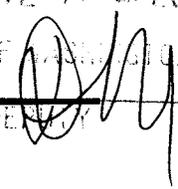


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COURT OF APPEALS  
DIVISION II

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

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DAVID N. SMITH,

Petitioner,

v.

EMPLOYMENT SECURITY DEPARTMENT  
OF THE STATE OF WASHINGTON,

Respondent.

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**RESPONDENT'S BRIEF**

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## **I. INTRODUCTION**

The Petitioner, David N. Smith, seeks judicial review of a decision of the Commissioner of the Employment Security Department denying his application for unemployment benefits due to misconduct. While working for Kitsap County as the senior program manager in the Public Works Department, Mr. Smith recorded conversations with co-workers, subordinates, supervisors, and members of the general public without their knowledge or consent in violation of the employer's policy and practice and Washington State law. Further, Mr. Smith removed an unauthorized software file from a county-owned laptop computer after being expressly instructed not to remove anything from the computer. Mr. Smith was then discharged from his employment with Kitsap County. The Commissioner's decision concluding that Mr. Smith's behavior amounted to misconduct is supported by substantial evidence and there is no error of law. Consequently, the Department asks that its decision be affirmed.

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

Was Mr. Smith properly denied unemployment benefits due to disqualifying work-related misconduct where, while working for Kitsap County, he recorded conversations with co-workers, subordinates, supervisors, and members of the general public without their knowledge or

consent in violation of the employer's policy and practice and Washington State law?

### III. COUNTERSTATEMENT OF THE CASE<sup>1</sup>

#### A. Substantive Facts

Mr. Smith worked for Kitsap County in the capacity of Senior Program Manager in the Public Works Department. Comm'r Rec. at 126; 331, 356 (FOF 1).<sup>2</sup> While serving in that capacity, Mr. Smith admits that he indiscriminately recorded conversations that he had with co-workers and members of the public without first informing them that the conversations were being recorded and without obtaining their consent. Comm'r Rec. at 131-32, 135-39, 153-57, 161-63, 331, 356 (FOF Sup.). Mr. Smith began recording various conversations sometime after October of 2001, and continued this practice for nearly three years, creating his final recording on November 7, 2004. Comm'r Rec. at 137-138, 331 (FOF 6).

Mr. Smith contends the reason behind his recording activity was to protect himself against "retaliatory harassment by his superiors." Brief of Appellant's (Br. Appellant) at 8; Comm'r Rec. at 332 (FOF 12).

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<sup>1</sup> A copy of the Initial Order issued by the Administrative Law Judge is attached in App. A. A copy of the Commissioner's decision is attached in App. B.

<sup>2</sup> A "FOF" followed by a number in parentheses (FOF \_\_ ) represents the specific Findings of Fact made by the Administrative Law Judge in Comm'r Rec. at 330-338, and adopted by the Commissioner. An "FOF Sup." In parentheses represents augmented findings of the Commissioner in Comm'r Rec. at 356-359.

Mr. Smith makes allegations of misbehavior regarding many of his co-workers, however it appears his primary concern was Ron Yingling, a former supervisor who retired in October of 2001. Br. Appellant at 8; Comm'r Rec. at 137, 157-175, 332 (FOF 12). According to Mr. Smith, Mr. Yingling threatened him on numerous occasions, and because Mr. Yingling had a familial relationship with other supervisors employed by Kitsap County, as well as ties to the local community, Mr. Smith was concerned. Comm'r Rec. at 132-174, 332 (FOF 12).

By Mr. Smith's own admission, the recording device he used was not sophisticated, and it did not allow for easy activation without detection, therefore, he simply left the device recording in his pocket throughout the day. Comm'r Rec. at 144, 332 (FOF 7). This routine made it impossible to target any specific conversation for recording, such as only those occurring between Mr. Smith and Mr. Yingling, and instead resulted in the recording of random conversations involving various participants. Comm'r Rec. at 144, 332 (FOF 7). Furthermore, the recordings were not limited to those conversations that took place in Mr. Smith's office, as many of the recorded conversations occurred inside county-owned vehicles, local businesses, and the private homes of Kitsap County residents. Comm'r Rec. at 144, 159-163. Again, the private citizens had no knowledge whatsoever that Mr. Smith, a representative of

the government, was recording a conversation within their own home. Comm'r Rec. at 162, 356-357 (FOF Sup.).

After a conversation had been recorded, Mr. Smith would sometimes take his recording device home and download the recording onto his county-owned laptop computer. Comm'r Rec. at 144, 163-164, 331 (FOF 5). Mr. Smith had a method of cataloguing the recorded conversations on his computer with a numbering system of files and sub-files. Comm'r Rec. at 168, 331 (FOF 5). The program that allowed for the downloading and storage of recorded conversations belonged to Mr. Smith himself, who installed the program onto the county-owned computer. Comm'r Rec. at 163-167, 331 (FOF 5). In his testimony, Mr. Smith acknowledged that he was aware of the county policy prohibiting the installation of personal software onto county computers; however he elected to install the software anyway. Comm'r Rec. at 166-167.

Due to an ongoing investigation pertaining to the county's involvement in a lawsuit, Randy Casteel, Director of Public Works for Kitsap County, asked Mr. Smith to relinquish his county-owned computer, specifically instructing Mr. Smith not to remove anything from the computer. Comm'r Rec. at 34, 357 (FOF Sup.). Mr. Smith informed Mr. Casteel that his computer was at home, and he would have to retrieve

it. Comm'r Rec. at 34. By Mr. Smith's own admission, he removed the recording software that evening despite instructions to the contrary, did not tell anyone about removing the software, and then surrendered the computer the following day. Comm'r Rec. at 148-149, 357 (FOF Sup.).

Kitsap County terminated Mr. Smith's employment after it learned that in the course of his employment, Mr. Smith "used a digital recorder to record conversations with co-workers, subordinates, supervisors, and members of the general public without their knowledge or consent in violation of the employer's policy and practice and Washington State law." Comm'r Rec. at 137-138, 141-145, 151-163, 208, 214-215, 331, 356 (FOF 2). Further, the employer fired Mr. Smith because he acted insubordinately when he removed an unauthorized software file from a county-owned laptop computer after being expressly instructed to not remove anything from the computer. Comm'r Rec. at 163-69, 208, 214-215, 331, 357 (FOF 2).

**B. Procedural Facts**

After his discharge, Mr. Smith applied for unemployment benefits. Comm'r Rec. at 209. The Department initially allowed benefits, finding that Mr. Smith had not been discharged for disqualifying misconduct. Comm'r Rec. at 201-205. The employer, Kitsap County, requested a hearing to contest the Department's determination. A hearing was held,

and the administrative law judge (ALJ) affirmed the award of benefits. Comm'r Rec. at 206, 330-337. The employer filed a petition for review with the Commissioner of the Department. The Commissioner adopted some of the ALJ's findings of fact, found additional findings, and rejected the ALJ's decision, ruling instead that Mr. Smith engaged in disqualifying misconduct. Comm'r Rec. at 343-439, 350-359.

Mr. Smith appealed the Commissioner's decision to Kitsap County Superior Court. After reviewing the administrative record, the briefing of the parties, and hearing argument, the Superior Court ruled that the Commissioner's findings were supported by substantial evidence and the conclusions correctly applied the law; the Superior Court affirmed the Commissioner's decision. CP at 59-63, 68-70.

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

Judicial review of Employment Security Department benefits decisions are governed by the Administrative Procedures Act (APA), 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). Generally, "[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). In this case, although Mr. Smith initially assigned error to Finding of Fact IV, he later states that he no longer contests this finding. Br. Appellant at 1, 11-12. In withdrawing his single assignment of error to a finding of fact, he has failed to specifically challenge any of the findings of fact. Rule 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). However, although Mr. Smith does not expressly challenge any other findings in his assignments of error, the argument section of his brief contains challenges to the Commissioner’s additional Findings of Fact II, III, and IV. Br. Appellant at 12, 16, 17. Accordingly, this court may exercise discretion and consider his arguments, notwithstanding his noncompliance with RAP 10.3(g). If it does, the Commissioner’s findings are supported by substantial evidence.

Judicial review of the findings of fact is limited to the agency record. RCW 34.05.558. The reviewing court does not re-weigh evidence and 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 inferences." *William Dickson Co. v. Puget Sound Air Pollution*, 81 Wn. App. 403, 411, 914 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*, 122 Wn.2d at 403. 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).

Whether an employee's behavior constituted "misconduct" is a mixed question of law and fact. *Tapper*, 122 Wn.2d at 402. When the

issue involves a mixed question of law and fact, the reviewing court must: (1) apply the substantial evidence standard to establish the relevant facts; (2) make a de novo determination of the correct law; and (3) apply the law to the facts. *Id.* at 403.

## V. ARGUMENT

Mr. Smith's actions constitute misconduct under the Employment Security Act (Act). The Commissioner correctly concluded that Mr. Smith's actions displayed carelessness or negligence of such a degree or recurrence to show an intentional disregard of the employer's interest, and/or dishonesty in the form of deliberate deception related to his employment. Additionally, the facts found support a conclusion that Mr. Smith engaged in misconduct because his actions amount to a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employees. The facts also demonstrate deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee, again leading to the conclusion that Mr. Smith's actions constitute misconduct. This misconduct, if known to the general public, could adversely impact the county's interest in serving its constituents, as well as expose the county to litigation and liability. The actions thus meet the definition of misconduct in RCW 50.20.066. Accordingly, the Commissioner correctly ruled that Mr. Smith is disqualified from receiving unemployment benefits.

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

The 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. 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 Act. The presence or absence of misconduct by the employee is thus a determining factor in whether a worker who has been discharged will be granted benefits under the Act.

**B. Statement Of The Law On Disqualifying Misconduct As Modified By The 2003 Legislature**

A claimant may not receive unemployment benefits if he was terminated from his job due to misconduct.<sup>3</sup> RCW 50.20.066. “Misconduct” includes, *but is not limited to*, the following conduct by a claimant:

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<sup>3</sup> RCW 50.20.066 disqualifies claimants who cause their own unemployment by committing misconduct, furthering the legislative intent to preserve state resources for workers who are “unemployed through no fault of their own.” RCW 50.01.010; *see, Pacquing v. Dep’t of Employment Sec.*, 41 Wn. App. 866, 868, 707 P.2d 150 (1985); *Tapper*, 122 Wn.2d at 409.

- (a) *Willful*<sup>4</sup> or *wanton*<sup>5</sup> disregard of the rights, title, and interests of the employer or a fellow employee;
- (b) *Deliberate violations* or *disregard* of standards of behavior which the employer has the right to expect of an employee;
- (d) *Carelessness or negligence* of such a degree or recurrence to show an intentional or substantial disregard of the employer's interest.

RCW 50.04.294(1) (emphasis added).

Thus, "willful" behavior is not the only thing that will constitute misconduct under the statute; "wanton," "careless," and "negligent" action can also constitute misconduct under the law.

In enacting RCW 50.04.294 in 2003, the Legislature provided the courts and the Department with several examples of action that would constitute disqualifying misconduct because they show a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee:

(a) *Insubordination showing a deliberate, willful, or purposeful refusal* to follow the reasonable directions or instructions of the employer;

...

(c) *Dishonesty* related to employment, including but not limited to deliberate falsification of company records, theft, *deliberate deception*, or lying

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<sup>4</sup> "Willful" means intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer or a co-worker." WAC 192-150-205(1). This definition incorporates the *Hamel* three-prong test for "willful disregard of an employer's interest."

<sup>5</sup> "Wanton" means malicious behavior showing extreme indifference to a risk, injury, or harm to another that is known or should have been known to you. It includes a failure to act when there is a duty to do so, knowing that injury could result." WAC 192-150-205(2).

...

(e) *Deliberate acts that are illegal, provoke violence or violation of laws, or violate the collective bargaining agreement. However, an employee who engages in lawful union activity may not be disqualified due to misconduct;*

(f) *Violation of a company rule if the rule is reasonable<sup>6</sup> and if the claimant knew or should have known<sup>7</sup> of the existence of the rule; or*

...

RCW 50.04.294(2) (emphasis added).

The Legislature also provided that the following behaviors do not constitute misconduct:

(a) Inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity;

(b) Inadvertence or ordinary negligence in isolated instances<sup>8</sup>; or

(c) Good faith errors in judgment or discretion.

RCW 50.04.294(3). Several cases interpreting the prior statute, consistent with section 294, provide examples of errors in judgment that are not disqualifying misconduct. *See generally, Albertson's, Inc. v. Employment Sec. Dep't*, 102 Wn. App. 29, 15 P.3d 153 (2000) (store employee who

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<sup>6</sup> "A company rule is reasonable if it is related to your job duties, is a normal business requirement or practice for your occupation or industry, or is required by law or regulation." WAC 192-150-210 (4).

<sup>7</sup> "The department will find that you knew or should have known about a company rule if you were provided an employee orientation on company rules, you were provided a copy or summary of the rule in writing, or the rule is posted in an area that is normally frequented by you and your co-workers, and the rule is conveyed or posted in a language that can be understood by you." WAC 192-150-210 (5).

<sup>8</sup> "'Inadvertence or ordinary negligence in isolated instances' means that your action is an accident or mistake and is not likely to result in serious bodily injury." WAC 192-150-200 (3)(b).

purchased outdated discounted meat not guilty of misconduct, especially when this activity was previously authorized by the employer); *Gibson v. Employment Sec. Dep't*, 52 Wn. App. 211 (1988) (honoring a picket line was a single act of negligence or poor judgment and did not constitute misconduct). On the other hand, the reference to “isolated instances” in RCW 50.04.294(3) provides further support that cases involving *recurrent* or *repeat* instances of negligence would constitute misconduct under the new statute, contrary to the holding in the following cases: *Wilson*, 87 Wn. App. at 197 and *Darneille v. Employment Sec. Dep't*, 49 Wn. App. 575, 744 P.2d 1091 (1987).

RCW 50.04.294 reflects prior case law as it impliedly contains a harm or “potential for harm” requirement. All of the examples of misconduct provided in RCW 50.04.294 are things that would cause actual or potential harm to an employer. For example, insubordination, tardiness, and absences harm an employer’s interest in maintaining a productive work force. Dishonesty and illegal activity could subject the employer to civil and criminal liability. Carelessness or negligence to a certain degree could harm the employer’s economic interest. Similarly, carelessness or negligence which is likely to cause serious bodily harm to the employer or other employees harms the employer’s interest in a productive work force

and also subjects the employer to liability. As WAC 192-150-200(2)<sup>9</sup> provides:

The action or behavior must result in harm or *create the potential for harm* to your employer's interests. This harm may be tangible, such as damage to equipment or property, or intangible, such as damage to your employer's reputation or a negative impact on staff morale.

Based on the provisions of statute and regulation defining misconduct, the Commissioner properly concluded that Mr. Smith engaged in misconduct when he recorded numerous conversations with others without their knowledge or permission and violated his employer's reasonable directive to delete nothing from his employer-owned laptop before returning it to the employer.

**C. Substantial Evidence Supports The Commissioner's Findings Of Fact**

As indicated above, although Mr. Smith does not expressly challenge any other findings in his assignments of error, the argument section of his brief contains challenges to the Commissioner's additional Findings of Fact II, III, and IV. Br. Appellant at 12, 16, 17. Regardless, the findings are supported by substantial evidence. The Commissioner found that Mr. Smith, in connection with his employment, knowingly

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<sup>9</sup> This is based on the long-standing policy that it is unfair to require an employer to compensate employees who engage in conduct harmful to the employer's interests. *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 858 P.2d (1993).

recorded his conversations with co-workers and private citizens dealing with his government employer. Comm'r Rec. at 356 (FOF Sup.). At no time did he advise or give notice to said individuals that their conversations with him were being recorded. Comm'r Rec. at 356 (FOF Sup.). In the process of recording these conversations, Mr. Smith, at all times, concealed the recording device in his shirt pocket. Comm'r Rec. at 356 (FOF Sup.). The evidence supporting this finding includes Mr. Smith's own admission of such activities. Comm'r Rec. at 137-138, 161-162. The secretly recorded conversations were work-related and occurred in county offices, county-owned vehicles, local businesses, and in the private homes of Kitsap county residents. Comm'r Rec. at 144, 159-163.

**D. Mr. Smith Is Disqualified Under RCW 50.20.066 From Receiving Unemployment Benefits Because He Was Terminated From Employment Due To Disqualifying Misconduct**

A worker terminated from employment for reasons of misconduct is disqualified from receiving unemployment benefits. RCW 50.20.066. Misconduct includes the willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee. RCW 50.04.294(1)(a). As this subsection is further defined in RCW 50.04.294(2), it becomes evident that Mr. Smith's actions amounted

to misconduct when he indiscriminately recorded conversations that he had with co-workers and members of the public without first informing them that the conversations were being recorded and without obtaining their consent. Additionally, Mr. Smith's actions qualify as misconduct under RCW 50.04.294(1)(b), because it was not unreasonable for Kitsap County to expect that Mr. Smith would abide by the laws of the State and refrain from engaging in the surreptitious recording of fellow employees and the general public. Lastly, as the Commissioner properly concluded, Mr. Smith's actions displayed carelessness or negligence of such a degree or recurrence to show an intentional or substantial disregard of the employer's interest. If the general public of Kitsap County were made aware of Mr. Smith's actions, it would adversely impact the county's interest in serving its constituents, expose the county to litigation and liability, and at the very least, erode public trust. Accordingly, misconduct was established.

**1. Mr. Smith's Actions Constitute Misconduct As Defined In RCW 50.04.294(1)(a), And Meet A Number Of The Statutory Examples Which Further Define Misconduct**

Misconduct includes willful or wanton disregard of the rights, title, and interests of the employer or fellow employee. RCW 50.04.294(1)(a). The legislature further defined RCW 50.04.294(1)(a) by providing examples of acts constituting misconduct because the acts signify a willful

or wanton disregard of the rights, title, and interests, of the employer of a fellow employee. RCW 50.04.294(2).

**a. Mr. Smith Showed A Willful Disregard Of The Employer's Interest By Purposefully Refusing To Follow His Supervisor's Reasonable Directive**

Insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer is one example of misconduct. RCW 50.04.294(2)(a). In his testimony, Mr. Smith testified that he installed privately owned software on a county-owned computer which enabled him to playback and listen to the recorded conversations that he surreptitiously obtained. Comm'r Rec. at 163-167. After a conversation had been recorded, Mr. Smith would sometimes take his recording device home and download the recording onto his county-owned laptop computer. Comm'r Rec. at 144, 163-164. Mr. Smith had a method of cataloguing the recorded conversations on his computer with a numbering system of files and sub-files. Comm'r Rec. at 168. Due to an ongoing investigation pertaining to the county's involvement in a lawsuit, Randy Casteel, Director of Public Works for Kitsap County, asked Mr. Smith to relinquish his county-owned computer, specifically instructing Mr. Smith not to remove anything from the computer. Comm'r Rec. at 34. Mr. Smith informed Mr. Casteel that his computer was at home, and he would have to retrieve it. Comm'r Rec. at 34. By

Mr. Smith's own admission, he removed the recording software that evening despite instructions to the contrary, did not tell anyone about removing the software, and then surrendered the computer the following day. Comm'r Rec. at 148-149.

The Commissioner found that Mr. Smith put privately owned software on a county-owned computer which enabled him to playback and listen to the recorded conversations that he surreptitiously obtained. Comm'r Rec. at 331 (FOF 5). Mr. Smith admitted as much in his testimony. Comm'r Rec. at 163-167. Additionally, the Commissioner found that the claimant was directed by the employer's Director of Public Works to return his county-owned laptop computer without deleting any files from that computer. Comm'r Rec. at 357 (FOF Sup.). The claimant returned the computer, but prior to doing so, and in direct violation of his employer's directive, he deleted the program that allowed him to download recorded conversations from his digital recorder. Comm'r Rec. at 357 (FOF Sup.). The evidence supporting the Commissioner's finding is substantial.

These findings are supported by Mr. Smith's own testimony that he removed this software after he received instructions from his superiors to remove no files and return the computer to the county for inspection. Comm'r Rec. at 147-149. "Absent competent evidence which actually,

factually, and substantially preponderates against the findings [of an administrative agency], the findings must stand.” *Fuller v. Employment Sec. Dep’t*, 52 Wn. App. 603, 606-07, 762 P.2d 367, n.1 (1988).

The Commissioner employs these findings to bolster the conclusion that Mr. Smith was clearly aware of the impropriety of his activities. In reference to Mr. Smith’s removal of the program, the Commissioner states, “[s]uch conduct further establishes the claimant’s awareness his above-cited recording of conversations was impermissible and not in the best interest of his employer.” Comm’r Rec. at 357 (FOF Sup.).

However, had the Commissioner been so inclined, he could have relied on this finding as yet another basis to conclude that Mr. Smith’s conduct amounted to misconduct. The Legislature explicitly enumerated acts amounting to misconduct, which include, insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer. RCW 50.04.294(2)(a). In Mr. Smith’s own testimony, he explains that Mr. Casteel asked him to return the computer without deleting any files. Comm’r Rec. at 147. Mr. Smith then goes on to admit that, prior to returning the computer, he did in fact remove the program he had installed. Comm’r Rec. at 149. Mr. Smith did not tell anyone that he had removed the software. Comm’r

Rec. at 149. Mr. Smith's conduct was in direct violation of his employer's directive, and when applied to the law, amounts to the statutory definition of misconduct under RCW 50.04.294(2)(a).

**b. Mr. Smith's Actions Amount To Deliberate Deception And Qualify As Misconduct**

Misconduct also includes dishonesty related to employment, including but not limited to deliberate, falsification of company records, theft, deliberate deception, or lying. RCW 50.04.294(2)(c). Mr. Smith admits that he indiscriminately recorded conversations that he had with co-workers and members of the public without first informing them that the conversations were being recorded and without obtaining their consent. Comm'r Rec. at 131-32, 135-39, 153-57, 161-63, 331, 356 (FOF Sup.). Mr. Smith began recording various conversations sometime after October of 2001, and continued this practice for nearly three years, creating his final recording on November 7, 2004. Comm'r Rec. at 137-138, 331 (FOF 6).

By Mr. Smith's own admission, the recording device he used was not sophisticated, and it did not allow for easy activation without detection, therefore, he simply left the device recording in his pocket throughout the day. Comm'r Rec. at 144, 332 (FOF 7). This routine made it impossible to target any specific conversation for recording, such as

only those occurring between Mr. Smith and Mr. Yingling, and instead resulted in the recording of random conversations involving various participants. Comm'r Rec. at 144, 332 (FOF 7). Furthermore, the recordings were not limited to those conversations that took place in Mr. Smith's office, as many of the recorded conversations occurred inside county-owned vehicles, local businesses, and the private homes of Kitsap County residents. Comm'r Rec. at 144, 159-163. Again, the private citizens had no knowledge whatsoever that Mr. Smith, a representative of the government, was recording a conversation within their own home. Comm'r Rec. at 162, 356-357 (FOF Sup.). There can be no dispute that Mr. Smith's recordings were deliberate, as he engaged in this activity repeatedly over the course of three years. Furthermore, it is without question that these activities were deceptive, not only to Mr. Smith's co-workers, but also members of the general public who had their conversations recorded without consent. Accordingly, Mr. Smith's actions constitute misconduct under RCW 50.04.294(2)(c).

**c. Mr. Smith Willfully Disregarded His Employer's Interest When He Secretly Recorded Private Conversations In Violation Of State Law**

Deliberate acts that are illegal, provoke violence or violation of laws, or violate the collective bargaining agreement will constitute misconduct. RCW 50.04.294(2)(e). Washington's Privacy Act makes it

illegal to record a private conversation without first obtaining the consent of all persons in the conversation. RCW 9.73.030 provides:

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any: . . .

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

. . .

(3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

Under RCW 9.73.030, the protections of the Privacy Act apply only to private communications or conversations. *State v. Clark*, 129 Wn.2d 211, 224, 916 P.2d 384 (1996), citing *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 189, 829 P.2d 1061 (1992). Generally, the question of whether a particular communication is private is a question of fact, but may be decided as a question of law where the facts are undisputed. *State v. Christensen*, 153 Wn.2d 186, 192-193, 102 P.3d 789 (2004), citing *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002) (citing *State v. Clark*, 129 Wn.2d at 225).

The term "private" is not defined in RCW 9.73. Washington Appellate courts have addressed that term by analyzing, under the circumstances of a particular case, whether a given conversation of communication was private. The *Clark* court adopted the test set forth in *Kadoranian*, 119 Wn.2d at 189. The Washington State Supreme Court determined the "intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case" controls whether a conversation is private. *Clark*, 129 Wn.2d at 211, 224, quoting *Kadoranian*, 119 Wn.2d at 190, (also quoting from *State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1978), review denied, 92 Wn.2d 1006 (1979)). The term "private" is to be given its ordinary and usual meaning: "belonging to one's self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message; a private communication ... secretly; not open or in public." *State v. Clark*, 129 Wn.2d at 224-25. "To record a conversation behind a closed door usually would entail prying or intrusion into a person's home, workplace, automobile or other private zone." *State v. Clark*, 129 Wn.2d at 211.

Mr. Smith cannot avoid the conclusion that he recorded private conversations by stating he was at work. The Courts have recognized that

within the employment context, employees may have a reasonable expectation of privacy in their place of work.

The U.S. Supreme Court rejected the contention that public employees can never have a reasonable expectation of privacy in their place of work. As with the expectation of privacy in one's home, such an expectation in one's place of work is 'based upon societal expectations that have deep roots in the history of the [Constitution].

*O'Connor v. Ortega*, 480 U.S. 709, 716-18, 107 S.Ct 1492, 94 L.Ed.2d 714 (1987), quoting *Oliver v. United States*, 466 U.S. 170, 178, n.8, 104 S.Ct 1735, 80 L.Ed.2d 214 (1984).

A particularly relevant case of workplace privacy is *U.S. v. McIntyre*, 582 F.2d 1221 (9th Cir. 1978). In that case, a city's chief of police and a lieutenant approved of a plan to "bug" the assistant chief by placing a microphone and transmitter in a briefcase in the assistant chief's office. At the chief's direction, two police officers monitored the assistant chief's conversations. At no time did any of the participants seek a court order or the assistant chief's consent for the surveillance. *McIntyre*, 582 F.2d at 1223. The chief of police and lieutenant were convicted of violating and conspiring to violate Title II of the Omnibus Crime Control and Safe Streets Act of 1968, which prohibits, *inter alia*, the electronic interception of an oral communication made under circumstances justifying an expectation the communication would not be intercepted.

One of the issues on appeal there was whether the assistant chief had a reasonable expectation of privacy. *Id.* Guided by the U.S. Supreme Court's decision in *Katz v. U.S.*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed2d (1967), the Ninth Circuit's inquiry concerned whether the communications overheard by the two officers acting at the chief's direction were uttered by a person (1) who has a subjective expectation of privacy, and (2) whose expectation was objectively reasonable. *McIntyre*, 582 F.2d at 1223, citing *U.S. v. Freie*, 545 F.2d 1217 (9th Cir. 1976). The Ninth Circuit held that "there is no question that [the assistant chief] had a subjective expectation of privacy. At trial the [assistant chief] testified that he believed that normal conversations in his office could not be overheard, even when the doors to his office were open." The court went on to state that "a police officer is not, by virtue of his profession, deprived of the protection of the [Constitution]. This protection extends to warrantless eavesdropping to overhear conversation from an official's desk and office." *McIntyre*, 582 F.2d at 1224, citing *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct 616, 17 L. Ed. 2d 562 (1967), and *Berger v. New York*, 388 U.S. 41, 87 S.Ct 1873, 18 L. Ed.2d 1040 (1967); see also *Walker v. Darby*, 911 F.2d 1573 (11th Cir. 1990) (Three postal supervisors, pursuing a personal vendetta against a postal worker, electronically intercepted the

worker's conversations at his workstation, transmitting them to one of their offices).

The Commissioner determined that the secret recordings Mr. Smith deliberately made of his conversations with co-workers, superiors, and the public constituted disqualifying misconduct pursuant to RCW 50.20.066(1). Comm'r Rec. at 356-359. State law clearly prohibits the secret recording of private conversations that occur in the workplace and in private homes. Criminal and civil penalties attach to any violation of RCW 9.73. Mr. Smith's conduct not only exposed himself to criminal sanctions, his knowing and deliberate acts exposed the County to civil liability. The undisputed evidence contained in the record revealed that Mr. Smith deliberately deceived those with whom he conversed because he did not tell his co-workers, superiors, or the private citizens with whom he met in their homes, that he was recording their conversation; nor did Mr. Smith ever ask the permission of the people with whom he conferred for permission to record. Comm'r Rec. at 137-163. Based upon the

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administrative record, the Commissioner correctly found that Mr. Smith committed disqualifying misconduct.

**d. Mr. Smith Was Aware That He Violated A Reasonable Rule Of His Employer When He Surreptitiously Recorded Conversation Of Fellow Employees Without Their Consent**

Another act constituting misconduct includes violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule. RCW 50.04.294(2)(f). Mr. Smith asserts that the county's only witness failed to provide a specific policy against the recording of private conversations. Br. Appellant at 13. However, while Mr. Casteel could not find a written policy in this regard, he did recall the topic had been discussed at a training session. Comm'r Rec. at 33. Mr. Casteel referenced that training, specifically describing a role playing scenario in which the instructors made clear that it was against the law to record a conversation without the consent of the person who was being recorded. Comm'r Rec. at 33. When questioned whether Mr. Smith had attended such training, Mr. Casteel replied, "[h]e attended one that I'm aware of, yes." Comm'r Rec. at 33.

Furthermore, it is irrelevant whether the County has an explicit policy relating to the recording of conversations. The county does not

need a policy stating that it is a requirement to comply with State law. All citizens are expected to know and comply with State law. In fact, per the discussion above, simply engaging in deliberate acts that are illegal constitutes misconduct. To require an employer to create an individual policy which explicitly addresses all illegal acts would not only be unduly burdensome, but also duplicative in light of this statute.

Compliance with State law is a reasonable rule, and Mr. Smith violated this rule when he surreptitiously recorded conversations without the consent of the participants. The fact that Mr. Smith concealed his recording device is further proof of his awareness that his actions were impermissible and in violation of a rule of his employer.

**2. Mr. Smith's Actions Show A Deliberate Violation Or Disregard Of Standards Of Behavior Which His Employer Had The Right To Expect**

Deliberate violations or disregard of standards of behavior that the employer has the right to expect of an employee also constitutes misconduct. RCW 50.04.294(1)(b). It is not unreasonable for an employer to expect that an employee will behave in accordance with State law. Specifically, it is not unreasonable for an employer to expect that an employee will not engage in the surreptitious recording of fellow employees and the general public. By Mr. Smith's own admission, these recordings were made deliberately. Comm'r Rec. at 137-138.

Additionally, Kitsap County, as an employer, has a right to expect that when a supervisor makes a reasonable request of an employee, that employee will comply with such a request. In Mr. Smith's case, he was asked to return his county-owned computer without removing anything. In direct violation of this request, Mr. Smith removed a program prior to returning the computer. Comm'r Rec. at 147-149.

Mr. Smith's recording activities, in conjunction with his insubordinate behavior regarding the return of the computer, amount to deliberate violations or disregard of standards of behavior which Kitsap County has the right to expect of an employee. Under RCW 50.04.294(1)(b), this constitutes misconduct.

**3. Mr. Smith's Actions Demonstrate Carelessness Or Negligence Of Such A Degree Or Recurrence To Show A Disregard Of The Employer's Interest**

Carelessness or negligence of such a degree or recurrence to show an intentional or substantial disregard of the employer's interest constitutes misconduct. RCW 50.04.294(1)(d). In Mr. Smith's case, the Commissioner not only concluded that Mr. Smith's acts constituted disqualifying misconduct, but also noted that his actions could be construed as an unlawful interception of private communications pursuant to the provisions of RCW 9.73.030. Comm'r Rec. at 357 (FOF Sup.). Furthermore, "such conduct, if known by the general public of Kitsap

County, could certainly impact a citizen's willingness to discuss issues with a county employee, thereby adversely impacting the county's interest in serving its constituents, as well as exposing the county to litigation and liability. The Claimant's conduct herein is, therefore, either carelessness or negligence of such a degree as to show an intentional disregard of the employer's interest, and/or dishonesty, in the form of deliberate deception, related to his employment." Comm'r Rec. at 357. RCW 50.04.294(1)(d); RCW 50.04.294(2)(c). The Commissioner's application of the law is correct.

**4. The Only Issue To Be Determined In This Appeal Is Mr. Smith's Eligibility For Benefits**

Mr. Smith seemingly argues that his surreptitious recording of private conversations was not only justified, but also necessary because of his perceived retaliatory threats. Br. Appellant at 14-15.

"Due to the retaliatory harassment by his superiors, Smith started recording conversations with his supervisors and coworkers from 2001 through 2004. This was necessary..."

Br. Appellant at 8. Mr. Smith's supposed fear of retaliation, whether credible or not, neither excuses his misconduct, nor invalidates the denial of benefits.

Mr. Smith also contends that the Commissioner's Findings and Conclusions were erroneous because the Commissioner failed to address

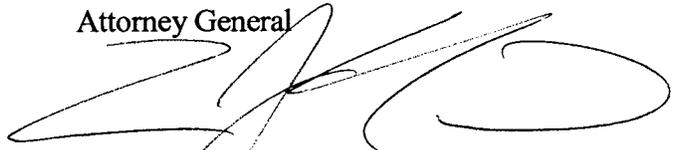
Mr. Smith's claim that the discharge was pre-textual and that he was terminated in retaliation for engaging in protected activities. Br. Appellant at 25. First of all, Mr. Smith's activities were not protected, but more importantly, those issues are irrelevant in this proceeding. Mr. Smith's argument is misplaced. The only issue to be determined in this appeal is the eligibility for benefits. As argued above, his actions constitute misconduct. The Commissioner's ruling was proper.

#### VI. CONCLUSION

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

RESPECTFULLY SUBMITTED this 12 day of January, 2009.

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# APPENDIX A

STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE EMPLOYMENT SECURITY DEPARTMENT

IN THE MATTER OF:

David N. Smith

Claimant

DOCKET NO: 02-2006-10754

INITIAL ORDER

SSA:

BYE: 04/14/2007

UIO: 770

**Hearing:** This matter came before Administrative Law Judge Jon M. Loreen on September 19, 2006 at Bremerton, Washington after due and proper notice to all interested parties.

**Persons Present (in person):** The claimant David N. Smith; the claimant representative Clayton E. Longacre, attorney; claimant witnesses Dale Wiley, traffic signals and operations supervisor, Charles Shank, traffic safety person, Carlee Sutherland, office assistant 1, Elissa Galusha, accounting manager, Bill Zupancic, transportation planner 2, and Scott C Murphy, engineer-concurring; the employer-appellant, Kitsap County, employer representative Martin F. Muench, senior deputy prosecuting attorney; and employer witness Randy Casteel, director of public works.

**STATEMENT OF THE CASE:**

The employer filed an appeal on May 30, 2006 from a Decision of the Employment Security Department dated May 20, 2006. At issue in the appeal is whether the claimant was discharged from employment for a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee as defined in RCW 50.04.294(1)(a), or other misconduct pursuant to RCW 50.20.066, or voluntarily quit without good cause pursuant to RCW 50.20.050. Also at issue is whether the claimant was able to, available for, and actively seeking work during the weeks at issue.

Having fully considered the entire record, the undersigned Administrative Law Judge enters the following Findings of Fact, Conclusions of Law and Initial Order:

INITIAL ORDER - 1

## **FINDINGS OF FACT:**

1. The claimant worked for the interested employer from May 1990 until his separation on April 19, 2006. The employer discharged the claimant. At the time of separation, the claimant was employed as a senior program manager and he was paid approximately \$84,000.00 per year. It was a full-time, non-union position. At the time of separation, the claimant reported to Jon Brand, assistant director of public works. Mr. Brand, in turn, reported to Randy Casteel, director of public works.

2. The employer discharged the claimant based on its conclusion he violated state law by recording conversations with co-workers and members of the public with whom he interacted, without disclosing to them that he was doing so. An additional basis for the employer's decision to discharge the claimant was its conclusion he had disobeyed the employer's instructions by deleting a computer program from an employer-owned computer after being instructed to turn it in without deleting any files. See exhibit 6, page 1.

3. It is the employer's position that the claimant violated state law, RCW 9.73.030, by recording conversations with co-workers including subordinates, peers, and supervisors, and with members of the public with whom he spoke in connection with his work. It is also the employer's position that the claimant deliberately disregarded instructions by deleting a program the claimant had installed on a county-owned laptop.

4. It is the claimant's position that he was unaware that he was in violation of any employer policy or rule and he was unaware that he was in violation of any state law in connection with his recording of conversations with co-workers and members of the public. The claimant's position, with respect to the computer program, was that he was instructed to not delete any files and that he did not delete any files. He only deleted a program which he had obtained and which he had installed on the computer. The program had a one-person user license that he had acquired with the software and he thought that he would be in violation of the software license if he were to leave the software on the computer when he turned it in to the county.

5. The claimant had purchased a digital recorder and software that came with it that allowed him to download conversations onto his computer. He chose to download them on a laptop computer that belonged to the county and that he was allowed to keep at his home. Some of the conversations that he downloaded he kept and did nothing with. Other conversations he downloaded and later deleted. Other conversations he downloaded and then typed a transcript of the conversation.

6. The claimant recorded conversations with co-workers and members of the public from 2002 through 2004. At no time did the claimant inform the person or persons with whom he was speaking that he was recording the conversation. At no time did the claimant ask for or seek permission to record the conversation from the persons with whom he was speaking. The claimant did not have a specific reason or practice in deciding whether to turn on his digital recorder. On some occasions, he turned it on and left it running until the battery ran down.

7. When he had his digital recorder running, he did not distinguish whether he was recording a work-related conversation with an employee of Kitsap County or a work-related conversation with a member of the public with whom he was speaking in connection with his duties as a program manager or whether he was speaking to someone about personal, private matters. He just left the recorder running.

8. A Kitsap County employee, Charles Shank, brought a lawsuit against the county and certain named individuals who were employed by the county, including the public works director, Randy Casteel. In connection with Mr. Shanks' lawsuit, the claimant was deposed. In the course of the claimant's deposition, he said that he had been recording conversations. Mr. Shanks attorney then served the claimant with a subpoena duces tecum, directing him to produce any evidence that he might have that might be relevant to Mr. Shank's case.

9. In response to the subpoena, the claimant spoke to Jacqueline Aufderheide, a deputy prosecuting attorney for Kitsap County who was defending the lawsuit brought by Mr. Shanks. He told her of his practice of recording conversations and told her he had over 90 hours of recordings of conversations. The claimant provided copies of those recordings to Ms. Aufderheide.

10. Randy Casteel is the director of public works for Kitsap County. In May 2005, Mr. Casteel learned that in connection with Mr. Shanks lawsuit, that the claimant had been recording conversations during the course of his work, including other Kitsap County employees and members of the public with whom he came into contact with during the course of his employment. He also learned that the claimant had not informed any of these persons that he was recording their conversations.

11. The employer did not take immediate disciplinary action against the claimant because the claimant was a witness in Mr. Shank's lawsuit. The claimant was Mr. Shank's supervisor. The litigation involving Mr. Shank was settled in January 2006. On April 14, 2006, the employer delivered a notice of pre-termination hearing to the claimant. See exhibit 5.

12. The claimant told Mr. Casteel he was recording conversations because he had concerns about threats that he had received from Ron Yingling, a former deputy director in the department. The claimant had never reported to any supervisor or manager that he was being threatened or intimidated. The claimant never notified any law enforcement agency of threats that he had received from Mr. Yingling. The claimant also stated that he was recording his conversations with others to assist him in the performance of his job.

13. The claimant never asked a supervisor or manager if it was appropriate for him to record conversations with county employees or members of the public with whom he dealt in connection with his work. The claimant never asked consent of the person whose conversation was being recorded.

14.

INITIAL ORDER - 3

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15. In March 2005, Mr. Casteel directed the claimant to bring in his laptop computer and directed the claimant to not delete any files from the computer.

16. The claimant returned the computer. Before returning it, he deleted the program that allowed him to download conversation files from his digital recorder,. He did not delete any files. He deleted the program in order to comply with the licensing agreement that came with the program. The claimant did not feel he was disobeying Mr. Casteel's instructions by deleting a program.

17. The employer presented evidence that from time to time, human resources presents training and that part of the training informs county employees that they are not allowed to record a conversation without obtaining consent. However, there was no evidence to specifically establish that the claimant had attended such training, before, during, or after he engaged in recording conversations.

18. In approximately July 2005, Mr. Casteel had a staff meeting and told employees that they should not be recording conversations. The claimant was no longer recording conversations at that time. The last time that the claimant recorded a conversation in connection with work was in November 2004.

19. The employer has no specific policy relating to the recording of conversations. The employer based its decision to discharge the claimant on RCW 9.73.030 which makes unlawful the interception or recording of private communications without the consent of the person(s) being recorded.

20. There is no evidence that the claimant was ever told that he should not record any conversations during the course of his work and no evidence that the claimant was given any warnings for violating any rule or policy or law regarding the recording of conversations.

21. During the weeks at issue the claimant was willing and able to accept any offer of suitable work and sought work as directed by the Department.

#### **CONCLUSIONS OF LAW:**

1. The provisions of RCW 50.04.294, RCW 50.20.066, WAC 192-150-085, WAC 192-150-200, WAC 192-150-205, and WAC 192-150-210 apply and will be found on the attachment.

2. According to RCW 50.04.294(1), misconduct includes, but is not limited to, a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee; deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee; carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or carelessness or negligence of

such degree or recurrence to show an intentional or substantial disregard of the employer's interest. Misconduct does not include inadvertence or ordinary negligence in isolated instances, good faith errors in judgment, inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity. See RCW 50.04.294(3).

3. WAC 192-150-200(1) and (2), provide that the action or behavior must be connected with the claimant's work and result in harm or create the potential for harm to the employer's interests. This harm may be tangible, such as damage to equipment or property, or intangible, such as damage to the employer's reputation or a negative impact on staff morale.

4. The burden of establishing misconduct is on the employer. Misconduct must be established by a preponderance of evidence. *In re Murphy*, Empl. Sec. Comm'r Dec.2d 750 (1984). A preponderance of the evidence is that evidence which produces the stronger impression, has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition to it. *Yamamoto v. Puget Sound Lumber Co.*, 84 Wash. 411, 146 P. 861 (1915).

5. In this case, the undersigned concludes misconduct has not been established.

6. RCW 9.73.030 contains provisions relating to the unlawful interception of private communications. That statute states in part:

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

...

(3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

7. This statute has been examined in numerous appellate court decisions, most of them involving criminal activity (e.g., the surreptitious recording of persons in a car involved in an illegal drug purchase and sale). In determining whether the statute has been violated, it must be determined whether the communications are "private."

8. In *State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1978) *review denied*, 92 Wn.2d 1006(1979), the court, based on a dictionary definition, held the term "private" meant:

. . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication  
. . . secretly: not open or in public.

9. The violation of the act is in the act of intercepting and recording of the communication without consent. *Kearney v. Kearney*, 95 Wn. App. 405, 974 P.2d 872 (1999), *review denied*, 138 Wn.2d 1022.

10. In this case, the claimant randomly recorded conversations with anyone he spoke to while his digital tape recorder was turned on, whether it was other employees of Kitsap County, or members of the public with whom he came in contact in the course of his business, or anyone else not in either of those groups with whom he came in contact. He never disclosed to anyone that he was recording their conversation.

11. However, the evidence presented in this case does not establish the claimant recorded "private" conversations without consent in violation of this statute.

12. The claimant's recording of his conversations with members of the public he came in contact with in the course of his work were not "private" communications, as the persons with whom he spoke knew his position with the county and they were providing information to him about something the county was planning to do or that they were asking the county to do. To act on the information they provided to him, he would by necessity have to relay to others what these persons had told him.

13. The evidence presented does not establish that the conversations the claimant had with other employees of Kitsap County constituted "private" communications. The claimant's communications with co-workers would involve work, and information that would have to be shared with others.

14. In this case, the undersigned concludes misconduct has not been established. The evidence does not establish the claimant's recording of conversations without consent or notice constituted a violation of RCW 9.73.030. The conversations recorded were not "private" conversations. The determination appealed should be affirmed. The claimant is not subject to disqualification pursuant to RCW 50.20.066.

15. RCW 50.20.010(1)(c) requires each claimant to be able to, available for, and actively seeking work. The claimant was able to, available for, and actively seeking work during the

weeks at issue and is therefore not subject to denial under the above-cited statute and related laws and regulations, copies of which are found on the attachment.

16. RCW 50.32.097 is applicable and provides:

Any finding, determination, conclusion, declaration, or final order made by the commissioner, or his or her representative or delegate, or by an appeal tribunal, administrative law judge, reviewing officer, or other agent of the department for the purposes of Title 50 RCW, shall not be conclusive, nor binding, nor admissible as evidence in any separate action outside the scope of Title 50 RCW between an individual and the individual's present or prior employer before an arbitrator, court, or judge of this state or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts or was reviewed pursuant to RCW 50.32.120.

**Now therefore it is ORDERED:**

The Decision of the Employment Security Department under appeal is **AFFIRMED**.

a. The claimant was not discharged due to a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee as defined in RCW 50.04.294(1)(a), and is therefore not subject to disqualification pursuant to RCW 50.20.066(1).

b. The claimant was able to, available for and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c).

**Notice to Employer:** If you are a base year employer for this claimant, or become one in the future, your experience rating account will be charged for any benefits paid on this claim or future claims based on past wages you paid to this individual. If you are a local government or reimbursable employer, you will be liable for any benefits paid. Benefit charges or liability will accrue unless this decision is set aside on appeal. See RCW 50.29.021. If you pay taxes on your payroll, any charges for this claim could be used to calculate your future tax rates.

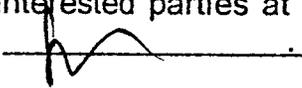
**Notice to Claimant:** Your former employer has the right to appeal this decision. If this decision is reversed because it is found you committed misconduct connected with your work, all benefits paid as a result of this decision will be an overpayment. State law says you will not be eligible for waiver of the overpayment, nor can the department accept an offer of compromise (repayment of less than the total amount paid to you). The benefits must be repaid even if the overpayment was not your fault. See RCW 50.20.066(5).

Dated and Mailed on November 03, 2006 at Seattle, Washington.



Jon M. Loreen  
Administrative Law Judge  
Office of Administrative Hearings  
600 University Street, Suite 1500  
Seattle, WA 98101-1129

**Certificate of Service**

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. 

**PETITION FOR REVIEW RIGHTS**

This Order is final unless a written Petition for Review is addressed and mailed to:

**Agency Records Center  
Employment Security Department  
PO Box 9046  
Olympia, Washington 98507-9046**

and postmarked on or before **December 4, 2006**. All argument in support of the Petition for Review must be attached to and submitted with the Petition for Review. The Petition for Review, including attachments, may not exceed five (5) pages. Any pages in excess of five (5) pages will not be considered and will be returned to the petitioner. *The docket number from the Initial Order of the Office of Administrative Hearings must be included on the Petition for Review.* Do not file your Petition for Review by Facsimile (FAX). Do not mail your Petition to any location other than the Agency Records Center.

JL:kg

Attachment A

**Mailed to the following:**

David N Smith  
1816 Jacobsen Blvd  
Bremerton, WA 98310-5438

Claimant

INITIAL ORDER - 8

2610754.JL

Clayton E Longacre Attorney at Law  
Longacre Law Office  
569 Division Street, Suite F  
Port Orchard, WA 98366-4600

Claimant Representative

Kitsap County  
c/oTALX UC eXpress  
PO Box 283  
St Louis, MO 63166-0283

Employer Representative

Martin F Muench, Sr Dep Pros Atty  
Office of the Kitsap County Pros Atty  
614 Division St, MS-35A  
Port Orchard, WA 98366-4676

Employer Representative

# APPENDIX B

the within named interested parties at the respective addresses, postage prepaid, on February 2, 2007.

*Gail Hansen*

Representative, Commissioner's Review  
Office, Employment Security Department

UIO: 770  
BYE: 04/14/2007

BEFORE THE COMMISSIONER OF  
THE EMPLOYMENT SECURITY DEPARTMENT  
OF THE STATE OF WASHINGTON

Review No. 2006-3167-C

In re:

DAVID N. SMITH  
SSA No.

Docket No. 02-2006-10754

CORRECTED DECISION  
OF COMMISSIONER

On November 15, 2006, KITSAP COUNTY, by and through Martin F. Muench, Senior Deputy Prosecuting Attorney, petitioned the Commissioner for review of a decision issued by the Office of Administrative Hearings on November 3, 2006. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Initially, we note that the Office of Administrative Hearings' findings of fact Nos. 15 through 21 are mislabeled, and redesignate said findings as Nos. 14 through 20, respectively. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), the undersigned adopts the Office of Administrative Hearings' findings of fact, with the exception of findings Nos. 3, 4, 14, 15, 16, 18 and 19, which findings are not adopted, and enters the following:

ADDITIONAL FINDINGS OF FACT

I

The claimant, in connection with his employment, knowingly recorded his conversations with coworkers and private citizens dealing with his governmental employer. At no time did the claimant advise or give notice to said individuals that their conversations with him were being recorded. In the process of recording those conversations, the claimant, at all times, concealed the recording device in his shirt pocket.

II

Competent evidence of record establishes, and we find as fact, that the claimant was aware his recording of conversations with said parties was impermissible. Competent evidence of record establishes, and we find as fact, that the claimant was aware the recording of said conversations was not in the best interests of his employer. Competent evidence of record establishes, and we find as fact, that the claimant's assertion he concealed the making of said recordings out of fear of one Ron Yingling is not credible.

### III

The work-related conversations secretly recorded by the claimant while speaking on behalf of Kitsap County were "private" conversations, as that term is contemplated by RCW 9.73.030 and interpreted in State of Washington v. Clark, 129 Wn.2d 211, 224-230, 916 P.2d 384 (1996). We note that Kitsap County, as a governmental entity of the State of Washington, can be held liable for damages arising out of the tortious conduct of its employees, RCW 4.96.010(1), and that an employee's violation of RCW 9.73.030 can, in addition to grounding a criminal charge against the individual, also ground a civil action for damages against the employer. RCW 9.73.060. We, therefore, find as fact that the claimant's conduct herein posed the potential threat of exposing his employer to civil liability.

### IV

In March 2005, the claimant was directed by the employer's Director of Public Works to turn in his laptop computer without deleting any files from that computer. The claimant returned the computer, but, prior to so doing, and in direct violation of his employer's directive, he deleted the program that allowed him to download recorded conversations from his digital recorder. Such conduct further establishes the claimant's awareness his above-cited recording of conversations was impermissible and not in the best interest of his employer.

Having found the foregoing as fact, we adopt the conclusions of law of the Office of Administrative Hearings', with the exception of conclusions Nos. 5, 7, 8, 11, 12, 13, and 14, which conclusions are not adopted, and enter the following:

#### ADDITIONAL CONCLUSION OF LAW

Applying the facts of this matter to the legal criteria set forth in adopted conclusions of law Nos. 1, 2, 3, 4, 6 and 9, we conclude the claimant's discharge precipitating conduct has been shown, by a preponderance of competent, credible, and convincing evidence of record, to have been misconduct connected with his employment, as that term is contemplated by RCW 50.20.066(1). In his capacity as an official representative of Kitsap County, a governmental entity, the claimant intentionally, and without notice, recorded private conversations with individuals seeking to deal with his employer. Such conduct, if known by the general public of Kitsap County, could certainly impact a citizen's willingness to discuss issues with a county employee, thereby adversely impacting the county's interest in serving its constituents, as well as exposing the county to litigation and liability. The claimant's conduct herein is, therefore, either carelessness or negligence of such a degree as to show an intentional disregard of the employer's interest, and/or dishonesty, in the form of deliberate deception, related to his employment. RCW 50.04.294(1)(d); RCW 50.04.294(2)(c). Both constitute benefit disqualifying conduct under the Act. We note that, at the most, the claimant's conduct could be construed as an unlawful interception of private communications pursuant to the provisions of RCW 9.73.030

Now, therefore,

IT IS HEREBY ORDERED that the decision of the Office of Administrative Hearings issued on November 3, 2006, is MODIFIED. Claimant is disqualified pursuant to RCW 50.20.066(1) beginning April 16, 2006, and thereafter for ten calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to ten times his or her weekly benefit amount. The claimant was able to, available for and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c). Under RCW 50.20.066(5), the claimant must repay all benefits paid in error because of a disqualification from benefits based on misconduct. The amount of the overpayment owed by the claimant is REMANDED to the Department for calculation. *Employer:* If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. See RCW 50.29.021.

DATED at Olympia, Washington, February 2, 2007.\*

*John M. Sells*

---

Review Judge  
Commissioner's Review Office

\*Copies of this decision were mailed to all interested parties on this date.

#### RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

#### JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

**If you choose to file a judicial appeal, you must both:**

- a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND**
- b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.**

**The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.**

NO. 37492-7-II

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

DAVID N. SMITH,

Appellant,

v.

EMPLOYMENT SECURITY  
DEPARTMENT OF THE STATE OF  
WASHINGTON,

Respondent.

DECLARATION OF  
SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that I caused the document referenced below to be mailed via United States Postal Service, properly addressed and postage prepaid, to the following:

**DOCUMENT: Respondent's Brief**

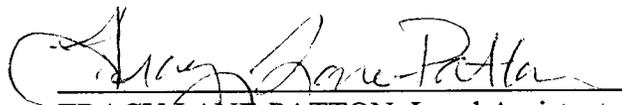
**ORIGINAL TO:**

Court of Appeals, Division II – via ABC Legal messenger  
950 Broadway Suite 300  
Tacoma, WA 98402-4427

**COPY TO:**

Clayton Longacre  
569 Division Street, Suite #F  
Port Orchard, WA 98366

DATED this 12<sup>th</sup> day of January, 2009.

  
TRACY LANE-PATTON, Legal Assistant