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**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

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CARL ANDERSON,

Petitioner,

v.

EMPLOYMENT SECURITY DEPARTMENT OF THE  
STATE OF WASHINGTON,

Respondent.

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**RESPONDENT'S BRIEF**

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**ORIGINAL**

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF THE ISSUE.....	2
III.	COUNTERSTATEMENT OF THE CASE.....	2
IV.	STANDARD AND SCOPE OF REVIEW .....	16
V.	ARGUMENT .....	19
	A. Under The Employment Security Act, An Individual Who Is Discharged For Work-Connected Misconduct Is Disqualified From Receiving Unemployment Benefits.....	19
	B. By Failing To Disclose To His Employer A Material Conflict Of Interest, Mr. Anderson Committed Disqualifying Misconduct By Acting In Willful Disregard Of His Employer’s Interests.....	22
	1. Mr. Anderson was aware of his employer’s interest. ....	23
	2. Mr. Anderson knew or should have known that his conduct was contrary to the interests of his employer.....	25
	3. Despite knowledge of his employer’s interest, Mr. Anderson intentionally disregarded that interest.....	27
	C. Mr. Anderson’s Failure To Disclose His Conflict Of Interest Resulted In Harm To His Employer. ....	30
	D. Mr. Anderson’s Attorney Fees Request Should Be Reserved Until Such Time As The Commissioner’s Decision Is Reversed Or Modified, And Such Time As The Department Has An Opportunity To Respond To The Reasonableness Of The Amount Requested.....	36
VI.	CONCLUSION .....	37

## TABLE OF AUTHORITIES

### Cases

<u>Becker v. Employment Sec. Dep't,</u> 63 Wn. App. 673, 821 P.2d 81 (1991).....	17
<u>Cowles Pub'g Co. v. Employment Sec. Dep't,</u> 15 Wn. App. 590, 550 P.2d 712, 715 (1976).....	20
<u>Davis v. Dep't of Labor &amp; Indus.,</u> 94 Wn.2d 119, 615 P.2d 1279 (1980).....	18
<u>Dermond v. Employment Sec. Dep't,</u> 89 Wn. App. 128, 947 P.2d 1271 (1997).....	30, 31
<u>Hamel v. Employment Sec. Dep't,</u> 93 Wn. App. 140, 966 P.2d 1282 (1998).....	passim
<u>Haney v. Employment Sec. Dep't,</u> 96 Wn. App. 129, 978 P.2d 543 (1999).....	21
<u>Heidgerken v. Dep't of Nat. Resources,</u> 99 Wn. App. 380, 993 P.2d 934 (2000).....	22
<u>Hilltop Terrace Homeowner's Ass'n v. Island County,</u> 126 Wn.2d 22, 891 P.2d 29 (1995) .....	22
<u>Leibbrand v. Employment Sec. Dep't,</u> 107 Wn. App. 411, 27 P.3d 1186 (2001).....	21, 30
<u>Penick v. Employment Sec. Dep't,</u> 82 Wn. App. 30, 917 P.2d 136 (1996), <u>review denied</u> 130 Wn 2d 1004, 925 P.2d 989 (1996).....	19
<u>Robel v. Roundup Corp.,</u> 148 Wn.2d 35, 59 P.3d 611 (2002) .....	18
<u>State v. Longuskie,</u> 59 Wn. App. 838, 801 P.2d 1004 (1990).....	18

<u>State v. Stenson,</u> 132 Wn.2d 668, 940 P.2d 1239 (1997).....	18
<u>State v. Walton,</u> 64 Wn. App. 410, 824 P.2d 533 (1992).....	18
<u>Tapper v. Employment Sec. Dep't,</u> 122 Wn.2d 397, 858 P.2d 494 (1993) .....	17, 19, 20
<u>William Dickson Co. v. Puget Sound Air Polution,</u> 81 Wn. App. 403, 915 P.2d 750 (1996).....	19
<u>Wilson v. Employment Sec. Dep't,</u> 87 Wn. App. 197, 940 P.2d 269 (1997).....	19

**Statutes**

RCW 34.05.510	16
RCW 34.05.558	18
RCW 34.05.570(1)	17
RCW 34.05.570(1)(a)	17
RCW 34.05.570(3)(d)	19, 22, 35
RCW 34.05.570(3)(e)	17
RCW 50.01.010	19
RCW 50.04.293	20, 30
RCW 50.20.060	1, 20
RCW 50.32.120	16
RCW 50.32.160	36

**Other Authorities**

RAP 10.3(g)

17

## I. INTRODUCTION

The Petitioner, Carl Anderson, seeks judicial review of the “Decision of Commissioner,” a final administrative order of the Employment Security Department (Department), issued on February 20, 2004 and affirmed by the Superior Court under the “Findings, Conclusions, and Order” filed on April 29, 2005.<sup>1</sup> Commissioner’s Record (hereafter CR)<sup>2</sup> 849-859, 870-874; Clerk’s Papers (hereafter CP) 44-47.

The Decision of Commissioner denied unemployment benefits to Mr. Anderson based upon a finding that he was discharged from his employment with King County due to misconduct. RCW 50.20.060. While working as the Project Manager for the County’s sale and development of a property, Mr. Anderson was also secretly a partner of the ultimate winning bidder on the property, WCB Properties, LLC (WCB LLC). Mr. Anderson was discharged by his employer when it was

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<sup>1</sup> Mr. Anderson filed a Petition for Reconsideration, which was dismissed by the Department because it was not filed within 10 days of the mailing of the Decision of Commissioner. CR 1039.

<sup>2</sup> The Commissioner’s Record is a Certified Appeal Board Record. This brief references pages in the Commissioner’s Record and the Clerk’s Papers.

discovered that he purposefully hid this material conflict of interest, in clear violation of a duty of disclosure under the County's Code of Ethics. The Commissioner's decision is supported by substantial evidence and is not in error of law. Consequently, the Department asks that its decision be affirmed.

## **II. COUNTERSTATEMENT OF THE ISSUE**

Was Mr. Anderson properly denied unemployment benefits due to disqualifying work-related misconduct where, while working as the King County Project Manager for the County's sale and development of a property, Mr. Anderson was also secretly a partner of the ultimate winning bidder on the property, creating a material conflict of interest in clear violation of a duty of disclosure under the County's Code of Ethics?

## **III. COUNTERSTATEMENT OF THE CASE**

Carl Anderson worked as a temporary employee of King County from July 15, 1996 to April 17, 1998, when he became a full-time, permanent employee of the County. CR 15 (FOF

1).<sup>3</sup> Prior to his employment with the County, Mr. Anderson worked for the federal Department of Health for 13 years and then did real estate acquisition work for a large national firm. CR 235-238 (FOF Sup.).

While a temporary employee with the County, Mr. Anderson worked part- to full-time as a consultant; Mr. Anderson also variously held County titles of “Project Manager III” or “Property Analyst III.” CR 18-19, 238-239 (FOF 1). Mr. Anderson retained the title of Program Manager or Property Analyst III when he became a permanent employee in 1998. Id. (FOF 1). Mr. Anderson was placed on paid administrative leave by the County on March 25, 2002 and remained in that status until his dismissal on May 5, 2003. CR 18, 32 (FOF 2). During Mr. Anderson’s administrative leave, the County hired a private investigator to investigate allegations that Mr. Anderson had a conflict of interest while he worked on

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<sup>3</sup> A FOF followed by a number in parentheses (FOF \_\_ ) represents the specific Finding of Fact made by ALJ at CR 850-855 and adopted by the Commissioner. An “FOF Sup.” in parentheses represents the augmented findings of the Commissioner at CR 871.

a particular project for the County beginning in 1996. CR 20 (FOF 2).

The County has a Code of Ethics, part of the King County Code at Section 3.04, which mandates that certain employees make yearly disclosures of finances and potential or actual conflicts of interest. CR 692-706 (Exhibit 8, pp. 11-25) (FOF 3). Mr. Anderson's job involved the sale of surplus real estate for the County, and he was one of the mandated employees required to file a yearly financial disclosure report. CR 21-22, 57 (FOF 3).

Mr. Anderson filed financial disclosure reports for years 1997 through 2001 (filed in 1998 through 2002). CR 738-763 (Exhibit 10) (FOF 4). At no time during those years, did Mr. Anderson disclose to the County any interest in an entity known as WCB Properties, LLC; the Roseville Corporation; or any other business entity. CR 28 (FOF 4).

If an employee believes he may have a conflict of interest between his official duties and his private interests, he is

required by the Code of Ethics to report that in writing to his supervisor, regardless of the financial disclosure forms filed yearly. CR 700 (Exhibit 8, p. 19); King County Code, Section 3.04.037 (FOF 5).

Mr. Anderson received a summary of the Code of Ethics in July 1996 and again in April 1998. CR 770-771, 774 (Exhibits 13, 16). Mr. Anderson signed an acknowledgment of receipt, indicating he had received the summary of the Code. CR 30 (FOF 6).

In 1996 a surplus property called the Washington Center Building, alternatively known as the Minor Avenue Property (hereinafter referred to as WCB), was to be sold by the County. CR 120-121, 125 (FOF 7). Mr. Anderson was placed in the position of Project Manager for that sale by the County. Id. (FOF 8). The process for selling surplus properties was for the County to issue a Request for Proposal (RFP) to potential buyers, inviting bids on the property. CR 79, 115 (FOF 8). A review board was then assembled to assess the bids from the

potential buyers and choose the appropriate bidder(s) to whom the property would be sold. CR 155 (FOF 8).

The amount of money offered by the buyer was not the only consideration in selling the property; a primary goal of the County was that the property sold would be properly developed into affordable housing. CR 84 (FOF 9). This meant that there were diverse agencies involved after the sale, with various considerations and requirements to be met by the buyers in developing the property. CR 85-86 (FOF 9). The buyers had to commit to County involvement, as well as involvement by other government agencies, after the sale. Id. (FOF 9). The WCB was, in fact, eventually developed into affordable senior housing. CR 823 (Exhibit 27, p. 20) (FOF 9).

As the Project Manager for the sale of the WCB, Mr. Anderson was responsible for preparing and issuing the Request for Proposal; he was required to gather information on the property itself, by way of conducting a “due diligence” assessment of the property prior to sale, and was responsible for

soliciting proposals from potential bidders. CR 115 (FOF 10). Mr. Anderson was further responsible for finalizing the sale, including resolving any problems which arose during closing of the property. Id. (FOF 10). Mr. Anderson was also expected to be involved in helping the successful bidders find financing for the purchase. (FOF 10). Further, Mr. Anderson would be involved in the development of the property, by ensuring that the buyers were in compliance with the sales contract and properly developing the property as agreed upon in the contract. (FOF 10). In a typical deal, Mr. Anderson, in the role of Project Manager, would help negotiate the sale with the successful bidders. CR 116 (FOF 10). However, in the sale of the WCB, Mr. Anderson did not do so. CR 116-117 (FOF 10).

After Mr. Anderson developed and circulated the Request for Proposal, and it had been issued, the County received bids from potential buyers. CR 125-126 (FOF 11). At that time, Mr. Anderson informed his superiors that he “knew” some of the bidders. CR 35-36, 126 (FOF 11). Mr. Anderson

indicated he knew, on a social basis, the two bidders from WCB LLC. CR 126-127 (FOF 11). Because the group of potential buyers for a property which is to be developed into affordable housing is quite small, Mr. Anderson's supervisors were not surprised that Mr. Anderson knew some of them and even socialized with some of them. CR 126 (FOF 12). However, in an effort to avoid even an appearance of a conflict of interest between Mr. Anderson and the principles at WCB LLC, the County took some measures to separate Mr. Anderson from the decision-making process, including designating Mr. Anderson as a non-voting member of the review board which assessed the bids and chose the winning bid. CR 127-129 (FOF 12). Based on the information Mr. Anderson revealed to the employer, the County believed it had adequately protected itself from charges of conflict of interest by taking those steps. CR 128 (FOF 12).

WCB LLC was chosen as the successful bidder. CR 773 (Exhibit 15) (FOF 13). The bid offered was significantly more than the next lowest bid, by about \$1.8 million. (FOF 13).<sup>4</sup>

In 2000 the County investigated allegations of a conflict of interest related to Mr. Anderson's work for the County and his relationship to the principles and/or business entities involved in purchasing WCB, including WCB Properties LLC. CR 140-143, 765-769 (FOF 14). Mr. Anderson, at that time, was minimally cooperative with the investigation, and after supplying some information, refused to answer further questions by his superiors about his relationship, especially his financial relationship, to Ginger Marshall, Vera Taylor, and WCB LLC. CR 459-460 (Exhibit 7, pp. 12-13) (FOF 14). Mr. Anderson was disciplined for insubordination related to his refusal to cooperate with the investigation upon direct instruction and questioning by his superiors. CR 452-56 (Exhibit 7, pp. 5-9) (FOF 14). However, based on the

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<sup>4</sup> Mr. Anderson actually testified that the WCB LLC bid was \$1.8 million, while the next ranked bid was \$1 million. CR 270.

information supplied by Mr. Anderson in 2000, the County determined that Mr. Anderson's relationship with WCB Properties LLC and the two principles, Ms. Marshall and Ms. Taylor, did not constitute an actual conflict of interest. Id. (FOF 15). The supervisor making that decision stated it was a "qualified" conclusion that Mr. Anderson had not been involved in a conflict of interest on the WCB deal, since Mr. Anderson refused to answer all the questions posed by the County about his relationship to the entity WCB Properties LLC and the two principles. CR 456 (FOF 15). Ms. Marshall told the supervisor that Mr. Anderson had absolutely no business or financial relationship with WCB Properties LLC or the two principles. CR 450, 456 (Exhibit 7, pp. 3-4, 9, paragraph 1, last line) (FOF 15). The supervisor's memo states that, in the supervisor's opinion, Mr. Anderson had not acted in any way to harm the County during the time he was the Project Manager of the WCB sale. CR 456 (FOF 15).

In 2001 WCB LLC and Ms. Marshall and Ms. Taylor sued Mr. Anderson; Mr. Anderson countersued all the plaintiffs. CR 708-721 (Exhibit 9, pp. 2-15) (FOF 16). In Mr. Anderson's answer to the complaint and countersuit, he admitted he was a "partner" with Marshall in 1997, for the "purpose of developing assisted-living communities for a profit." CR 712 (FOF 16). Mr. Anderson further admitted he filed a Certificate of Formation for a limited liability company, WCB LLC, in October 1997 and identified himself as a "member" of the company with Marshall and later with Ms. Taylor. Id. (FOF 16). Mr. Anderson further stated that the principles, including himself, of WCB Properties LLC were each 1/3 partners in the venture, sharing expenses and contributions of capital in that proportion. Exhibit 9, p. 6, ll. 31-37. Id. (FOF 16).

In addition, Mr. Anderson admitted in his countersuit that WCB Properties LLC "submitted a request for proposal to King County" regarding the Minor Avenue property (the Washington

Center Building). Id. (FOF 17). After WCB Properties' bid was chosen to buy the property, Mr. Anderson further stated that he and the two women intended to "jointly finance, develop, and operate the property for profit. . ." CR 713 (FOF 17). The project was called "Fairmont Terrace" by the time development began. Id. (FOF 17).

Mr. Anderson also admitted in his countersuit that during the one-year period of time the property was under development, Mr. Anderson personally expended "thousands of hours" of his time and "incurred expenses on behalf of the venture." CR 714 (FOF 18). Mr. Anderson demanded that the two women recognize him as a 1/3 partner in WCB LLC, and pay him 1/3 of the development fee obtained by the entity, reimburse him for his expense on the project, and admit him as a member of WCB LLC, as previously agreed. CR 716 (FOF 18).

Mr. Anderson's deposition was taken for the lawsuit initiated in February, 2001. CR 722-738 (Exhibit 9, pp. 16-31)

(FOF 19). Mr. Anderson admitted he and Ms. Marshall prepared the bid for WCB Properties LLC, to purchase the WCB property, in response to the Request for Proposal issued by the County. CR 722 (FOF 19). Mr. Anderson goes on to say that the Review Board then looked at his bid in response to the proposal, and that Mr. Anderson himself was one of the persons on that board who “looked” at it, although he was not voting on the bids. CR 722 (FOF 19). Mr. Anderson admitted he did not disclose his role as a partner of WCB Properties LLC, or his role in submitting the bid to the County on behalf of the business; he specifies that he disclosed to the County only that he knew Ms. Marshall and Ms. Taylor. CR 723 (FOF 19).

In his deposition, Mr. Anderson admitted he was the partner who arranged for the limited liability company form of WCB LLC. CR 725 (FOF 20). Mr. Anderson and Ms. Marshall agreed Mr. Anderson would be a “secret” partner of the LLC in 1997, when it was formed, until it was appropriate

for Mr. Anderson to “come out of the closet.” CR 726 (FOF 20). The reason for Mr. Anderson’s “secret partner” status was Mr. Anderson’s concern about having a conflict of interest between his partnership status with WCB Properties LLC and his job with the County. Id. (FOF 20). An understanding was reached that Ms. Marshall and Ms. Taylor would tell their employers about their involvement in the project, but nothing was said by Mr. Anderson’s need to inform his employer, the County. CR 728 (FOF 20).

In the deposition, Mr. Anderson admitted he and the two women split the costs of buying and developing the project one-third each. Id. (FOF 21). Mr. Anderson invested money into buying the WCB from the County and he was specifically “. . . trying to not have an audit trail back to me in case something nasty came up with the county.” CR 729 (FOF 21). Mr. Anderson did not want to reveal his involvement in the WCB LLC until the County’s review process and bid acceptance had

occurred, and until the Purchase and Sales agreement had been finalized. Id. (FOF 21).

Mr. Anderson further stated in his deposition that he wrote the proposal for WCB LLC to purchase the WCB from the County. CR 735-736 (FOF 22). He also stated he did that on his computer “at work;” thus, a County-owned computer was used by Mr. Anderson to prepare the proposal on behalf of Mr. Anderson’s private business, to buy the WCB property from the County. CR 736 (FOF 22).

Mr. Anderson worked for King County as a Project Manager during all times pertinent to the sale and development of the WCB/Fairmont Terrace, and during the years from 1997 to 2001, at least, Mr. Anderson was a partner in WCB Properties LLC, and had a direct financial interest in the entity. (FOF 23). At no time during his employment with King County did Mr. Anderson inform the employer of his business or financial interest in the WCB sale or development. CR 63-64, 108-109 (FOF 23). Mr. Anderson was asked directly by

various managers about his involvement and either denied it directly or refused to respond to the question. CR 787 (FOF 23). These denials occurred even during the investigation in 2000, into the exact same issues and questions as to Mr. Anderson's role in the WCB Properties LLC, and his relationship with Ms. Marshall and Ms. Taylor. CR 105 (FOF 23). Mr. Anderson's supervisors asked him directly if he was in business with the two women, and Mr. Anderson denied it. CR 787 (FOF 23). Mr. Anderson was asked if he was a principle in WBC Properties LLC, and Mr. Anderson denied he was a principle. CR 787 (FOF 23).

#### **IV. STANDARD AND SCOPE OF REVIEW**

Judicial review of Employment Security Department benefits decisions is governed by the Administrative Procedures Act, pursuant to RCW 34.05.510 and RCW 50.32.120. Under the APA, the Court of Appeals "sits in the same position as the superior court" on review of the agency action. Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494

(1993). The general provisions relating to the court's review of agency final orders are as follows:

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity...

RCW 34.05.570(1). Similarly, “[t]he decision of the Commissioner is deemed prima facie correct and the burden of demonstrating the invalidity of the Commissioner’s decision is on the party asserting its invalidity.” Becker v. Employment Sec. Dep’t, 63 Wn. App. 673, 676, 821 P.2d 81 (1991); RCW 34.05.570(1)(a).

Disputed issues of fact are reviewed under the “substantial evidence” standard. RCW 34.05.570(3)(e). Mr. Anderson has not specifically challenged any of the findings of fact. Rules of Appellate Procedure (RAP) 10.3(g). Thus, the unchallenged findings of fact are verities on appeal. Robel v. Roundup Corp.,

148 Wn.2d 35, 42, 59 P.3d 611 (2002); State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997).<sup>5</sup>

Judicial review is limited to the agency record. RCW 34.05.558. Questions of credibility are for the trier of fact to resolve. Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). "It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence." State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992), citing State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). "The appellate court gives deference to factual decisions; it views the evidence in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the fact-finder's views regarding the credibility of witnesses and the weight to be given reasonable but competing

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<sup>5</sup> In fact, Mr. Anderson seems to concede in his "Assignments of Error" that all of the Department's findings should be treated as verities by this Court. See Brief of Appellant (AB) at 1; CR 850-855, 871.

inferences.” William Dickson Co. v. Puget Sound Air Pollution, 81 Wn. App. 403, 411, 915 P.2d 750 (1996) (citations omitted).

Questions of law, unlike questions of fact, are subject to de novo review. RCW 34.05.570(3)(d); Tapper v. Employment Sec. Dep’t, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). However, the reviewing court shall give substantial weight to the agency interpretation of the law due to the Commissioner’s expertise. Wilson v. Employment Sec. Dep’t, 87 Wn. App. 197, 201, 940 P.2d 269 (1997); Penick v. Employment Sec. Dep’t, 82 Wn. App. 30, 37-38, 917 P.2d 136 (1996), review denied 130 Wn 2d 1004, 925 P.2d 989 (1996).

## V. ARGUMENT

### A. **Under The Employment Security Act, An Individual Who Is Discharged For Work-Connected Misconduct Is Disqualified From Receiving Unemployment Benefits.**

The Employment Security Act (Act) was enacted to provide compensation to individuals who are “involuntarily” unemployed “through no fault of their own.” RCW 50.01.010; Tapper, 122 Wn.2d at 408. The Act requires that the reason for

the unemployment be external and apart from the claimant. Cowles Pub'g Co. v. Employment Sec. Dep't, 15 Wn. App. 590, 593, 550 P.2d 712, 715 (1976). Permitting workers to draw unemployment benefits when they are "at fault" for a separation from their jobs would undermine the fundamental policy of the Employment Security Act. The presence or absence of "fault" is thus the determining factor in whether a worker who has been discharged will be granted benefits under the Act.

In keeping with this principle, RCW 50.20.060 provides: "With respect to claims that have an effective date before January 4, 2004, an individual shall be disqualified from benefits...[when] he or she has been discharged or suspended for misconduct connected with his or her work...." Whether an employee's behavior constitutes misconduct is a mixed question of law and fact. Tapper, 122 Wn.2d at 402.

Misconduct is defined in RCW 50.04.293:

"Misconduct" means an employee's act or failure to act in willful disregard of his or her employer's

interest where the effect of the employee's act or failure to act is to harm the employer's business.

“Willful disregard” does not require an intent to harm the employer’s business. Rather, it need only be established that the employee voluntarily disregarded the employer’s interest by intending an act. “Consequently, an employee acts with willful disregard when he (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 probable consequences.” Hamel v. Employment Sec. Dep’t, 93 Wn. App. 140, 146-147, 966 P.2d 1282 (1998).

Regarding the element of harm to the employer, “actual detriment to the employer's operations must be objectively demonstrated.” Leibbrand v. Employment Sec. Dep’t, 107 Wn. App. 411, 426, 27 P.3d 1186 (2001) (quoting Haney v. Employment Sec. Dep’t, 96 Wn. App. 129, 141, 978 P.2d 543 (1999)). Such harm need not be “tangible or economic,” but it must be more than “imaginary or theoretical.” Id.

As will be established below, the facts and circumstances of Mr. Anderson's discharge demonstrates that his conduct was in willful disregard of his employer's interest, resulting in harm to the employer. Accordingly, the Commissioner's determination is supported by substantial evidence and in accordance with the law.

**B. By Failing To Disclose To His Employer A Material Conflict Of Interest, Mr. Anderson Committed Disqualifying Misconduct By Acting In Willful Disregard Of His Employer's Interests.**

Mr. Anderson does not assign error to any finding of fact.

AB 1. "Unchallenged findings of fact are verities on appeal." Heidgerken v. Dep't of Nat. Resources, 99 Wn. App. 380, 384, 993 P.2d 934 (2000); Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn.2d 22, 30, 891 P.2d 29 (1995). Accordingly, this Court should uphold the Commissioner's decision unless the Commissioner erroneously interpreted or applied the law. RCW 34.05.570(3)(d).

The unchallenged findings in this matter include the determinations that “[c]learly, Mr. Anderson did not tell the employer the truth in response to its direct questions about his relationships with the business entity WCB Properties LLC, and the principles of that business,” and that Mr. Anderson “purposely hid his business and financial involvement with WCB Properties LLC, and with [Ms.] Marshall and [Ms.] Taylor, from the County.” CR 854, 871, 787-788 (Exhibit 20, pp.2-3).

**1. Mr. Anderson was aware of his employer’s interest.**

Mr. Anderson fails to establish that the Commissioner was in error in determining that Mr. Anderson willfully disregarded his employer’s interest. Regarding the first element of the willful disregard test, Mr. Anderson was aware of his employer’s interest.

King County has an interest in preserving both the actual and perceived fairness of its open bidding process. The County

has a Code of Ethics, part of the King County Code at Section 3.04, which in part mandates disclosure of finances and potential or actual conflicts of interest. CAR 692-706.

Addressing conflicts of interest, the County's "Employee Code of Ethics" states, in part:

A county employee shall be deemed to have a conflict of interest if the employee directly or indirectly...[i]s beneficially interested, directly or indirectly, in any contract, sale, lease, option or purchase that may be made by, through, or under the supervision of the employee, in whole or in part... .

Exhibit 8, p. 14. All new employees of the County are required to sign a form indicating that they have reviewed and read the Code of Ethics, and understand it. CR 123-124. The testimony of Cathy Clemens, Administrator to the King County Board of Ethics, further established that King County had a comprehensive education/training program to ensure that employees are aware of the rules regarding conflicts of interests. CR 55, 74-76. Additionally, even before his employment with King County, Mr. Anderson was quite familiar with what would constitute a

conflict of interest in a government setting, since as early as the 1970's he performed internal control reviews for the federal Health, Education and Welfare Audit Agency, where conflicts of interest was a potential issue of concern. CR 118-120.

As Mr. Anderson's job involved the sale of surplus real estate for the County, his job was covered by the Code's requirements. Further, Mr. Anderson was required to, and did, file a yearly financial disclosure report for the years 1997 through 2001 (filed in 1998 through 2002). CR 738-762 (Exhibit 10). Thus, substantial evidence supports that Mr. Anderson was aware of his employer's interest that all conflicts of interest be disclosed.

**2. Mr. Anderson knew or should have known that his conduct was contrary to the interests of his employer.**

In Hamel, the court stated that "applying the objective 'should have known' standard, we assume that [the Petitioner] knew what a 'reasonable person' would have known." Hamel, 93 Wn. App. at 148.

Mr. Anderson knew, or should have known, that being a financial principle of a firm that was bidding on a County property of which he, the County's Project Manager overseeing the sale of that property, was jeopardizing his employer's interest.

Mr. Anderson was well aware of his conflict of interest, as evidenced by his October 18, 2001 deposition testimony showing that he intended to hide his partnership with Ms. Marshall and Ms. Taylor in WCB LCC from his employer:

A: [Anderson] Because at the time the focus of this WCB, by the name of it, Washington Center Building, was-that was going to be the entity that was going to file the application with the proposal with King County to buy the building. And Ginger and myself, we agreed that I would be a secret partner and a member of WCB, LLC until such time it was appropriate for me to come out of the closet, so to speak..

Q: Tell me about the agreement that you would be a secret partner. What was said specifically and by whom?

A: It was a result of a conversation between Ginger and myself regarding my concern about potential conflict of interest with King County, and it was my concern primarily about the potential conflict of interest with King County, and we'd like

to do this. And we both talked about it, and we came to the conclusion that [sic] best way was to have me be a secret silent partner and not disclose to anyone. It just come though a discussion of working through strategy in how best to represent me in the project, and that was the decision we both came to.

CR 726-727 (Exhibit 9, pp. 20-21).

**3. Despite knowledge of his employer's interest, Mr. Anderson intentionally disregarded that interest.**

Finally, substantial evidence demonstrated that despite being aware of his employer's interest, Mr. Anderson acted contrary to that interest in willful disregard of its probable consequences. Mr. Anderson knowingly and intentionally maintained his position in WCB while working for the County as a project manager. He not only failed to cooperate with the County's investigation when confronted with his conflict of interest, he lied in response to direct questions about his business relationship to WCB LCC. See e.g., CR 452-456 (Exhibit 7, pp. 5-9), CR 787-788 (Exhibit 20, pp. 2-3).

Mr. Anderson's supervisors asked him directly if he was in business with the two women, and Mr. Anderson denied it. CR 150, 787. Mr. Anderson was asked if he was a principle in WBC Properties LLC, and Mr. Anderson denied he was a principle. Mr. Anderson adamantly stated to his employer that he had no past or present business relationship with the purchasing entity, WCB Properties LLC. CR 150-151, 787.

Only well after depositions in the fall of 2001, in which he testified to his business relationship with Ms. Marshall and Ms. Taylor, did Mr. Anderson finally admit to his employer in a May 8, 2002 memorandum his partnership relationship in WCB LCC. CR 578 (Exhibit 7, p. 31).

Mr. Anderson argues that he did, in fact, disclose his conflict of interest by his merely telling his employers that he "knew" Ms. Marshall and Ms. Taylor. Yet this position is disingenuous in light of the multiple times Mr. Anderson hid or lied about his business relationship during his employer's investigations. Clearly, there exists a tangible and significant

difference between disclosing “knowing” individuals within a relatively closed housing development business community, and being a secret, silent partner with the principles bidding on a County property; Mr. Anderson’s employer would actually have been surprised if he did not know a number of the players in this community. CR 126.

Mr. Anderson failed to disclose to his employer that he and Ginger Marshall filed a Certificate of Formation for WCB LLC, that he was a one-third partner in WCB LLC, that he brought the Washington Center Building to the attention of WCB LLC as a possible site of a venture, that he and Ms. Marshall prepared WCB LLC’s bid proposal, and that he and his two WCB partners had agreed to jointly finance, develop and operate a facility in the Minor Avenue property. CR 126-127, 206-207. These failures to disclose material conflicts constitute an intentional disregard of the County’s interests.

**C. Mr. Anderson's Failure To Disclose His Conflict Of Interest Resulted In Harm To His Employer.**

The second prong in demonstrating misconduct is that the effect of the employee's action or failure to act was to harm the employer's business. RCW 50.04.293. In order to show that the employee's conduct had the effect of causing harm, actual detriment to the employer must be objectively demonstrated. Hamel, 96 Wn. App. at 141. However, that harm "need not be tangible or economic..." Dermond v. Employment Sec. Dep't, 89 Wn. App. 128, 135, 947 P.2d 1271 (1997). Each case must be determined on its facts. Id. at 136.

Mr. Anderson asserts that his actions did not harm his employer, pointing in part to the fact that the County economically benefited from WCB's high bid on the Minor Avenue property. Yet, harm need not be tangible or economic. Leibbrand, 107 Wn. App. at 426.

In Dermond, the Court of Appeals rejected the argument that tangible economic harm must be shown, noting that "... it

[tangible economic harm argument] penalizes an employer who takes appropriate mitigating steps to prevent tangible harm that might otherwise result.” Id. at 135. The court went on to note that an employer “who becomes aware of potentially harmful conduct by an employee should not be required to wait until financial loss is realized before acting to terminate the miscreant.”<sup>6</sup> Id.

Mr. Anderson also argues that there was no evidence that he intended to harm his employer. However, in Hamel, this court emphasized that misconduct turns on the employee’s awareness of the employer’s interest and that “willful disregard” does not rest on a determination of whether the employee intended to harm the employer, because the

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<sup>6</sup> The Dermond court further noted that “[the Legislature is certainly aware that many employers covered by the Employment Security Act are not engaged in commerce and would have great difficulty demonstrating an actual financial loss. A volunteer coordinator employed by a nonprofit agency who refused to work might cause grave harm to those not served, but no tangible economic harm to the employer. A church employee who defiantly locked worshippers out of the church would cause consternation and inconvenience, but not necessarily tangible economic harm to the church. And except in cases of actual property damage, government or other public employers would rarely be able to make a showing of tangible economic harm.” Dermond, 89 Wn. App. at 135.

employee's specific motivation for his conduct is not relevant. Id. at 146-48 (emphasis added).

Here, Mr. Anderson intentionally and flagrantly failed to comply with his employer's reasonable conflict of interest rules. As a government entity, King County is in a position of public trust. As stated by Catherine Clemens, Administrator to the King County board of Ethics, "...trust in government is essential. And that in order to ensure that trust, there can be no apparent or real conflict of interest between county employees, personal and financial interest, and their job responsibilities." CR 56. Thus, even the appearance of unfairness in the public bidding process is detrimental to the County's interests and accordingly creates harm.

Mr. Anderson's actions did indeed create the potential to cast a dark cloud over the County's reputation for honest dealing with potential purchasers and developers of properties. According to Dave Preugschat, the Deputy Director for the King County Office of Lease Management Division and the

supervisor of Mr. Anderson's former supervisor, Mr. Anderson was in a position to influence the outcome of the bidding process on this property:

[Mr. Anderson] was in a position to control the information that was being presented to prospective bidders on the process. He was in a position to give them information that would make them want to not participate in the process. He was in a position to understand some of the business constraints that prospective proposers may be working under. He was in a position, had a full understanding of the minimum, the minimums that we would be looking at in making an ultimate decision of whether or not we'd even sell the building. And he was in a position to impart that information to others.

CR 113, 128-129.

Thus, as stated by Mr. Preugschat, the concern is not just the potential for an employee using his position for private gain, but also that the County would suffer a loss of credibility in its competitive bidding process if there is an appearance that not everyone in the general public has a "fair shot" at doing business with the County. CR 195-196.

Mr. Anderson argues that the “potential” for harm is insufficient under the misconduct test. He is incorrect, as potential harm is not the same as “imaginary or theoretical” harm. Here, Mr. Anderson’s subterfuge may have resulted in actual, but undiscovered harm. It is this very uncertainty and potential for harm that the County’s conflict of interest provision was created to avoid. The ALJ and Department were correct in stating that “[i]t can never be known what, if any, effect Mr. Anderson’s insider knowledge of the WCB deal had on any of the other bidders, or how it might have influenced the review board’s final choice of WCB Properties LLC as the winning bid. Mr. Anderson was involved to a substantial degree in the gathering and dissemination of information about the WCB, the sale, the bidding process, and myriad other processes, both to the public and to potential buyers, as well as to the County. Mr. Anderson performed innumerable tasks that were done in preparation for the sale of the building, and then

in the development of the building as affordable housing.” CR 855 (FOF 29).

Further, Mr. Anderson’s employer experienced a loss of time, productivity, and expenses due to the need for multiple investigations into Mr. Anderson’s hidden dealings. CR 32, 140-179. An impact on the morale of the County’s Property Services Section as a result of the allegations and investigation was also reported. CR 32. King County thus experienced actual harm from Mr. Anderson’s persistent failure to disclose his financial interest in WCB Properties Partners.

In summary, the application of the unchallenged findings of fact to the applicable law establishes that the Commissioner did not erroneously interpret or apply the law. RCW 34.05.570(3)(d). While working as the Project Manager for the sale of the WCB, Mr. Anderson was also a secret partner in the purchaser of the property, WCB LLC. Mr. Anderson acted in willful disregard of his employer’s interest, resulting in harm to

the employer. The Commissioner's decision therefore should be affirmed.

**D. Mr. Anderson's Attorney Fees Request Should Be Reserved Until Such Time As The Commissioner's Decision Is Reversed Or Modified, And Such Time As The Department Has An Opportunity To Respond To The Reasonableness Of The Amount Requested.**

Finally, Mr. Anderson requests "reimbursement of his attorneys fees incurred throughout the appellate process." AB 30.

The Employment Security Act does provide a statutory exception to the "American Rule" of attorney fees in certain unemployment litigation cases. RCW 50.32.160. Under this rule, "reasonable attorney fees" in connection with judicial review may be recovered and paid from the unemployment administration fund "if the decision of the commissioner shall be reversed or modified." RCW 50.32.160.

At this point, the Court is reviewing only the validity of the agency's final order. The reasonableness of Mr. Anderson's attorney fees is not properly before the Court. Should Mr.

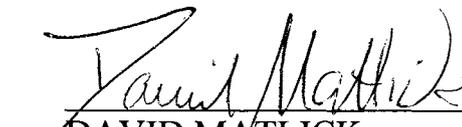
Anderson prevail on appeal, the Department would respectfully request time to prepare a response, after the submission of a cost bill. At that time, the Department would address the requested hourly rate and the amount of time spent completing tasks, as well as the general reasonableness of the attorney fees requested.

## VI. CONCLUSION

Based upon the foregoing, the Department respectfully requests that the Commissioner's determination be affirmed.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of May, 2006.

ROB MCKENNA  
ATTORNEY GENERAL

  
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**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

CARL ANDERSON,  
Petitioner,

v.

STATE OF WASHINGTON  
EMPLOYMENT SECURITY  
DEPARTMENT,

Respondent.

CERTIFICATE OF  
MAILING

06 MAY 23 PM 2:32  
STATE OF WASHINGTON  
BY [Signature]

FILED  
COURT APPEALS

MELISA VAAL, certified: I am a citizen of the United States and competent to be a witness herein.

That on May 23, 2006, I deposited in the United States mail, postage prepaid, first-class mail to:

STEPHEN M. HANSON  
ATTORNEY AT LAW  
950 PACIFIC AVE, STE 450  
TACOMA, WA 98402-4441

the following documents: Respondent's Brief.

The original was delivered by MELISA VAAL, to be filed with the court no later than May 23, 2006.

I certify under penalty of perjury under the laws of the

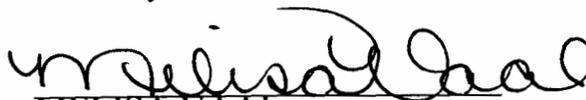
**ORIGINAL**

state of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of May,

2006.

ROB MCKENNA  
Attorney General

A handwritten signature in cursive script, appearing to read "Melissa Vaal".

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