under RCW 50.04.294(1)(b), and violation of a reasonable employer rule under RCW 50.04.294(2)(f). Br. of Appellant at 17-19. Under the APA, parties generally may not raise issues on appeal that were not raised before the agency, absent an applicable statutory exception. RCW 34.05.554. This rule "protect[s] the integrity of administrative decisionmaking" in several respects, including protecting agency autonomy by allowing the agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors; aiding judicial review by promoting the development of facts at the administrative level; and promoting judicial economy, possibly even obviating judicial involvement. *King Cnty. v. Wash. State Boundary*

Review Bd., 122 Wn.2d 648, 668-69, 860 P.2d 1024 (1993) (quoting *Fertilizer Inst. v. U.S. Env'tl. Prot. Agency*, 935 F.2d 1303, 1312-13 (D.C. Cir. 1991)).

Puget Sound Security has not explained how any of the exceptions in RCW 34.05.554(1) may apply. The Court should decline to consider Puget Sound Security's arguments that other provisions of RCW 50.04.294(1) and (2)—apart from alleged insubordination under RCW 50.04.294(2)(a)—may apply, because these arguments were not raised below. In not raising these arguments at the agency level, Puget Sound Security failed to develop the necessary facts to prove the applicability of the newly-cited provisions and failed to give the Department the first opportunity to apply its expertise and discretion. See *Boundary Review Bd.*, 122 Wn.2d at 668-69. In any event, Puget Sound Security has not met its burden to prove misconduct under any of the newly-cited provisions.

Puget Sound Security first argues that Bolling's actions were misconduct because he exhibited "[c]arelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest." RCW 50.04.294(1)(d); Br. of Appellant at 17. "Carelessness' and 'negligence' mean failure to exercise the care that a reasonably prudent person usually exercises." WAC 192-150-205(3).

The Commissioner's findings of fact do not establish that Bolling failed to exercise the care of a reasonably prudent person "of such degree or recurrence to show an intentional or substantial disregard of the employer's interest." *See* RCW 50.04.294(1)(d). Puget Sound Security terminated Bolling for what was only the second instance of written discipline in the course of his two-year employment. AR at 453 (FF 13, 16, 17). As discussed more thoroughly above, the evidence showed that Bolling believed his actions were appropriate or justified in each of the relevant incidents. AR at 454 (FF 20). For example, in the light bulb incident he testified that he was doing what he had been trained to do, AR at 250-51, 314; he did not immediately write a report after the Alder Park incident due to lack of time and his concern about breaking a rule that two guards could not be on shift at the same time, AR at 253-54, 399; he called the client on the day of the park ranger incident in an attempt to follow his supervisor's instructions that he do so, AR at 169, 194-96, 309-11; and he believed he was following a supervisor's instructions when he went looking for radio batteries. AR at 304, 395, 409. These actions were neither careless nor negligent.

Puget Sound Security also argues for the first time in this appeal that Bolling's conduct constituted "[d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an

employee.” RCW 50.04.294(1)(b); Br. of Appellant at 15. Under the plain language of this provision, to establish this basis for misconduct, Puget Sound Security would have needed to prove that it had the right to expect a particular standard of behavior from Bolling and that Bolling deliberately violated or disregarded that standard. RCW 50.04.294(1)(b). The findings of fact do not reflect that Puget Sound Security proved any such standard. See AR at 453-54 (FF 13-20). Additionally, as previously discussed, the Commissioner’s findings of fact do not support a conclusion that Bolling’s actions constituted a *deliberate* violation or disregard of any standards, as Bolling was not aware that he was potentially violating or disregarding Puget Sound Security’s interests by his actions. AR at 453-54 (FF 15-20), 456 (Conclusion of Law (CL) 10)

Finally, Puget Sound Security did not establish that Bolling violated a reasonable company rule of which he knew or should have known. RCW 50.04.294(2)(f). Puget Sound Security now alleges, in a conclusory manner, that Bolling violated one or more company rules. Br. of Appellant at 17-19 (“Mr. Bolling chose to violate work rules, expectations, and instructions of his supervisor, leading to his termination.”). However in making this argument, it does not identify which “work rules” Bolling violated, and it did not develop or prove the necessary facts at the administrative level to establish misconduct in this

regard, as was its burden. *See* AR at 453-54 (FF 13-20); *Nelson*, 98 Wn.2d at 374-75 (employer's burden to show misconduct by a preponderance of evidence). The Commissioner's factual findings do not reflect any specific company rule that Bolling violated. *See* AR at 453-54 (FF 13-20). Although Puget Sound Security alleges in its Statement of the Case that Bolling failed to write certain reports and broke rules relating to client communication and property, the Commissioner did not make such findings of fact. Br. of Appellant at 3-7, 17-18. In the absence of a factual finding, the court "must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). This Court should decline Puget Sound Security's invitation to reweigh the evidence. *W. Ports Transp.*, 110 Wn. App. at 449; *William Dickson Co.*, 81 Wn. App. at 411. Puget Sound Security did not establish misconduct under RCW 50.04.294(2)(f).

The Court should conclude that Puget Sound Security did not establish misconduct.

VI. CONCLUSION

Bolling's conduct was not intentional behavior done deliberately or knowingly with the awareness that he was violating or disregarding Puget Sound Security's rights. Rather, Bolling's conduct was unsatisfactory,

and he failed to perform his job well because he was unable to do so. As such, his conduct was not misconduct under the Employment Security Act, and he is not disqualified from unemployment benefits. Because the Commissioner's factual findings are supported by substantial evidence in the record and the Commissioner made no error of law, the Department respectfully requests that the Court affirm.

RESPECTFULLY SUBMITTED this 3rd day of October, 2014.

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PROOF OF SERVICE

I, ROXANNE IMMEL, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 6th day of October 2014, I caused to be served a true and correct copy of **Respondent's Brief**, by ABC Legal messenger with courtesy copy via e-mail to:

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Original (+ 1 copy) by ABC Legal messenger

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED this 6th day of October 2014, in Seattle, Washington.



Roxanne Immel, Legal Assistant

7/11/2014 10:10:17 AM
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