

NO. 36939-7-II

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

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DWAYNE D. LENCA,

Appellant,

v.

STATE OF WASHINGTON  
EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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**RESPONDENT'S BRIEF**

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**ORIGINAL**

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## **I. INTRODUCTION**

Dwayne D. Lenca (Lenca) appeals from a decision of the Commissioner of the Employment Security Department denying unemployment benefits under RCW 50.20.050 because he voluntarily quit his job without good cause. The Commissioner's decision is supported by substantial evidence and in accordance with the law and should be affirmed.

## **II. STATEMENT OF THE ISSUES**

Was Lenca properly disqualified from receiving unemployment benefits under RCW 50.20.050(2) when he agreed to the commission-based structure of his pay at the time of hire and chose to leave the position due to wage garnishment and the stressful nature of the work?

Did Lenca's hearing meet procedural requirements under RCW 50.32.040, despite his decision to leave prior to its completion?

## **III. STATEMENT OF THE CASE**

Lenca worked as a customer service route manager for Schwan's Home Service, Inc. (Schwan), from April 10, 2006, until he quit on August 15, 2006. Comm'r Rec. at 16, 49 (FF 1).<sup>1</sup> After he quit, Lenca

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<sup>1</sup> Throughout this brief, the Commissioner's Record is referenced as "Comm'r Rec." followed by the page number(s). Specific findings of fact and conclusions of law made by the administrative law judge and adopted by the Commissioner are respectively referenced as "FF" and "CL" followed by the number of the specific finding or conclusion. Clerk's Papers submitted in the course of the Superior Court review are referenced as "CP."

submitted a claim to the Department for unemployment benefits, reporting he quit because he had been promised \$600 per week plus commissions after he was assigned a route, but instead was paid only commissions. Comm'r Rec. at 36.

When Schwan did not provide information to the Department about Lenca's job separation, the Department determined, based on available information, that Lenca had established good cause for quitting under RCW 50.20.050(2)(b)(v) and WAC 192-150-115, in that Schwan had reduced his pay by 25% or more. Comm'r Rec. at 35-36, 50 (FF 8).

Schwan appealed, asserting Lenca was informed when he was hired that he would receive a guaranteed salary for only a short time, and after being trained his salary would become entirely commission-based. Since Schwan did not cause the salary reduction, Schwan believed Lenca did not have good cause to quit. Comm'r Rec. at 41-42.

A Notice of Hearing was issued to Schwan and Lenca by the Office of Administrative Hearings accompanied by an informational booklet, "How to Prepare and Present Your Case." Comm'r Rec. at 33-34. George Parlee, local general manager for Schwan and Lenca's immediate supervisor, appeared for Schwan. Comm'r Rec. at 8, 49.

When the administrative law judge (ALJ) commenced the hearing, Lenca explained he had a job interview in 20 minutes. The ALJ said she

would proceed with the hearing, and when Lenca wished to leave he could make that decision. Comm'r Rec. at 7.

Lenca testified first. He said he was not informed at the start of his employment in April that his pay would be converted to 100% commission, but was only told of this in July when he was assigned a driver route. Comm'r Rec. at 16. He said that on August 1, 2006, he had given a letter of resignation to Parlee and to Don Castinado, the assistant manager. Comm'r Rec. at 18–19. Lenca testified that his letter of resignation detailed his reasons for quitting which included the “pay structure” and “other things.” Comm'r Rec. at 19.

After Lenca completed his testimony, he told the ALJ that it was time for his interview. The ALJ explained that the hearing would continue and that if he left, Lenca would not be able to ask Parlee questions. Lenca asked if he could respond in writing or via e-mail, but the ALJ explained why that would not be feasible. Lenca left, understanding that if he were aggrieved by the ALJ's order, he would be able to appeal to the Commissioner. Comm'r Rec. at 20.

Parlee testified that he explained the details of Lenca's compensation to him when he was first hired. Comm'r Rec. at 11, 50 (FF 3). Parlee told Lenca that during his first five weeks of employment he would receive a guaranteed income of \$600.00 per week. Comm'r

Rec. at 21, 49 (FF 2). During the next phase of employment his salary would comprise earned commissions plus a supplemental declining guaranteed payment (step-down plan). The guaranteed payment would start at \$30 per day but during the following weeks would decline to \$20 per day, then \$10 per day, and eventually his salary would become solely commission-based. Comm'r Rec. at 23, 45–46, 50 (FF 4). By this time, Lenca was expected to produce sufficient sales that would result in a minimum of \$600.00 salary per week in commissions. Comm'r Rec. at 17, 21–23, 50 (FF 4).

Parlee also informed Lenca that the minimum guaranteed payment portion could be extended, based on an evaluation of his pay and performance. Comm'r Rec. at 22, 27–28, 50 (FF 5). After the first five weeks of employment, Parlee reviewed Lenca's performance and decided to extend Lenca's training and the \$600.00 a week payment plan for another month. The following month he started Lenca on the step-down plan. Comm'r Rec. at 21–23, 50 (FF 6).

The ALJ resolved the conflicting testimony of Lenca and Parlee by finding Parlee credibly established that all the details of Lenca's payment were discussed with him at the time of hire. Comm'r Rec. at 50 (FF 3).

Lenca testified he quit because he was not earning enough money to support himself after his pay structure changed to commissions.

Comm'r Rec. at 15–16. 50 (FF 7). According to Parlee, however, when Lenca quit he was still earning at least \$600 a week. Comm'r Rec. at 29-30. Again, the ALJ determined that Parlee's testimony was more credible. Comm'r Rec. at 50 (FF 9).

Parlee testified that Lenca never discussed concerns about his pay, that he was not aware Lenca was quitting, and that neither he nor Don Castinado received a letter of resignation from Lenca. Comm'r Rec. at 25–26, 50 (FF 10). Parlee explained that on the day Lenca quit he had failed to show up for work but still had possession of the company truck. Parlee called Lenca, and when the calls were not answered he went to Lenca's home. It was only then that Lenca told Parlee he was quitting because the job was too stressful and he was not taking home enough money because his wages were being garnished. Comm'r Rec. at 25–26; *see also* Comm'r Rec. at 41, 50 (FF 10), 52–53 (CL 5).

The ALJ set aside the Department's initial determination, finding the employer had "credibly established that all the details of payment were discussed with Lenca at the time of hire." Comm'r Rec. at 50 (FF 3). Further, at the time Lenca quit, he was still making \$600 a week. Comm'r Rec. at 50 (FF 9).

Lenca petitioned the Commissioner for review of the ALJ's order. In his petition, Lenca elaborated why he left the hearing early and further

augmented his testimony. He also attached three documents to his petition: a letter of resignation dated August 1, 2006, a letter to the Department dated August 30, 2006, and three pay stubs. Comm'r Rec. at 62–66.

The Commissioner adopted the ALJ's findings of fact and conclusions of law, and entered an additional conclusion of law stating that the additional material submitted by Lenca could be considered as argument, but could not be considered as substantive evidence. The Commissioner then affirmed the ALJ's decision that Lenca is disqualified for unemployment benefits because he lacked good cause for voluntarily quitting his job.

Lenca petitioned the Superior Court for judicial review, which affirmed the Commissioner's decision. CP 42–44. Lenca then appealed to this Court.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

Judicial review of the Commissioner's Decision is controlled by Washington's Administrative Procedure Act (APA). RCW 50.32.120; RCW 34.05.510; *W. Ports Transp., Inc. v. Empl. Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002). The Court of Appeals "sits in the same position as the superior court" on review of the agency action under

the APA. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The appellate court reviews the Commissioner's Decision rather than the underlying initial order. *Id.* at 404–05 (citing RCW 34.05.464(4)).

The Commissioner's decision is considered prima facie correct and the burden of demonstrating the invalidity of an agency action is on the party challenging the validity of the action. RCW 34.05.570(1)(a); *Robinson v. Empl. Sec. Dep't*, 84 Wn. App. 774, 777, 930 P.2d 926 (1996). The court should only grant relief 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 standard for reviewing agency orders is set out in RCW 34.05.570(3).

The factual findings entered by the Commissioner are reviewed by this Court under the “substantial evidence” standard of RCW 34.05.570(3)(e). “Substantial evidence is evidence that 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) (citation omitted). This Court should not reweigh evidence or assess the credibility of witnesses. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Here, the Commissioner entered credibility findings entitled to deference from this Court. *See Comm'r Rec.* at 50 (FF 3, 9) and 52–53 (CL 5).

The substantial evidence standard is deferential and requires courts to view “the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.” *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371–72, 859 P.2d 610 (1993), (citing *State v. Cy. of Pierce*, 65 Wn. App. 614, 829 P.2d 217 (1992)). Lenca has only challenged Commissioner’s Finding of Fact 9 (related to Lenca’s compensation at the time he left his job). *See* Appellant’s Br. at 2. Because Lenca does not challenge any of the Commissioner’s other findings, they are verities in this appeal. *Fuller v. Empl. Sec. Dep’t*, 52 Wn. App. 603, 606, 762 P.2d 367 (1988).

Regarding Finding of Fact 9, the Court should assess this finding to determine whether it is supported by substantial evidence in the record. *See* RCW 34.05.570(3)(e). The evidence supporting this finding is detailed testimony from Parlee, Lenca’s manager, regarding Lenca’s compensation at the time that he left the job. Comm’r Rec. at 29–32. Parlee detailed Lenca’s compensation, explaining that at the time Lenca left the job he was getting about \$90 a day in commission, though, “[t]hat would fluctuate, maybe 80, maybe 110 that day, it all depended on the sales of the day.” Comm’r Rec. at 30. The ALJ pursued the issue further:

**ALJ:** [A]t the time, then, that he quit and you retrieved the truck and the keys and the wallet, he indicated pay was a concern. Did you have the opportunity to sit down and explain to him, hey, you're still getting \$600 a week?

**Parlee:** Yes, I did.

**ALJ:** Any comment from him at that time?

**Parlee:** The comment from him was that everybody's in taking money out of his paycheck. I don't know who it was garnishing wages, or whatever, but they were taking like 200 of the week out, or something like that. And he says I just can't afford it. I said well, I can't help you on your personal end like that. You are getting what we discussed.

Comm'r Rec. at 31–32. This evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding that Lenca was making \$600 per week at the time he left his job and thus is supported by substantial evidence. *See Estate of Jones*, 152 Wn.2d at 8. Therefore, the Court should leave it undisturbed.

Lenca also argues that the Commissioner's decision was an error of law. Appellant's Brief at 9. A court reviews questions of law de novo. *Tapper*, 122 Wn.2d at 403. Courts, however, have consistently accorded a "heightened degree of deference" to the Commissioner's interpretation of employment security law in view of the Department's expertise in administering the law. *W. Ports*, 110 Wn. App. at 449–50; *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).

Whether a person has good cause to quit a job is a mixed question of law and fact. *Tapper*, 122 Wn.2d at 402; *Terry v. Empl. Sec. Dep't*, 82 Wn. App. 745, 748, 919 P.2d 111, 114 (1996). When the issue involves a mixed question of law and fact, the reviewing court must: (1) establish which challenged facts are supported by substantial evidence, (2) determine the applicable law de novo, and (3) apply the law to the facts as found by the agency. *Tapper*, 122 Wn.2d at 403. In reviewing a mixed question, the court is not free to substitute its judgment of the facts for that of the agency. *Id.*

Lenca argues the pay stubs he attached to his petition should have been considered as evidence by the Commissioner in determining whether to remand to the ALJ for additional fact finding. Such consideration would have been contrary to law. As explained by this Court in *Towle v. Dep't of Fish & Wildlife*, 94 Wn. App. 196, 205–06, 971 P.2d 591 (1999), when an ALJ conducts an APA hearing, the ALJ is the presiding officer and, as such, establishes the record and enters an initial order. The agency official who reviews that order, such as the Commissioner, must conduct the review in accordance with RCW 34.05.464. Absent specific authorization, the reviewing officer is not permitted to take additional evidence or to go outside the record established by the presiding officer at the hearing.

Here, there is no such specific authorization. The Commissioner's review procedures are set out in RCW 50.32.080 and WAC 192-04-170. Nothing in these provisions permits the Commissioner to consider additional evidence in reviewing the ALJ's decision.

Based on the record before the ALJ, the Commissioner properly determined that Lenca did not demonstrate the record below was incomplete for reasons within the control of the administrative law judge. Lenca made a choice not to timely provide documentary evidence in support of his claim, not to timely seek a continuance due to his scheduling conflict, and to leave the hearing before Parlee testified. A mere failure of a party to produce probative evidence does not mean the record is incomplete, nor does it mean the ALJ failed to provide a fair hearing.

Under WAC 192-04-120, in the exercise of sound discretion the ALJ may order a continuance.<sup>2</sup> The ALJ's decision to complete the hearing and not sua sponte continue the hearing is within agency discretion, and the Commissioner's affirmation of that decision is also an exercise of that discretion. "In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself

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<sup>2</sup> See also model rule, WAC 10-08-090, under which the ALJ *may* order a continuance if a party shows good cause.

undertake to exercise the discretion that the legislature has placed in the agency.” RCW 34.05.574(1).

“A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *Okamoto v. Empl. Sec. Dep't*, 107 Wn. App. 490, 495, 27 P.3d 1203 (2001) (quoting *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984)). The Commissioner properly determined that the ALJ did not abuse her discretion by completing the hearing when Lenca departed.

**B. Lenca Is Ineligible For Benefits Because He Left Work Voluntarily Due To Wage Garnishment**

The Commissioner properly held that Lenca is ineligible for benefits because he left work for personal reasons that are not among the statutory good cause factors for quitting. Comm’r Rec. at 52–53 (CL 5); *see* RCW 50.20.050(2)(a). Because the reasons for Lenca’s voluntary quit are not included in those set forth by statute, Lenca has not established that he quit for good cause. RCW 50.20.050; *Starr v. Wash. State Dep’t of Empl. Sec.*, 130 Wn. App. 541, 545, 123 P.3d 513 (2005) (*review denied* 157 Wn.2d 1019). A person who voluntarily quits without statutory good cause is not eligible to receive unemployment benefits. RCW 50.20.050(2)(a). Here, Lenca acknowledges that he voluntarily quit.

Comm'r Rec. at 15, 50, 65. The sole issue to be decided is whether he had good cause.

Lenca carries the burden of establishing good cause to voluntarily quit. He must establish good cause by a preponderance of the evidence. *Townsend v. Empl. Sec. Dep't*, 54 Wn.2d 532, 341 P.2d 877 (1959).

RCW 50.20.050(2)(b) sets out ten specific factual situations that constitute good cause for quitting work. This statute has been construed to contain no additional, open-ended circumstance of any type and “provides the exclusive list of good cause reasons for voluntarily quitting employment that will not disqualify a claimant from receiving unemployment compensation benefits.” *Starr*, 130 Wn. App. at 545, 549<sup>3</sup> Lenca told his employer he quit because he could not afford to keep the job because his wages were being garnished. Comm'r Rec. at 21, 26, 31, 50 (FF 10).<sup>4</sup> Leaving work because one's wages are being garnished is not one of the factual situations that constitute good cause for quitting.

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<sup>3</sup> The Washington Supreme Court has accepted review of *Batey v. Empl. Sec. Dep't*, 137 Wn. App. 506, 514 n.4, 154 P.3d 266 (2007) and *Spain v. State Employment Sec. Dept.*, an unpublished decision of this court. See 137 Wn. App. 1005 (2007), 2007 WL 404712. *Batey* and *Spain* are consolidated for hearing. In *Batey* the court found the 2003 amendments to RCW 50.20.050 unconstitutional because the enacting bill, EHB 3278, did not meet the constitutional subject-in-title requirement. However *Batey* does not apply here because Lenca's separation took place after the effective date of the re-enacted statute that was not affected by *Batey*. In *Spain*, the claimant's arguments were the same as those made in *Starr* and were rejected by this Court for the same reasons as in *Starr*.

<sup>4</sup> See also Comm'r Rec. at 52–53 (CL 5).

The Commissioner properly found that Lenca left work because he was taking home less pay due to wage garnishment, not a good cause for voluntarily quitting. *See* Comm'r Rec. at 52–53 (CL 5).

**C. Lenca Is Not Eligible For Relief Under RCW 50.20.050(2)(b)(v) Because Any Pay Reduction Resulted From Terms Of Employment To Which He Had Agreed At The Time Of Hire**

Lenca claims relief under RCW 50.20.050(2)(b)(v), which allows an individual to voluntarily quit for good cause if his usual compensation is reduced by twenty-five percent or more. WAC 192-150-115 interprets this statutory provision:

(1) “Compensation” means remuneration as defined in RCW 50.04.320.

(2) “Usual” includes amounts actually paid to you by your employer or, if payment has not yet been made, the compensation agreed upon by you and your employer as part of your hiring agreement.

(3) To constitute good cause for quitting work under this section, employer action must have caused the reduction in your usual compensation.

WAC 192-150-115(1)–(3).

Here, Lenca and his employer agreed to a commission-based system of compensation in which an initial guaranteed payment would be stepped down. Comm'r Rec. at 23, 50 (FF 3). Therefore, Lenca cannot establish good cause because any reduction in pay that he experienced

resulted from the terms of employment to which he had agreed at the time of his hire.

When Lenca began working for Schwan, he signed a new employee form. The top of the form includes the clear title: “*Commission Employee . . . New Employee Form.*” Comm’r Rec. at 43. (emphasis added). Lenca admits signing the form on the day he was hired:

**ALJ:** Okay. But is that your signature on Exhibit 1?

**Lenca:** Yes, it is.

**ALJ:** Okay, so when did you sign it?

**Lenca:** I signed it on April 10th.

**ALJ:** Of what year?

**Lenca:** Of 2006.

Comm’r Rec. at 10–11. Lenca was on notice that the compensation method agreed upon by him and his employer as part of his hiring agreement was commission based. *See* WAC 192-150-115(2). Lenca quit when his remuneration went to commission based on the compensation agreement formed at the time of his hire:

**ALJ:** Tell me why you quit your job.

**Lenca:** Because the income was drastically reduced when it went from guaranteed to a commission.

**ALJ:** So your income, income was reduced?

**Lenca:** Yes.

**ALJ:** From what to what?

**Lenca:** Well it varied. When I went to the commission it varied.

Comm'r Rec. at 15–16. Lenca thus admits that he quit because his pay was reduced when his compensation became more heavily based on commission. Because Lenca had agreed at the time of hire to the shift to commission-based payment, and thus the possibility of an accompanying reduction in pay, he cannot now claim that the employer reduced his pay. Rather, the reduction was a risk he assumed under the terms of the compensation upon which he and his employer agreed at the time of hire. *See* WAC 192-150-115(2). Additionally, employer action did not cause the reduction in pay. *See* WAC 192-150-115(3). Therefore, the Commissioner did not err in holding that Lenca did not establish good cause under RCW 50.20.050(2)(b)(v).

**D. Lenca's Post-Hearing Pay Stub Argument Was Properly Excluded By The Commissioner Under RCW 50.32.080**

The Commissioner correctly exercised his discretion in considering the pay stubs as argument rather than adding them to the record. The Department provided Lenca with notice that he could present evidence prior to or at his administrative hearing:

Submission of Additional Documents: After you receive the Notice of Hearing and proposed exhibits from OAH, if you have documents you wish to have considered in the hearing, send copies of those documents to the OAH office listed on the Notice of Hearing and to all other parties and representatives listed on the Notice of Hearing . . . .

Comm'r Rec. at 39. Despite this notice, Lenca did not provide any records to support his position at the time of his initial hearing. Comm'r Rec. at 2, 9, 35–48. Lenca provided neither the pay stubs nor his two week notice that he purportedly sent to his employer. *Id.* The employer, on the other hand, did provide evidence to support its contentions. Comm'r Rec. at 43–46.

The record shows that while Lenca's pay was subject to change, the changes did not result in a twenty-five percent decrease, and they had not taken effect to total any decrease in income at the time he quit his job. Comm'r Rec. at 52–53 (CL 5). As such, the Commissioner correctly concluded that Lenca was disqualified from receiving benefits because he voluntarily quit without good cause.

**E. Lenca's Hearing Met Procedural Requirements Under RCW 50.32.040, Despite His Decision To Leave Prior To Its Completion**

Lenca's hearing met all statutory procedural requirements. *See* RCW 50.32.040. He had been given ample notice of the hearing. The notice was issued November 1 scheduling the telephone hearing for November 16. The notice instructed the parties to call in ten minutes before the hearing time to provide a telephone number where they may be called by the ALJ. Although Lenca had ample opportunity to request a continuance before the date of the hearing, he did not avail himself of it.

Instead he waited for the scheduled hearing and then explained he had a scheduling conflict. Comm'r Rec. at 7.

Because Lenca was given notice of the hearing consistent with the statutory requirement, and he did not communicate with OAH or Schwan about his unavailability until immediately before the hearing was convened, the ALJ did not abuse her discretion in allowing the hearing to proceed in Lenca's absence.

Lenca contends the Commissioner's Decision should be reversed because it misinterpreted and misapplied RCW 50.32.040. Appellant's Br. 11-15. Lenca's argument in support of that contention is without merit. Due process requires "timely and adequate notice detailing the reasons for a proposed termination, and an effective *opportunity* to defend." *Goldberg v. Kelly*, 397 U.S. 254, 268, 90 S. Ct. 1011 (1970) (emphasis added). Lenca confuses an opportunity to respond with availing one's self of that opportunity once granted.

Lenca asserts the Department failed to follow the agency's own past decision, *In re Noble*. Appellant's Br. at 15. However, that case involved a claimant's *request* to the administrative law judge for the text of a statute so that the claimant could "make a knowledgeable presentation of his case." *In re Noble*, Empl. Sec. Comm'r Dec.2d 412 (1978). The

administrative law judge had access to the resource requested by Noble's counsel, and it would have been reasonable to have provided it.

The request made by the claimant in *Noble* is distinguishable from Lenca's situation. Lenca did not request a continuance, but merely announced at the beginning of the hearing he had a job interview that had been scheduled prior to receiving the notice of the hearing. Lenca did not explain why he did not ask for a continuance prior to the time of the hearing.

Lenca contends he did not receive a fair hearing "for reasons within the control of the OAH." Appellant's Br. at 9. Lenca argues that because the ALJ did not sua sponte grant him a continuance when he announced his scheduling conflict, he did not receive a fair hearing. Lenca presents no authority for the proposition that it is the ALJ's obligation to grant a continuance, at the risk of denying a fair hearing, any time a pro se party appears for a hearing and announces he has a preexisting scheduling conflict.

Lenca knew of the conflict and could have previously informed OAH and Schwan of the conflict and sought a continuance prior to the time set for the hearing. He chose to leave his hearing early, a hearing in which he had the burden to prove that he voluntarily quit for good cause. Comm'r Rec. at 7, 20; *Townsend*, 54 Wn.2d 532. Lenca's judgment and

his decision not to timely seek a continuance of the hearing because he had a prearranged job interview are factors that are outside of OAH's control:

**Lenca:** . . . my interview starts in about 20 minutes, so I didn't know if that was going to be an issue or --

**ALJ:** Okay, well, we'll proceed as quickly as possible. And then *when you're ready to go I'll let you make that decision; okay?*

**Lenca:** *All right, thank you.*

Comm'r Rec. at 7 (emphasis added).

Lenca made an informed decision to leave his hearing early. When he chose to leave, the implications of that choice were made clear:

**Lenca:** Your Honor, I have to go, I have my interview coming up here. So what should I do from here?

**ALJ:** Well, Mr. Lenca, the hearing will continue. *You will miss out on an opportunity to ask Parlee questions. Are you comfortable with that?*

**Lenca:** Can I respond in writing or via e-mail?

**ALJ:** Uh, no, because you won't have the opportunity to hear what Parlee is stating.

**Lenca:** Okay. So I'd have to appeal if I disagree.

**ALJ:** Correct.

**Lenca:** *All right, that's fine, then. Thank you for your time.*

Comm'r Rec. at 20 (emphasis added). Because Lenca chose to leave his hearing early knowing the consequences of his decision, going forward with the proceedings was not improper.

Lenca asserts it was incumbent upon the ALJ to continue his hearing, citing WAC 192-04-120. That regulation gives an administrative law judge the “*discretion* [to] grant a continuance of a hearing at any time at the request of any interested party or on his or her own motion.” WAC 192-04-120 (emphasis added). However, when reviewing matters within agency discretion:

the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.

RCW 34.05.574(1).

The Commissioner determined that the ALJ’s exercise of discretion here was reasonable because Lenca chose to leave the hearing before the employer had offered his evidence. The ALJ gave Lenca the opportunity to object to the hearing continuing in his absence; he did not. The ALJ asked Lenca if he was comfortable with the hearing continuing knowing that: he would be unable to ask Parlee questions, he would be unable to respond in writing, and he would have to appeal if he disagreed. Comm’r Rec. at 20. Lenca agreed to the hearing continuing by replying “[a]ll right, that’s fine.” Comm’r Rec. at 20. The Commissioner also reasoned that since Lenca had made arrangements for a job interview before receiving the notice of the hearing, he should have requested to

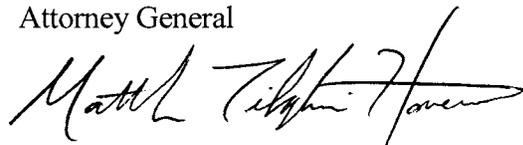
postpone the hearing prior to the day of the hearing. Comm'r Rec. at 68. Moreover, Lenca was provided with an opportunity to present his case, and he did not fully avail himself of it. Comm'r Rec. at 7, 20, 33. It was Lenca's choice not to fully participate in his hearing by leaving early. Comm'r Rec. at 7. Because the ALJ's exercise of discretion here was reasonable, the Court should uphold the Commissioner's decision.

#### V. CONCLUSION

The Commissioner determined that Lenca voluntarily quit his employment without good cause under the relevant statute and therefore was not eligible to receive unemployment benefits. Substantial evidence supports this decision and it contains no errors of law. Therefore, the Department respectfully asks that this Court affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of February, 2008.

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

DWAYNE LENCA,

Petitioner,

vs.

STATE OF WASHINGTON  
EMPLOYMENT SECURITY  
DEPARTMENT,

Respondent.

DECLARATION OF  
SERVICE BY  
MAILING

FILED  
COURT OF APPEALS  
DIVISION II  
08 FEB 27 PM 1:56  
STATE OF WASHINGTON  
BY [Signature]

I, SHIRLEY LINDBERG, declare as follows:

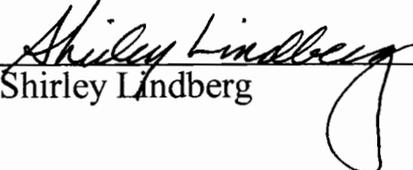
1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 26th day of February, 2008, I caused to be served by mailing a true and correct copy of Respondent's Brief, with proper postage affixed thereto to:

MARCUS LAMPSON  
UNEMPLOYMENT LAW PROJECT  
1904 THIRD AVE., SUITE 604  
SEATTLE, WA 98101

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

Dated this 26th day of February, 2008, in Seattle,  
Washington.

  
\_\_\_\_\_  
Shirley Lindberg