71991-2

71991-2

NO. 71991-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DONALD BAKER,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT
OF EMPLOYMENT SECURITY,

Respondent.

RESPONDENT'S BRIEF

ROBERT W. FERGUSON
Attorney General

APRIL S. BENSON,
WSBA # 40766
Assistant Attorney General
Attorneys for Respondent
OID #91020
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
Phone: (206) 464-7676
Fax: (206) 389-2800
E-mail: LALSeaEF@atg.wa.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

I. INTRODUCTION

Donald Baker was discharged from his job with Maintech Acquisition, LLC (Maintech) for being absent from his scheduled shifts without giving proper advance notice. The Commissioner of the Employment Security Department correctly determined that Baker's conduct amounted to "misconduct" as defined by the Employment Security Act, which disqualified him from receiving unemployment benefits. Though Baker argues that he was discharged for reasons other than those found by the Commissioner, the Commissioner did not find Baker's testimony credible. Additionally, the superior court properly declined to consider new evidence Baker offered on appeal. Baker has not demonstrated any basis for relief under the Administrative Procedure Act, chapter 34.05 RCW. The Court should affirm the Commissioner's decision because it is supported by substantial evidence and is in accord with the law.

II. COUNTERSTATEMENT OF THE ISSUES

1. Where the Commissioner's factual findings were drawn from evidence submitted by Maintech, and the fact-finder determined that Baker's testimony was not credible, does the administrative record contain substantial evidence to support the findings that Maintech had an attendance policy requiring employees to show up for work when scheduled and that three consecutive "no call, no shows" would result in discharge; that Baker was aware of the policy; and that Maintech discharged Baker because he was absent from work, three days in a row, without calling in advance?

2. The Employment Security Act defines "misconduct" to include "[w]illful or wanton disregard of the rights, title and interests of the employer," "[r]epeated and inexcusable absences," and "[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known" of the rule's existence. Did the Commissioner correctly conclude that Baker's conduct amounted to misconduct?

3. RCW 34.05.562(1) imposes strict limits on when a court may receive evidence in addition to that contained in the agency record for judicial review. Did the superior court properly decline to consider new evidence that Baker offered for the first time on appeal?

4. In RCW 34.05.574, the APA limits the type of relief available to a party on judicial review of agency action. Should the Court decline to award relief to Baker outside the scope of RCW 34.05.574?

III. STATEMENT OF THE CASE

Donald Baker worked full-time as a maintenance crew employee for Maintech Acquisition, LLC (Maintech) from November 29-December 23, 2011. Clerk's Papers (CP) at 139, 147, 203, 207, 234 (Finding of Fact (FF) 1). Maintech had a written attendance policy that required employees to show up for work when scheduled and on time. CP at 143, 205-06, 234 (FF 2). Maintech's policy defined absenteeism as "three (3) hours of work missed within a scheduled workday without properly notifying your Supervisor irrespective of cause." CP at 205. To give proper notice, an employee was responsible to contact his or her supervisor a minimum of one hour prior to the start of the scheduled workday, either by email or

telephone. CP at 205. In the absence of a supervisor, "notification must be made to the next reporting relationship (i.e., Operations Manager, etc.)." CP at 205. The policy further provided, "Failure to properly follow the notification process as stated will be classified as 'no call, no show' as defined below." CP at 205. "No call, no show" meant "not reporting to work and not calling to report the absence." CP at 205. Three consecutive "no call, no shows" would be considered a voluntary resignation by the employee and would result in termination of the employment. CP at 143, 205-06, 234 (FF 2). Baker was aware of Maintech's attendance policy. CP at 147, 205-06, 234 (FF 2).

On December 12 and 13, 2011, Maintech allowed Baker to work half days so that Baker could handle some pending court matters. CP at 144, 148, 203, 234 (FF 5). When Baker returned to work, he informed his supervisor, Tyson Wittrock, that he had taken care of his legal matters. CP at 144, 148, 234 (FF 5).

Baker was scheduled to work his usual 7:00 a.m. to 3:30 p.m. shift on December 20. CP at 140, 234 (FF 6). Around 7:00 a.m. that day, Baker was arrested at his apartment on suspicion that he had assaulted his roommate. CP at 148-49, 234 (FF 6). Baker did not show up for work or call in to work to let them know that he would be absent that day. CP at 140-41, 234 (FF 7).

Following his arrest, Baker spent one night in jail and was released around 9:30 a.m. on December 21. CP at 135, 150-51, 234 (FF 8). He was again scheduled to work his usual shift but did not go in that day. CP at 140-41, 234 (FF 8). He called a co-worker and asked his co-worker to tell Wittrock that he had been in jail. CP at 156-57, 159-60, 234-35 (FF 8). Wittrock received a message from the co-worker that Baker was in jail. CP at 159-60, 235 (FF 8).

The next day, December 22, Baker was again scheduled to work his usual shift but did not go in to work. CP at 140-41, 152, 235 (FF 9). He called Wittrock at 11:42 a.m. and told Wittrock that he had been jailed and had some legal issues to take care of, and could not come in to work that day. CP at 141-42, 153, 160-61, 235 (FF 9). Wittrock told Baker to come in to work the next day to discuss his future with the company. CP at 142, 153, 235 (FF 9).

Baker went in to work on December 23 and talked with Wittrock about his job. CP at 142, 162, 235 (FF 10). Wittrock told Baker that because of his failure to show up for work for multiple days, Baker was not reliable and Maintech would have to let him go. CP at 142-43, 155, 162, 203, 235 (FF 10).

Baker applied for unemployment benefits the same week. CP at 202, 235 (FF 11). In his application, Baker told the Department that he had been

laid off due to lack of work. CP at 128, 196, 209, 235 (FF 12). The Department initially approved Baker's claims. CP at 195-202, 235 (FF 12).

The Department later received information that Baker had not been laid off for lack of work, but instead that Maintech had discharged Baker because he had violated Maintech's attendance policy. CP at 195-204. Based on this information, the Department issued a Determination Notice, notifying the parties that Baker was disqualified from benefits because he had been discharged from work for misconduct. CP at 195-202. Baker was therefore responsible for paying back all of the benefits he had claimed relating to his employment with Maintech.[1] CP at 195-202.

Baker appealed the Department's decision to the Office of Administrative Hearings. CP at 192-94. An administrative law judge (ALJ) conducted a hearing on the matter, at which Baker and Wittrock testified. CP at 115-65. The ALJ issued an Initial Order affirming the Department's decision. CP at 233-40. In the Initial Order, the ALJ found that the parties' testimony "conflicted on material points." CP at 234 (FF 3). After considering and weighing all of the evidence, including the witnesses' demeanors, their motivations, the reasonableness and consistency of

[1] The Administrative Record in this case shows that Baker has had claims for periods other than those at issue in this case. CP at 269-70 (Decision of Commissioner for Docket Nos. 04-2012-28541, 04-2012-28542, 04-2012-28543, 04-2012-28544, relating to claims filed October 31, 2010, through November 20, 2010).

testimony, and the totality of circumstances, the ALJ found Baker's testimony not credible. CP at 234 (FF 3).

Baker petitioned the Department's Commissioner for review of the Initial Order. CP at 242-46. After a series of procedural steps not relevant to the merits of this appeal,[2] the Commissioner adopted the ALJ's findings of fact and conclusions of law and affirmed the initial order. CP at 278-81.

Baker appealed the Commissioner's decision to Snohomish County Superior Court. CP at 320-27. Baker argued that a different timeline of events had taken place with respect to his arrest. CP at 16-17, 37. He also argued that the allegation for which he was arrested was dismissed. CP at 16-17, 37. Baker submitted new evidence—documents that he believes support his version of events, but that he had not presented to the ALJ or Commissioner—to the superior court. Specifically, Baker submitted: a one-page document that appears to be related to a municipal court case with his opening brief, CP at 36-40; the same document and a copy of a two-page document entitled Domestic Violence No Contact Order with his reply brief, CP at 14-21; and separately, a copy of a court docket from Marysville

[2] Baker's petition for review appeared to be untimely. CP at 249. The Commissioner remanded the matter for a hearing on whether Baker had good cause for his untimely appeal. CP at 167-88, 249. After the remand hearing, the Commissioner determined that Baker had not established good cause and dismissed Baker's petition. CP at 249-51. Baker appealed to Snohomish County Superior Court. The Department eventually agreed to remand the matter to the Commissioner for a decision on the merits of the appeal. CP at 262-63 (Findings of Fact, Conclusions of Law and Order in Snohomish County Superior Court No. 13-2-01950-5). The resulting Commissioner's decision is the order on appeal in this case. CP at 278-81.

Municipal Court, CP at 12-13. The superior court declined to consider the new evidence submitted by Baker and affirmed the Commissioner's decision. CP at 8-10. Baker sought reconsideration, but the superior court denied his request as untimely. CP at 1-7.

Baker now appeals the superior court's decision to this Court.

IV. SCOPE AND STANDARD OF REVIEW

The Washington Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final decision by the Department's 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). This Court undertakes the limited task of reviewing the Commissioner's findings to determine, based on the evidence in the administrative record, whether those findings are supported by substantial evidence. RCW 34.05.558; *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). The Court then determines *de novo* whether the Commissioner correctly applied the law to those factual findings. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

This Court must consider the Commissioner's decision to be *prima facie* correct and the party asserting the invalidity of an agency action—here, Baker—bears the burden of demonstrating such invalidity.

RCW 34.05.570(1)(a); RCW 50.32.150; *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014).

The Commissioner's findings of fact must be upheld if supported by substantial evidence in the agency record. RCW 34.05.558; RCW 34.05.570(3)(e); *William Dickson Co.*, 81 Wn. App. at 411. 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); *Campbell*, 180 Wn.2d at 571. Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). The reviewing court is to "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; *see also Tapper*, 122 Wn.2d at 403 (court gives deference to agency's factual findings).

The process of reviewing for substantial evidence "'necessarily entails acceptance of the fact-finder's views regarding credibility of witnesses and the weight to be given reasonable but competing inferences.'" *William Dickson Co.*, 81 Wn. App. at 411 (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217

(1992)); *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 35-36, 226 P.3d 263 (2010). A court may not substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403. Unchallenged factual findings are verities on appeal. *Tapper*, 122 Wn.2d at 407.

The Court reviews questions of law de novo, under the error of law standard. RCW 34.05.570(3)(d); *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.

Whether a claimant engaged in misconduct is a mixed question of law and fact. *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 8, 259 P.3d 1111 (2011). To resolve a mixed question of law and fact, the Court engages in a three-step analysis in which it: (1) determines whether the Commissioner's factual findings are supported by substantial evidence; (2) makes a *de novo* determination of the law; and (3) applies the law to the facts. *Tapper*, 122 Wn.2d at 403. As under any other circumstance, a court is not free to substitute its judgment for that of the agency as to the facts. *Id.* The process of applying the law to the facts is a question of law, subject to de novo review. *Id.*

V. ARGUMENT

The Commissioner correctly determined that Baker was disqualified from receiving unemployment benefits because he was discharged from work for misconduct.

As an initial matter, the Court must consider the Commissioner's decision to be *prima facie* correct, and Baker bears the burden to demonstrate otherwise. *See* RCW 34.05.570(1)(a) (party asserting invalidity of agency action has the burden to demonstrate such); RCW 50.32.150 (decision of the Commissioner is prima facie correct in all court proceedings under Employment Security Act, and burden of proof is on the party attacking the decision); *Campbell*, 180 Wn.2d at 571 (same). Yet Baker makes no express assignments of error to any factual finding or conclusion of law, no express references to the administrative record on review, and scant citation to legal authority. *See* RAP 10.3(a)(4), (5), (6); RAP 10.3(g), (h). By submitting only a summary argument, Baker has not met his burden on appeal to show error.

In any event, the Commissioner's decision in this case was correct. 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

408. As such, a claimant is disqualified from receiving unemployment benefits if he or she has been discharged from his or her job for work-connected "misconduct."[3] RCW 50.20.066(1).

The statute defining misconduct, RCW 50.04.294, identifies four general circumstances that constitute misconduct as well as several acts that are misconduct *per se* "because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee." RCW 50.04.294(2); *Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012) ("Certain types of conduct are misconduct per se.").

Three provisions within the definition of misconduct are relevant to Baker's case. First, RCW 50.04.294(1)(a) provides that misconduct includes "[w]illful or wanton disregard of the rights, title, and interests of the employer or a fellow employee." RCW 50.04.294(1)(a). Second, under RCW 50.04.294(2)(d) and (f), "[r]epeated and inexcusable absences, including absences for which the employee was able to give advance notice and failed to do so," or "[v]iolation of a company rule if

[3] Baker has not disputed that his conduct at issue was connected with his work. *See* WAC 192-150-200(2) ("[T]he action or behavior is connected with your work if it results in harm or creates the potential for harm to your employer's interests. This harm may be tangible, such as damage to equipment or property, or intangible, such as damage to your employer's reputation or a negative impact on staff morale.").

the rule is reasonable and if the claimant knew or should have known of the existence of the rule," each constitute misconduct *per se*.

In this case, substantial evidence supports the Commissioner's findings that Baker was aware of Maintech's policy that an employee would be terminated from work if he or she failed to show up for work without calling in advance for three consecutive days. Maintech terminated Baker for violating this policy. The Commissioner correctly concluded that Baker's conduct amounted to disqualifying misconduct under RCW 50.04.294(1)(a), (2)(d), and (2)(f). The Court should affirm.

A. Substantial Evidence in the Administrative Record Supports the Commissioner's Factual Findings

Baker has not assigned error or otherwise expressly challenged any of the Commissioner's findings of fact. This Court should treat them as verities on appeal. *Tapper*, 122 Wn.2d at 407; RAP 10.3(g), (h). Nevertheless, Baker's statement of events is not consistent with the Commissioner's findings. Baker contends that he was in jail for a different period than that found by the Commissioner; that he attempted, but was unable to contact Wittrock from jail; that some portion of his absence from work was excused; and generally, that Maintech's evidence was false. The Court should uphold the Commissioner's factual findings because substantial evidence in the administrative record supports them.

The Commissioner found that Maintech had a policy requiring employees to show up for work when scheduled and on time, that three consecutive "no call, no shows" would result in discharge, and that Baker was aware of the policy. CP at 234-35 (FF 2, 10). The Commissioner also found that Maintech discharged Baker because he was absent from work, three days in a row, without calling in advance to give proper notice of his absence on any of the three days. CP at 234-35 (FF 7-10), 278 (Commissioner adopted ALJ's findings of fact and conclusions of law). These findings are supported by substantial evidence.

First, substantial evidence supports the Commissioner's finding that Maintech had a policy requiring employees to show up for work when scheduled and on time, and that three consecutive "no call, no shows" would result in discharge from work. CP at 234 (FF 2). Wittrock testified at Baker's administrative hearing that Maintech's policy was that if "an employee is absent without notification three consecutive days, it will be understood by both parties that the employee has abandoned his or her position and voluntarily resigned." CP at 143. Maintech submitted a copy of the written policy as an exhibit. CP at 205-06. The policy defined absenteeism as "three (3) hours of work missed within a scheduled workday without properly notifying your Supervisor *irrespective of cause*." CP at 205 (emphasis added). An employee was responsible for notifying his or her

supervisor of an absence a minimum of one hour prior to the start of the scheduled workday, either by email or telephone. CP at 205. If the employee was unable to reach a supervisor, "notification must be made to the next reporting relationship (i.e., Operations Manager, etc.)." CP at 205. The policy further provided, "Failure to properly follow the notification process as stated will be classified as 'no call, no show' as defined below." CP at 205. "No call, no show" meant "not reporting to work and not calling to report the absence" as stated in the policy. CP at 205. Three consecutive "no call, no shows" would be considered a voluntary resignation by the employee and would result in termination of the employment. CP at 143, 205-06, 234 (FF 2).

Second, the record also supports the finding that Baker was aware of Maintech's attendance policy. CP at 234 (FF 2). At the administrative hearing, the ALJ asked, "Mr. Baker, were you aware of the employee policy found here on Exhibit 15 and 16?" CP at 147. Baker responded, "Yes, your Honor. I am aware of it." CP at 147.

Third, the record contains substantial evidence supporting the finding that Maintech discharged Baker because he was absent from work, three days in a row, without calling in advance to give notice as required by the policy on any of the three days. CP at 234-35 (FF 7-10). On a written form submitted to the Department in June 2012, Maintech

indicated that the final incident that caused Baker to be discharged from work was "no show no call 3 days." CP at 204. Similarly, Maintech submitted a copy of an email Wittrock sent to a Maintech senior administrator that explained, "On December 20th, 21st, and 22nd Donald failed to call or show up for work and his employment was terminated on the 23rd due to his attendance." CP at 207. Wittrock testified that Baker did not call in or come in to work on December 20 or 21. CP at 141. Though Baker did call on December 22, it was not until 11:42 a.m. CP at 141, 160-61. Wittrock also testified that he received a message from Baker through one of Baker's coworkers on December 21, he "did not talk to Donald [Baker] directly." CP at 159-60. Wittrock further testified that when he spoke with Baker on December 23, he said that he needed to let Baker go because of "his attendance and his reliability here." CP at 162.

Baker argues that Maintech dismissed him due to his arrest rather than his absences. Appellant's Brief at 2. Baker gave similar testimony at the administrative hearing. CP at 154. But, as described above, Maintech submitted ample evidence that it discharged Baker due to his absences, not due to his arrest. CP at 139-43, 161, 204, 207. Additionally, Wittrock expressly denied telling Baker that the pending criminal charges were the reason for his discharge. CP at 161. The ALJ and Commissioner did not find Baker's testimony credible, and resolved the conflicting testimony in

favor of Maintech. CP at 234 (FF 3), 278. This Court must defer to the Commissioner's judgment of the facts, and may not re-weigh evidence or witness credibility; consequently, this Court should uphold the Commissioner's findings. *Tapper*, 122 Wn.2d at 403; *William Dickson Co.*, 81 Wn. App. at 411.

B. The Commissioner Correctly Concluded that Maintech Discharged Baker for Disqualifying Misconduct

Based on substantial evidence before the agency, the Commissioner correctly concluded that Baker was discharged from work for disqualifying misconduct. "Misconduct" includes, among other things, "[w]illful or wanton disregard of the rights, title, and interests of the employer or a fellow employee." RCW 50.04.294(1)(a). "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). In determining whether the employee's actions were "willful" as that term is used in the statute, the focus is not on whether the employee intended to harm the employer. *Hamel v. Emp't Sec. Dep't*, 93 Wn. App. 140, 146, 966 P.2d 1282 (1998). Rather, an employee acts willfully if he or she acts deliberately or knowingly. WAC 192-150-205(1).

RCW 50.04.294 also identifies numerous acts as *per se* misconduct. RCW 50.04.294(2); *Daniels*, 168 Wn. App. at 728. 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). *Per se* misconduct includes "[r]epeated and inexcusable absences, including absences for which the employee was able to give advance notice and failed to do so." RCW 50.04.294(2)(d). *Per se* misconduct also includes violation of a company rule if the rule is reasonable and the claimant knew or should have known of its existence. RCW 50.04.294(2)(f).

Here, Baker's failure to timely call in to work to report his absences for three days in a row on which he was scheduled to work constituted misconduct as defined in RCW 50.04.294(1)(a). Baker's failure to call in constituted a willful disregard of his employer's interests. Even if Baker was unable to call in on December 20 because of his arrest and incarceration, the Commissioner found that Baker was released around 9:30 a.m. on December 21, yet still failed to call in to his employer until more than 24 hours later, at 11:42 a.m. on December 22. CP at 234-35 (FF 8, 9).[4] Baker was aware that

[4] Again, though Baker gave conflicting testimony on this point at the administrative hearing, the Commissioner found Baker's testimony not credible. CP at 234 (FF 3). Specifically, Baker's "testimony regarding the sequence of events after he was released from jail was not reasonable." *Id.* This Court must accept the fact-finder's views regarding credibility of witnesses. *William Dickson Co.*, 81 Wn. App. at 411.

he was violating his employer's interests, as he was aware of Maintech's attendance policy. CP at 147, 205-06, 234 (FF 2), 237 (CL 8); *see* WAC 192-150-205(1). Though Baker may not have intended to harm his employer, he acted intentionally or deliberately in failing to call his employer until shortly before noon on his third day absent from a scheduled shift. *See* WAC 192-150-205(1). The Commissioner correctly concluded that Maintech established misconduct under RCW 50.04.294(1)(a).

Additionally, the Commissioner properly concluded that Baker's conduct constituted *per se* misconduct under RCW 50.04.294(2)(d). Baker was discharged for being repeatedly and inexcusably absent. RCW 50.04.294(2)(d). By rule, "'Repeated and inexcusable absences' means repeated absences that are unjustified or that would not cause a reasonably prudent person in the same circumstances to be absent. Previous warnings from your employer are not required, but your repeated absences must have been the immediate cause of your discharge." WAC 192-150-210(3). Again, Baker was absent for three scheduled shifts in a row without calling in advance to give notice to his supervisor at Maintech. CP at 234-35 (FF 6-9). Though the Commissioner's findings reflect that Baker "called a co-worker and asked his co-worker to tell his supervisor that he had been in jail" on December 21, the findings do not reflect that Baker contacted, or even attempted to contact, Wittrock directly (as required by the employer's

policy, as further discussed below) until11:42 a.m. on December 22. CP at 234-35 (FF 8-9). Baker made little attempt to contact his employer and gave Maintech no advance notice that he would not work as scheduled on any of the three days. In particular, Baker's absences on December 21 and 22, after his release from jail, were unjustified. *See* WAC 192-150-210(3). Maintech established misconduct in this regard.

Finally, Baker's conduct constituted *per se* misconduct under RCW 50.04.294(2)(f) —violation of a reasonable and known company rule. Baker was aware of Maintech's attendance policy. CP at 147, 205-06, 234 (FF 2). The policy required employees to show up when scheduled and on time unless they gave a minimum of one hour notice to their supervisor prior to the start of the scheduled workday. CP at 205, 234 (FF 2). The policy made clear that notice was proper only when made directly to the supervisor, by stating that absences are excused when "discussed with your supervisor," and directing that "in the absence of your supervisor, notification must be made to the next reporting relationship (i.e., Operations Manager, etc.)." CP at 205. Under the policy, failure to properly follow the stated notification process would be considered a "no call, no show." CP at 205. The factual findings reflect that Baker did not come to work when scheduled for three days in a row, and did not follow the stated notification process for any of those three days, as he did not give his supervisor direct notice at least one

hour prior to the start of the scheduled workday. CP at 205, 234-35 (FF 6-9). Baker violated a known, reasonable company rule, and therefore committed misconduct under RCW 50.04.294(2)(f).

Once Maintech met its burden to establish Baker's misconduct, the burden shifted to Baker to demonstrate otherwise. *See Jacobs v. Office of Unemployment Comp. & Placement*, 27 Wn.2d 641, 651, 179 P.2d 707 (1947) ("the burden of proof to establish a claimant's right to benefits under the act rests upon the claimant"). Baker argued before the agency, as he does on appeal, that he attempted to contact Wittrock but was unsuccessful, that he had no contact information for anyone at Maintech other than Wittrock, and that some portion of the three days' absence was excused by Wittrock. *See* CP at 148-53, 156-59. But the Commissioner did not enter any findings of fact on this testimony and specifically found that Baker's testimony was not credible. This Court should decline to reweigh the evidence or revisit the credibility findings made below. *See William Dickson Co.*, 81 Wn. App. at 411.

C. The Superior Court Properly Declined to Consider New Evidence

Baker argues that the superior court erred in refusing to accept the new evidence he put forward and that the new evidence shows that his absences could not have been the reason for his discharge from work. The

superior court properly declined to consider any new evidence under the standards of the APA.

This Court reviews the superior court's decision to admit or refuse evidence for a manifest abuse of discretion. *Okamoto v. Emp't Sec. Dep't*, 107 Wn. App. 490, 494-95, 27 P.3d 1203 (2001). The superior court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. *Id.* at 495.

"[I]n administrative proceedings the facts are established at the administrative hearing and the superior court acts as an appellate court." *U.S. W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997). "If the admission of new evidence at the superior court level was not highly limited, the superior court would become a tribunal of original, rather than appellate, jurisdiction and the purpose behind the administrative hearing would be squandered." *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005). Accordingly, judicial review of an agency action is generally confined to the agency record. RCW 34.05.558; *Motley-Motley*, 127 Wn. App. at 76.

RCW 34.05.562(1) sets forth the "highly limited circumstances" under which new evidence is admissible on judicial review. *Motley-Motley*, 127 Wn. App. at 76. Specifically:

> (1) The court may receive evidence in addition to that contained in the agency record for judicial review, *only* if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
>
> > (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
> >
> > (b) Unlawfulness of procedure or of decision-making process; or
> >
> > (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.562(1) (emphasis added).

Baker does not explain how any of the grounds in RCW 34.05.562(1) apply in his case, but rather, contends that the superior court should have considered his new evidence under Civil Rule (CR) 59. But it is the APA, not the Superior Court Civil Rules, that governs judicial review of a Commissioner's decision. *See* RCW 34.05.510 (APA establishes exclusive means of judicial review of agency action; court rules govern ancillary procedural matters on judicial review "to the extent not inconsistent with this chapter"); *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 216-17, 103 P.3d 193 (2004) (superior court erred in applying CR 4 where it was inconsistent with APA service requirements).

Baker has not established that any of the circumstances described in RCW 34.05.562(1) apply to his case. The superior court properly declined to consider evidence outside the administrative record.

In any event, Baker has not explained why the new evidence he submitted could not have reasonably been discovered until the time of his superior court appeal. Each of the documents appears, on its face, to describe events in December 2011. CP at 13, 19-21, 40. Baker's administrative hearing took place in August 2012. CP at 233. Baker contends that the new evidence shows he was actually arrested on December 19. But at the administrative hearing, Baker testified, regarding his time in jail in December 2011, that "I went in on 12/20 and I was released 12/21." CP at 135. He reaffirmed this information several times. He agreed with the ALJ that the one day he was incarcerated was December 20 to December 21. CP at 135. When asked what time he was released on December 21, he did not contradict the date but instead asserted, "I believe it was 9:30 a.m." CP at 151.

Baker argues that new evidence should be allowed under WAC 192-100-055. That regulation defines "nondisclosure" and "willful nondisclosure" within the meaning of RCW 50.20.160. That statute sets forth the circumstances under which the Department has authority to redetermine one of its initial decisions regarding the amount of benefits

payable, denial of benefits, or allowance of benefits. RCW 50.20.160. A claimant or employer may appeal the Department's determination or redetermination under the review process in chapter 50.32 RCW. RCW 50.32.020. The Department's authority to redetermine an initial decision under RCW 50.20.160 exists only "in absence of a timely appeal" from an initial determination regarding the denial or allowance of benefits. RCW 50.20.160(2), (3); *see Darkenwald v. Emp't Sec. Dep't*, 182 Wn. App. 157, 167, 328 P.3d 977, *review granted*, ___ Wn.2d ___, 337 P.3d 326 (2014). Neither RCW 50.20.160 nor the related regulation, WAC 192-100-055, apply here, where Baker timely appealed the Department's determination notice.[5] CP at 192-95. Instead, the procedures stated in chapter 50.32 RCW governed the administrative appeal process and the APA governs judicial review. RCW 50.32.120; RCW 34.05.510; *Verizon Nw., Inc.*, 164 Wn.2d at 915.

Baker had a full and fair opportunity to present his case at his administrative hearing. After the fact, he presented new documents to the superior court that he believes undermine the Commissioner's factual findings, though the documents also appear to contradict Baker's own testimony. Allowing new evidence would essentially permit Baker to

[5] The determination notice issued on June 30, 2012, was a "redetermination" under the authority of RCW 50.20.160(3). Tthe Department had initially allowed Baker's benefit claims but later redetermined that decision when it received information indicating that Baker was ineligible. CP at 195-204.

improperly retry his case. *See Motley-Motley*, 127 Wn. App. at 77. The superior court properly declined to consider Baker's new evidence.[6]

D. The Superior Court Properly Denied Baker's Motion for Reconsideration

This Court reviews a trial court's denial of a motion for reconsideration for abuse of discretion. *Landstar Inway, Inc. v. Samrow*, 181 Wn. App. 109, 120, 325 P.3d 327 (2014). A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard." *Id.* (citing *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A decision is manifestly unreasonable when it "falls 'outside the range of acceptable choices, given the facts and the applicable legal standard.'" *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)).

Here, the superior court entered its Findings of Fact, Conclusions of Law and Order, affirming the Commissioner's decision, on April 23,

---

[6] Baker has not asked either court to remand his case for consideration of additional evidence. Even if the Court were to consider whether remand is appropriate, for many of the same reasons already described, the Court should conclude that Baker has failed to demonstrate that any circumstance under which remand is appropriate under RCW 34.05.562(2) is present here.

2014. CP at 8-10. Baker filed his reconsideration request on May 6, 2014. CP at 2-7. The superior court denied Baker's request as untimely. CP at 1. CR 59(b) provides that a motion for reconsideration "shall be filed not later than 10 days after the entry of the judgment, order, or other decision." The superior court did not abuse its discretion in denying Baker's motion for reconsideration, filed 13 days after entry of the superior court's decision, as untimely under CR 59(b).[7]

E. Baker Seeks Relief that is Unavailable Under the Administrative Procedure Act

The APA limits the types of relief available in a judicial review action. The court may affirm the agency action, order the agency to take action required by law, set aside agency action, remand the matter for further proceedings, or enter a declaratory judgment order. RCW 34.05.574(1). The court "may award damages, compensation, or ancillary relief *only to the extent expressly authorized by another provision of law*." RCW 34.05.574(2) (emphasis added).

Baker has requested "a monetary award for the hardship that these proceedings have caused" him. Appellant's Brief at 1. Baker cites no

[7] As previously stated, court rules govern ancillary procedural matters on judicial review "to the extent not inconsistent with" the APA. RCW 34.05.510. The Department is not aware of any provision in the APA governing requests for reconsideration on judicial review.

provision of law allowing such an award. No such provision exists. The Court should decline to award relief outside the scope of the APA.

VI. CONCLUSION

The Commissioner correctly concluded Baker was discharged from work for misconduct that disqualified him from receiving unemployment benefits. Substantial evidence in the administrative record supports the Commissioner's decision, and the decision is free of errors of law. The superior court properly declined to consider evidence outside the agency record, and Baker has not demonstrated that he is entitled to any relief in this case. The Department respectfully requests that the Court affirm.

RESPECTFULLY SUBMITTED this 17th day of February, 2015.

ROBERT W. FERGUSON
Attorney General

April S Benson

APRIL S. BENSON,
WSBA # 40766
Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I, Judy St. John, 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 17th day of February 2015, I caused to be served a copy of **Respondent's Brief** on the Appellants of record on the below date as follows:

Via United States Postal Service,
Donald W. Baker
2203 172nd Place SE
Bothell, WA 98012

Original filed via ABC Legal Messenger
Court of Appeals, Division 1
600 University St.
Seattle, WA 98101-4170

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

Dated this 17th day of February 2015 in Seattle, Washington.

Judy St. John, Legal Assistant