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Court of Appeals
Division III
State of Washington

NO. 33202-1

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

MICHAEL BOISE,

Appellant,

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY
DEPARTMENT,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Michael Boise quit his job as a building sales specialist after learning about payment terms he found objectionable. These payment terms were explained in employment agreements he signed but failed to read the day he was hired. After quitting, he sought but was denied unemployment benefits because he failed to establish that he had good cause to quit his job under the voluntary quit statute, RCW 50.20.050. To prove good cause to quit, Boise was required to establish that 1) his usual work was changed by his employer and 2) the new work violated his sincere moral beliefs. RCW 50.20.050(2)(b)(x). Boise cannot establish that there was any change in his usual work.

On appeal, Boise does not argue that there was a change in his usual work, nor does he challenge the finding of fact that his work did not change. Rather, Boise argues that the Commissioner of the Employment Security Department was required to assume that a change had occurred, despite the fact that the superior court remanded to the Commissioner for the purpose of making that finding. Because Boise fails to meet his burden of proving that a change in usual work occurred, and the Commissioner properly complied with the superior court's remand order, the Commissioner's Decision denying unemployment benefits should be affirmed.

II. STATEMENT OF ISSUES

1. Whether the Commissioner properly determined there was no change in work conditions when the superior court remanded “to issue a decision after employing a subjective analysis of whether a change in the conditions of employment violated a sincerely held moral belief.”

2. Whether the Commissioner properly followed the superior court’s remand order “to issue a decision” using a different legal standard consistent with that court’s decision.

3. Whether substantial evidence supports the relevant findings.

III. STATEMENT OF THE CASE

Boise worked as a building sales specialist for Cleary Building Corporation from February 1, 2013, until he quit on February 18, 2013. CP 21-21, 133. He accepted an initial weekly salary of \$580. CP 21, 46, 134. When he was hired on February 1, Boise signed an Employment Agreement, which stated on the second page that compensation would be in accordance with the Cleary Sales Specialist Pay Plan (“Pay Plan”). CP 77, 133-34. Boise initialed each page of the Employment Agreement and signed the final page, which included an acknowledgement that the “Employee acknowledges and understands all of the terms of [the]

Agreement and verifies that he/she has read all of the terms of [the] Agreement.” CP 44, 76-81, 134.

Boise also signed the Pay Plan on February 1, 2013, although he apparently did not receive a copy of the plan at that time. CP 43-46, 87, 134. The Pay Plan explained salary, bonuses and incentive programs. CP 134. The Pay Plan explained that after 60 days, his weekly salary could be reduced if he did not meet the sales budget. CP 82, 134. The Pay Plan also explained the terms of the “subcontract incentive program.” CP 82-86, 134. To participate in the program and earn incentive pay, sales specialists added a percentage markup to a contractor’s bid that they could negotiate. CP 31, 39, 82, 86, 134. Boise was uncomfortable with this because it was not consistent with his previous experiences with commission and sales. CP 30-32, 134. The employer, however, testified that the markup was a common industry practice and that all of the dollars are disclosed to the client as part of the contract process. CP 39-40, 134, DC 134-35.

After signing the Employment Agreement and Pay Plan, Boise left for two weeks of training in Verona, Wisconsin. CP 25, 134. Boise testified that it was at this training that he received a copy of the Pay Plan. CP 43-46, 134. At the end of the training, Boise quit, telling his manager that he could not risk the reduction in pay. CP 29, 34, 75, 133. After

turning in his notice, the branch manager offered to let Boise stay on to work through any issues, and it was at that point Boise told his branch manager that he could not add money to subcontracts. CP 30, 75, 134.

Boise applied for unemployment benefits and, as a part of that process, filled out a Voluntary Quit Statement. CP 61-66. On that document he was asked, "What was the main reason you decided to quit on that day?" CP 61. He stated, "Cleary did not disclose I would lose salary amount if I did not have over \$48,000 in sales per month." *Id.* He stated that the reason he gave his employer was, "personal reasons, my concern I would lose salary." *Id.* When asked on the form whether there was a "[c]hange in customary job duties which was against your religious or moral beliefs," he stated "no" and did not answer the question, "[h]ow did the change violate your beliefs?" CP 65. The form also inquired if the applicant's working conditions changed since hire, and Boise stated "none." CP 65. Boise did not state anywhere that he quit due to any moral objections. CP 61-66.

The Department denied Boise's claim, and Boise requested a hearing to contest the Department's determination. CP 55, 133. Following the hearing, an Administrative Law Judge (ALJ) issued an Initial Order affirming the Department's decision. CP 96-101, 133. The ALJ's Initial Order concluded Boise failed to establish he quit his job for

one of the statutorily enumerated good cause factors since he failed to establish that his salary was reduced by 25 percent or more or that his usual work changed to work that violates his sincere moral beliefs. CP 99.

Boise then petitioned the Commissioner of the Department for review of the ALJ's decision, and the Commissioner affirmed the ALJ's Initial Order. CP 111, 133. The Commissioner found that an anticipated loss in pay does not amount to an actual reduction in pay, so Boise did not have good cause to quit due to a 25 percent reduction in pay. CP 111. The Commissioner further found that the employer's practice of marking up a subcontractor's bid was a normal industry practice, and so Boise did not have good cause to quit due to a sincerely held moral belief. CP 111. Boise filed a Petition for Judicial Review with the superior court. CP 133.

On judicial review, the superior court remanded the matter to the Commissioner's Review Office "to issue a decision after employing a subjective analysis of whether a change in the conditions of employment violated a sincerely held moral belief of the petitioner." CP 131, 133. The court concluded that the Commissioner erred in using an objective standard to determine whether the moral belief was sincerely held. CP 130. In the remand order, the court also stated that the Department

erred in not making a finding of fact on whether a change in usual work occurred. CP 131.¹

On remand, the Commissioner did not adopt all the findings of fact from the Initial Order and made additional findings of fact regarding Boise's signing and receipt of the Employment Agreement and Pay Plan. CP 133-35. The Commissioner found there was no change in Boise's usual work because at the beginning of his employment, Boise signed the Employment Agreement and Pay Plan, which referenced markups on subcontracts and included the terms of compensation. CP 134, 136-37. Although Boise chose not to read the agreements when he signed them, he signed a document that explicitly referenced the markup of subcontract bids. CP 136-37. The Commissioner ultimately concluded that Boise failed to establish good cause to quit under RCW 50.20.050(2)(b)(x) because his "usual work," as defined in WAC 192-150-140(1), was not "changed to work that violate[d] [his] . . . sincerely held moral beliefs." CP 136-37. The Commissioner further found that because Boise continued to work for approximately two weeks after learning the terms of

¹ Boise argues that the superior court's order inferred that a change occurred and that if the Department believed this was incorrect it should have appealed that order, pointing out that the Department moved for reconsideration. Br. of Appellant at 6. It should be clarified that the Department moved for reconsideration on the issue of whether a subjective standard should be used when determining whether a moral belief is sincerely held, not the issue of whether a change occurred. CP 127-28. The Superior Court Order makes clear that there was no finding on whether a change occurred because the Commissioner was to make that finding on remand. CP 129-131.

the subcontract incentive plan at the beginning of his training, this was “not consistent with an individual whose sincere moral beliefs, viewed subjectively, have been violated.” CP 137. The Commissioner thus concluded Boise was ineligible for benefits. *Id.*

Boise again filed a Petition for Judicial Review with the superior court, and the superior court affirmed the decision of the Commissioner. CP 162-64. This appeal followed.²

IV. STANDARD OF REVIEW

Washington’s Administrative Procedure Act (APA) governs judicial review of a decision of the Employment Security Department’s Commissioner concerning eligibility for unemployment benefits. RCW 34.05.510; RCW 50.32.120. This Court sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Courtney v. Emp’t Sec. Dep’t*, 171 Wn. App. 655, 660, 287 P.3d 596 (2012). The Commissioner’s decision is prima facie correct. RCW 34.05.570(1)(a); *Anderson v. Emp’t Sec. Dep’t*, 135 Wn. App. 887, 893, 146 P.3d 475 (2006). Boise has the burden of demonstrating the invalidity of the Department’s decision.

² The Commissioner’s first decision also affirmed the ALJ’s Initial Order in that there was no 25 percent loss in pay to constitute good cause to quit under RCW 50.20.050(2)(b). CP 111. The superior court found no error in this, and the remand did not order reanalysis of this determination. CP 131. Boise did not challenge that finding or conclusion of law in his subsequent Petition for Judicial Review, CP 145, nor does he challenge it in this appeal. *See* Br. of Appellant (arguing only RCW 50.20.050(2)(b)(x)). Boise has, therefore, abandoned this argument.

RCW 34.05.570(1)(a). The Court may grant relief only if “it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.” RCW 34.05.570(1)(d).

The Court undertakes the limited task of reviewing the Commissioner’s findings to determine, based solely on the evidence in the administrative record, whether substantial evidence supports those findings. RCW 34.05.558; *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Unchallenged factual findings are verities on appeal. *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

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). 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, and may not re-weigh evidence, witness credibility, or demeanor. *Affordable Cabs, Inc. v. Dep’t of Emp’t Sec.*, 124 Wn. App. 361, 367, 101 P.3d 440 (2004); *Wm. Dickson Co.*, 81 Wn. App. at 411; *W. Ports Transp., Inc. v. Emp’t Sec. Dep’t*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002).

The Court then determines de novo whether the Commissioner correctly applied the law to those factual findings. *Tapper*, 122 Wn.2d

at 407. However, because the Department has expertise in interpreting and applying unemployment benefits law, the Court should afford substantial weight to the agency's decision. *Courtney*, 171 Wn. App. at 660.

V. ARGUMENT

The Employment Security Act was enacted to provide compensation to individuals who are involuntarily unemployed “through no fault of their own.” RCW 50.01.010; *Courtney*, 171 Wn. App. at 660. As such, a person is ineligible to receive unemployment benefits if he “left work voluntarily without good cause.” RCW 50.20.050(2)(a). An individual may establish good cause only by proving that he quit for one of the 11 reasons provided by RCW 50.20.050(2)(b). The burden of establishing good cause to quit is on the benefits claimant; this burden never shifts during the course of proceedings. *Townsend v. Emp't Sec. Dep't*, 54 Wn.2d 532, 534, 341 P.2d 877 (1959); *In re Anderson*, 39 Wn.2d 356, 365, 235 P.2d 303 (1951). Here, Boise argued below that he had good cause to quit for two reasons: a 25 percent reduction in his usual compensation, RCW 50.20.050(2)(b)(v), and RCW 50.20.050(2)(b)(x): “The individual's usual work was changed to work that violates the individual's . . . moral beliefs.” Boise no longer argues his usual

compensation was reduced by 25 percent or more. *See* Br. of Appellant; RCW 50.20.050(2)(b)(v).

The Court should affirm the Commissioner's decision because the Commissioner properly concluded that Boise's usual work was not changed to work that violated his sincere moral beliefs. CP 136; RCW 50.20.050(2)(b)(x). Boise does not argue that his usual work was changed, nor does he argue that this factual finding is unsupported by substantial evidence. This factual finding, therefore, is a verity on appeal. *Tapper*, 122 Wn.2d at 407. Rather, he appeals based on two claimed procedural errors stemming from how the Commissioner complied with the superior court's remand order. But because the superior court's remand order explicitly found the Commissioner erred in not making a finding of fact on whether a change occurred, and then remanded to determine whether there was a change in work conditions that violated a sincerely held moral belief as subjectively analyzed, the Commissioner appropriately made this additional finding.

Additionally, the Commissioner properly conducted the necessary further proceedings by engaging in additional analysis of the evidence already in the record as ordered by the superior court. It was not required to take additional evidence where the scope of remand required the application of a different legal standard to existing evidence and to make a

finding of fact on whether a change in usual work occurred. Lastly, the Commissioner's Order was supported by substantial evidence. The Court should affirm the Commissioner's Order.

A. The Commissioner Properly Complied With The Remand Order

Boise challenges the Commissioner's compliance with the remand order on two grounds. First, he argues the Commissioner inappropriately made a new finding of fact, and second, he argues the Commissioner erred in failing to conduct "further proceedings" to determine Boise's subjective belief. Br. of Appellant. However, the superior court's remand order stated that the "matter is remanded to the Commissioner's Review Office to issue a decision after employing a subjective analysis of whether a change in the conditions of employment violated a sincerely held moral belief." CP 131. The Commissioner, therefore, properly made the missing finding of fact regarding whether there had been a change in Boise's usual work and properly issued a decision applying a different legal standard based on the existing record.

- 1. Because the superior court ordered the Commissioner to determine whether there was a change in work conditions on remand, the Commissioner properly found that there was no change in Boise's usual work.**

Although in the first Commissioner's decision, the Commissioner concluded Boise did not establish his usual work was changed to work that

violated his sincere moral beliefs, the Commissioner did not make an explicit finding about whether there had been a change in Boise's usual work. CP 96-97, 111. This is a necessary element of establishing good cause to quit under RCW 50.20.050(2)(b)(x) ("The individual's work was changed to work that violates the individual's . . . sincere moral beliefs."). If the benefits claimant's "usual work" was not changed, then it is immaterial whether the work he or she was required to perform violated his or her personal beliefs.

In the first Petition for Judicial Review, the superior court concluded that the Department "erred in not making a finding of fact on whether or not there was a change in the usual work, as required by RCW 50.20.050" and remanded to the Commissioner "to issue a decision after employing a subjective analysis of whether *a change in the conditions of employment* violated a sincerely held moral belief of the petitioner." CP 131 (emphasis added). This order necessarily required the Commissioner to make a finding as to whether there was a change in Boise's employment. Boise's argument that the superior court inferred in its order that a change occurred is incorrect and is contradicted by the order's explicit conclusion that the Commissioner erred in failing to make such a finding. Br. of Appellant 6, citing to CP 129-131.

The Commissioner, therefore, properly made findings of fact regarding whether Boise's usual work was changed.

2. The Commissioner properly complied with the remand order by issuing a new decision based on the existing record.

The Commissioner properly complied with the remand order by issuing an order that made the missing finding of fact, and employed a different legal standard as ordered by the court. This in itself is a "further proceeding" insofar as a further proceeding was required. Boise argues that the Commissioner erred in not conducting further proceedings to gather "additional fact finding proceedings." Br. of Appellant 9. This argument is incorrect and meritless for three reasons.

First, the remand order did not include an order that "further proceedings" should occur. The plain language of the order required the Commissioner to issue a new order that included a missing finding of fact and that applied a different legal standard to a narrow issue. CP 130-31. Nothing in the remand order required a further evidentiary proceeding, as there was enough evidence in the record to comply with the remand. In short, there was already evidence in the record about what terms Boise agreed to when he accepted his job and whether those terms ever changed.

Second, taking new evidence, as opposed to entering new findings of fact based on the existing record, would have been improper. Taking

new evidence is the province of the Administrative Law Judge at the Office of Administrative Hearings level. RCW 50.32.080; *Lenca v. Emp't Sec. Dep't*, 148 Wn. App. 565, 576, 200 P.3d 281, 285-86 (2009). Where the remand was to the Commissioner's Review Office, the most appropriate further proceeding was to issue a new order based on the existing record.

Third, the APA does not require "further proceedings" on remand every time a matter is remanded on judicial review for failure to decide an issue. Under the APA, one of the instances in which a court shall grant relief pursuant to a petition for judicial review is if an "agency has not decided all issues requiring resolution by the agency." RCW 34.05.570(3)(f).³ Here, the superior court determined that the Commissioner had neglected to make a finding on whether a change in Boise's usual work had occurred. CP 130-31. Where there was sufficient evidence in the record from which the trier of fact could make this finding, it was appropriate for the superior court to remand to the Commissioner to make this additional finding.

Additionally, Boise erroneously asserts that *Suquamish Tribe v. Central Puget Sound Growth Management Hearings Board*, 156 Wn.

³ Boise cites to RCW 34.05.370(3)(f) in his brief on page 8. The Department assumes this is a typo and that Boise intended to cite RCW 34.05.570(3)(f) as he did on page 5 of his brief.

App. 743, 778, 235 P.3d 812, 830 (2010), and RCW 34.05.570(3)(f) stand for the proposition that an agency is *required* to conduct further proceedings whenever a superior court remands for failure to decide an issue. Br. of Appellant 8. However, *Suquamish Tribe* states that grounds for a remand and further proceedings *arise* when an agency fails to address an issue based on an erroneous legal conclusion that leads an agency to inadequately decide an issue; the case does not state that additional fact finding proceedings must occur every time a matter is remanded, as Boise argues. *Suquamish Tribe*, 156 Wn. App. at 778. The Commissioner properly complied with the remand order. The Court should affirm.

B. Substantial Evidence Supports The Relevant Findings

The Court should affirm the Commissioner's decision denying Boise benefits because substantial evidence supports the relevant findings of fact, and the conclusions of law are free from error. It is Boise's burden to satisfy the requirements of the good cause statute by establishing that 1) there was a change in his usual work and 2) that he had a sincerely held moral belief. On appeal, Boise does not challenge the finding that there was no change in usual work, nor does he challenge that he did not have a sincerely held moral belief. *See* Br. of Appellant. Accordingly, he cannot, as a matter of law, establish that his "work was changed to work that

violates [his] . . . sincere moral beliefs.” RCW 50.20.050(2)(b)(x). Boise instead challenges four irrelevant findings of fact as unsupported by substantial evidence, any one of which—even if unsupported—would not change the ultimate outcome, as they are not relevant to the issue of whether Boise had good cause to quit under RCW 50.20.050(2)(b)(x). *See* Br. of Appellant 9-10.

1. Substantial evidence supports the unchallenged finding that there was no change in usual work.

An individual has good cause to quit his job if “[t]he individual’s usual work was changed to work that violates the individual’s religious convictions or sincere moral beliefs.” RCW 50.20.050(2)(b)(x). The term “usual work” means “job duties or conditions” that were originally agreed upon by the employer and employee in the hiring agreement, customary for workers in that job classification, consistently performed during the base period, or mutually agreed upon by the employer and employee prior to action taken by the employer to change the employee’s job duties. WAC 192-150-140(1). Part of the criteria used for determining whether an individual had good cause to quit due to a change to work that violated sincerely held moral beliefs is that the change must be the result of action taken by the employer. WAC 192-150-140(2)(a). Additionally, the employee must notify the employer that the work violates religious beliefs

or sincere moral convictions, unless doing so would be futile. WAC 192-150-140(2)(c).

Here, the Commissioner found that Boise's usual work did not change, and this finding of fact is supported by substantial evidence. When Boise was hired, he signed Cleary's Employment Agreement and Pay Plan. CP 42-45, 134. Those documents contained the mutually agreed upon duties and conditions of Boise's employment. CP 42-45, 136. Although Boise testified that he was unaware of the terms of the subcontract incentive program, which included the markup provisions that he objected to, these conditions were explained in the Pay Plan that he signed when hired. CP 82-87, 136. Boise's failure to read the documents he signed, or request copies of the documents, do not constitute a change in his usual work that was initiated by his employer. Furthermore, Boise acknowledged in his Voluntary Quit Statement that his working conditions were unchanged since the date of his hire. CP 65. Finally, Boise does not challenge the finding that there was no change in his usual work, making that finding of fact a verity on appeal. *See Br. of Appellant; Tapper v. Emp't Sec. Dep't*, 122 Wn.2d at 407. The Court should affirm.

2. Substantial evidence supports the unchallenged finding that there was no sincerely held moral belief as subjectively analyzed.

Because there was no change in usual work, the inquiry as to whether Boise met the good cause statute ends. Nevertheless, even if Boise could establish that a change occurred, Boise did not raise a challenge to the finding that he did not have a sincerely held moral belief, *and* that finding is supported by substantial evidence.

Boise's testimony supports that he reviewed the Pay Plan on or about the second day of training and continued to work for two more weeks. CP 45, 137. Additionally, Boise's statements after he quit do not support that he quit due to a sincere moral conviction as subjectively analyzed. Boise's Notice of Termination stated that he "had to leave for family issues [and was] unable to put in time to fulfill [the] contract." CP 75. On his Voluntary Quit Statement, he stated that the main reason he decided to quit was that "Cleary did not disclose I would lose salary", and that he quit due to "personal reasons" and "concern [he] would lose salary." CP 61. When asked on the form whether there was a "[c]hange in customary job duties which was against your religious or moral beliefs," he stated "no" and did not answer the question, "[h]ow did the change violate your beliefs?" CP 65. When given the opportunity to provide other facts or details to explain his quit, he still did not state that

the work violated his sincere moral beliefs. CP 66. Boise's actions and statements thus do not support that he had a sincerely held moral belief or that he quit due to a violation of this sincere moral beliefs as subjectively analyzed. The Court should affirm.

3. The findings of fact Boise challenges are immaterial to the resolution of his case.

Boise's entitlement to benefits hinges on his ability to prove one of the statutorily enumerated "good cause" reasons. RCW 50.20.050(2)(b). Boise has abandoned his argument that his usual compensation was reduced by 25 percent or more. *See* Br. of Appellant. Further, Boise has failed meet his burden of establishing that he had good cause to quit because his usual work was changed to work that violates a sincerely held moral belief because he is unable to establish that his usual work was changed by his employer. Boise challenges findings of fact that are irrelevant to this inquiry.

Boise challenges the following factual findings as unsupported by substantial evidence: (1) that Boise quit due to dissatisfaction with pay, (2) that Boise worked for two weeks with knowledge of the employment compensation plan, (3) that marking up bids is common in the construction business, and (4) that Boise was reimbursed for cleaning the company car. Br. of Appellant 9-11. The Court may grant relief only if

“it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.” RCW 34.05.570(1)(d). Even if none of the four factual findings challenged were supported by substantial evidence, Boise still will not have met his burden of establishing there was a change in his usual work, and he must still be denied benefits. Boise, therefore, cannot establish he has been substantially prejudiced such that this court could grant the relief Boise seeks.

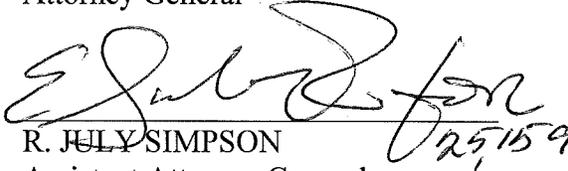
Nevertheless, substantial evidence in the record supports most of the challenged findings. Boise’s own testimony, the Notice of Termination, and the Voluntary Quit Statement he completed support the finding that he quit primarily due to dissatisfaction with his pay. CP 25-30, 61, 65-66, 75. Boise’s testimony establishes he reviewed the Pay Plan at the beginning of the training period—shortly after he was hired—but did not quit until February 18. CP 45. So substantial evidence supports the finding that he worked for two weeks with knowledge of the compensation plan. The employer’s testimony that marking up bids is a common industry practice supports the finding to that effect. CP 39-40. And finally, while the Department concedes the record does not support the finding that Boise was reimbursed for cleaning the company car, this finding has no bearing on whether Boise’s usual work was changed to work that violated a sincerely held moral belief. The Court should affirm.

VI. CONCLUSION

Boise is disqualified from benefits unless he meets his burden of showing that he had good cause to quit because his usual work changed to work that violates his sincere moral beliefs. The Commissioner properly complied with the remand order by making a finding of fact based on the administrative record that no change in usual work occurred. Because the Commissioner properly complied with the remand order, and because the relevant findings of fact are supported by substantial evidence, the Department respectfully requests that the Court affirm the Commissioner's decision denying benefits.

RESPECTFULLY SUBMITTED this 28 day of July, 2015.

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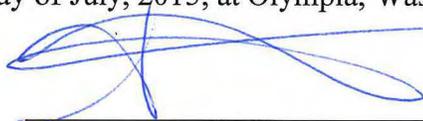
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DATED this 28th day of July, 2015, at Olympia, Washington.



AMY PHIPPS, Legal Assistant