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No. 59993-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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STATE OF WASHINGTON
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VERIZON NORTHWEST, INC.,

Appellant,

v.

WASHINGTON EMPLOYMENT SECURITY DEPARTMENT;
STEVEN D. ACKERMAN; LESSA P. ADAMS; ANGELA L.
ALEXANDER; MATTHEW J. ALICE; MARSHA A. ALLGIRE; ANN
M. ALMLI; LARRY F. AMES; CAROL A. ARENDSE; CHRISTINE S.
BAILEY; JERRY J. BAKKO; SHARON A. BARAKAT; MELISSA J.
BARRAN; DAVID O. BAUER; MARLENA S. BAUER; THOMAS W.
BECKER; SUZANNE M. BECKMANN; JOANNE L. BELL; TRENT A.
BERRING; STARLA J. BESSLER; MICHAEL E. BEVIS; DENMAN M.
BIRD; MICHAEL L. BLY; BOHDON W. BODNARCHUK; RUSSELL
L. BOKNECHT; JOHN A. BOORMAN; TERRI L. BOWKER; DAVID
L. BRADFORD; DON R. BRANSON; PATRICIA A. BRAY; SONYA L.
BREAU; TRAVIS S. BRIAN; BILLYE L. BROOKS; DOUGLAS M.
BROWN; PAMELA J. BROWN; GARY A. BUCKNER; JOSEPH T.
BUONGIORNO; NICKI R. BURNS-AMMA; KATIE G. BYRNES; RON
J. CAFFREYE; KELLY L. CAMPBELL; DEBORAH J. CARLSON;
LISA R. CARLSON; RICHARD L. CARROLL; KAREN L. CARSON;
RICHARD F. CASTANO; FRANCISCO J. CAYERE; RAYMOND D.
CHAVIS; JUDY A. CHESLEY; EZEKIEL J. CHRISTENSON; STEVEN
R. CLEVELAND; SHIRLEY A. COLEMAN; KENNETH D. COLLINS;
DEBORAH M. COOPER; KENNETH A. CUNNINGHAM; RUSSELL
D. CURRAN; THOMAS E. DALES; SHEILA K. DAVIDSON;
ROSEMARY B. DAVIS; TYRA L. DEBONO; DAVID J. DINGMAN;
DENNIS M. DOBBELAERE; JEANETTE S. DODSON; THOMAS

DORAN; JENNIFER L. DOWLING; FONDA K. DOWNS; JUDY
EDDY; GREGORY J. EITELBERG; SHEREE L. ELMENDORF;
JOANNE M. ERICKSEN; CECILE L. ERVIN; PAMELA J. EVANS;
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HAGGE; CYNTHIA A. HALL; PAULA E. HARRINGTON; TIM
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ANDREW F. KOPS; DAINEL N. KRAH; DIANA L. LADISER; GARY
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NUNN; STEPHEN C. OLESEN; BARRY N. ORDELL; ANDRE H.
OSBORNE; KATHRYN A. PANFILI; JANICE PARKER; GRETCHEN

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I. INTRODUCTION

Verizon Northwest, Inc. ("Verizon"), pursuant to RCW 34.05.526 and 34.05.570(3), seeks an order reversing the Order of the trial court and setting aside the Order of the Washington Employment Security Department ("the Department") affirming Summary Judgment in favor of claimants in the Matter of the Unemployment Compensation Benefits of Former Verizon Employees, OAH Docket No. 02-2004-41252, dated December 23, 2004 (the "Order"). Decisions handed down by both this Court and Division II make clear that the Order cannot stand.

Over two hundred sixty former Verizon employees took advantage of Verizon's Voluntary Separation Program for Management Employees ("MVSP"), a wholly voluntary plan which offered generous pension and severance benefits for management employees who opted to participate. No aspect of the MVSP was ever mandatory: Verizon had no targets for reducing its employee force and had no plans to involuntarily reduce management employees in Washington following MVSP, and actually posted and filled management positions while claimants were still employed.

The MVSP does not satisfy the criteria set forth in WAC 192-150-100, which creates a narrow exception to the statutory proscription against the award of unemployment benefits for a voluntary quit. Should the

Court determine that the Department's interpretation of WAC 192-150-100 is correct and that the former Verizon employees were entitled to unemployment benefits, Verizon further petitions this Court pursuant to RCW 34.05.570(2) for an order vacating and declaring invalid WAC 192-150-100 and the Department's adoption of that interpretive rule.

II. ASSIGNMENTS OF ERROR

A. The Commissioner's conclusion that Broschart is distinguishable is not supported by substantial evidence. Broschart v. Empl. Sec. Dep't, 123 Wn. App. 257 (2004).

B. The Commissioner's conclusion that Verizon's MVSP was "implicitly an involuntary one" is both an erroneous application of the law and not supported by substantial evidence.

C. The Commissioner's conclusion that "the reduction in force was inevitable" is not supported by - indeed, is contrary to - substantial evidence.

E. The Commissioner's conclusion that Verizon took the "final action" required by WAC 192-150-100(c) by "...selecting the employees to whom the announcement was made, and then in automatically accepting the employees' participation" in the program, "while retaining the power to reject those employees who were not

eligible for such participation" is both an erroneous interpretation of the law and not supported by substantial evidence.

E. Alternatively, if the Court finds WAC 192-150-100(1) applicable to the completely voluntary program at issue here, the Trial Court erred by concluding that the Department did not exceed its statutory authority in adopting the rule.

F. The Commissioner erred by failing to apply RCW 50.12.050 and WAC 192-16-009 to find that claimants' quit was "voluntary" and not for "good cause."

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Is the mere use of the term "reduction in force" in an announcement to employees sufficient to transform a purely voluntary severance incentive program into a mandatory, involuntary program?

B. Is the requirement of a written announcement of inevitable, planned layoffs in WAC 192-150-100 satisfied by an implied notice that future layoffs might or might not occur?

C. Does an employer's initial determination - made at the outset of a voluntary separation program - that a large group of employees, but less than its entire workforce, is eligible for the program have the same legal effect as retaining the authority to deny an eligible

employee the right to participate in the program, after the employee volunteers?

D. Does an employer's automated electronic confirmation of an employee's voluntary acceptance of an offer to participate in such a program constitute the final action of "acceptance" by the employer of the employee into the program?

E. If the Commissioner correctly applied WAC 192-150-100 to the wholly voluntary program here, is the regulation a permissible interpretation of RCW 50.20.050, which disqualifies claimants from benefits when they leave work "voluntarily without good cause"?

IV. STATEMENT OF THE CASE

In the fall of 2003, Verizon implemented a Voluntary Separation Program for Management Employees ("MVSP") that provided enhanced separation and pension benefits for a large group of management employees to incent them to retire or leave the company on a voluntary basis between October 1 and November 15, 2003. The MVSP was part of a nation-wide offering made in many Verizon entities including those in Washington.¹ CR 933, Declaration of Sharon Hankins, ¶ 3.2 This

¹ In fact, another court recently rejected the claims of other former Verizon employees who accepted the MVSP offer under a Pennsylvania statute requiring "cause of a necessitous and compelling nature," reasoning that no management employee told
(...continued)

program was offered at this time because of specific concerns Verizon had about managing its business. Specifically, in 2004 certain retirement protections enacted when Bell Atlantic and GTE merged to create Verizon were due to expire. Consequently, Verizon feared that an increasing stream of employees would retire throughout the year, leading to a long period of disruption. Verizon anticipated that an incentive program would cause employees considering retirement or separation to do so at once, and thus minimize the disruption over time. CR 933-34, Hankins Decl., ¶ 4.

On September 17, 2003, Verizon, through its Human Resources Department, sent an e-mail addressed to "All Management Employees <distribution.list@verizon.com>" informing these employees that Verizon had developed a "Voluntary Separation Program for Management Employees that provides enhanced separation and pension benefits for employees who volunteer between October 1 and November 14, 2003."³ CR 934, 939-40, Hankins Decl., ¶ 5; Exhibit A. While the Management

(...continued)

the claimants they would be laid off if they did not volunteer for the MVSP, and that the employee's fear of job loss was speculative. Johnson v. Unemp. Comp. Bd. of Review, 869 A.2d 1095 (Pa. Comrnw. Ct. 2005), appeal denied, 889 A.2d 90 (Pa. 2005).

² Citations are to the Commissioner's Record ("CR") where the clerk of the superior court transmitted the original record certified by the administrative agency pursuant to RAP 9.7(c), to the Clerk's Papers ("CP"), and to the Report of Proceedings ("RP").

Voluntary Separation Program was open to employees of most Verizon business units⁴, Verizon took pains to emphasize that it was a voluntary program, aimed at employees "who are considering retiring or leaving the company." CR 934, 940, Hankins Decl., ¶ 6; Exh. A. Under the MVSP, Verizon had not reserved the right to accept or decline participation in the MVSP by any eligible employee; there were no restrictions or caps on the number of participants. CR 935, Hankins Decl., ¶ 13.

This was the first communication by Verizon to its management employees regarding the voluntary program. CR 924, Levesque Decl., ¶ 4. While Verizon had announced plans to reduce its total workforce nationwide by 5000 management and non-management employees in 2003 - out of a total workforce at the time in excess of 220,000 - most of that 5000 target had been achieved before the MVSP was announced. CR 936, Hankins Decl., ¶ 18. As of September, 2003, Verizon had no plans to reduce its workforce in Washington. Id., ¶ 19. Indeed, between September 2003 and November 17, 2003, Verizon posted and filled 37

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³ Whenever Verizon sent an e-mail as described herein, employees on leave of absence were sent the notification via the U.S. Mail. CR 934, Declaration of Sharon Hankins, ¶ 5 n.2.

⁴ One business unit not participating in the MVSP was Verizon Wireless. CR 934,949, Hankins Decl., ¶ 7; Exh. B, p. 5 ("The Program is not available to employees in the following organizations: Verizon Wireless...."). Thus, the comments

(...continued)

openings for management positions in the State of Washington alone.

CR 925, Levesque Decl., ¶ 8.

Verizon prepared anticipated questions and answers as part of the first communication. CR 934, 946-87, Hankins Decl., ¶ 7; Exhibit B.

These 43 pages of Q and A's contain the following statements:

a. The purpose of the program was to stimulate voluntary management reductions and provide additional financial security to eligible employees who volunteer to leave the company during the volunteer period. CR 948, Q-and-A #1.

b. Verizon distinguished this voluntary separation program from an involuntary separation. "Voluntary separation differs from involuntary separation, where the company chooses to separate the employee and releases the employee to pursue redeployment and/or outplacement services immediately. In this voluntary program, the employee is making the choice to separate from Verizon." CR 975, Q-and-A #74. Under the heading, "Making a Decision," Q-and-A #61 stated, "While financial concerns may be paramount, deciding to leave Verizon is a personal decision as well as a financial one. Ultimately, this

(...continued)

quoted by claimants from Denny Strigl, President of Verizon Wireless, at pp. 3-4 of Claimants' Motion, CR 820-21, are wholly irrelevant.

is a choice only you can make." Employees were told that if they felt pressured to volunteer, they should contact their HR representative immediately, because "[t]he program is purely voluntary." CR 972, Q-and-A #65.

c. Although Verizon expected several thousand management employees to take advantage of the program, Q-and-A #5, it did not set any target or minimum number of employees who would have to accept the program to preclude involuntary layoffs or reductions in force.

Claimants admit that, before the MVSP was announced, Verizon's CEO had assured employees, in a public broadcast, that there would be no involuntary layoffs for the remainder of 2003. CR 863, Schultz Decl., ¶ 6.

d. Employees were provided with an opportunity for financial planning assistance by an outside financial planning firm which was "prepared to answer [employees'] questions about [their] personal situation and provide objective financial advice." CR 955, Q-and-A #25. Financial planning meetings were also to be announced. CR 972, Q-and-A #64.

e. Q-and-A #60 asks, "If I volunteer to leave Verizon, will I be eligible for Unemployment Compensation?" The answer defers to the various state employment security laws, and indicates,

the state agency may take into consideration any payments, such as severance, pension, etc., as well as whether the separation was voluntary or involuntary. Most states disqualify applicants who leave employment voluntarily. . . This separation program is voluntary, and there are no caps or restrictions on the number of employees who can volunteer. Verizon is offering many incentives, some of which may entice employees to volunteer to leave Verizon who otherwise may have continued to work for Verizon. Each employee should evaluate his or her own personal situation considering all of the program's options and incentives, and the possibly that they may - or in most cases, may not - be eligible to receive unemployment benefits. An employee's decision is based on personal circumstance and is strictly voluntary ... Unemployment Compensation is not an absolute benefit, and the fact that this is a voluntary program will disqualify employees in most states.

CR 969-70, Hankins Decl., Exhibit B.

On September 22, 2003, Verizon sent an e-mail to the same distribution list further explaining the program and providing names and numbers of key contacts for more information. The e-mail introduced Ayco Answerline, a third-party source of "objective information and advice" about financial planning. CR 934, 989-92, Hankins Decl., ¶ 8; Exhibit C. Ayco held a series of financial planning workshops at major Verizon locations. CR 925, Levesque Decl., ¶ 5. Both of the claimant-declarants, Keith Schultz and David Bauer, attended one of these financial planning sessions. CR 925, 928, 930, Levesque Decl., ¶ 6, Ex. A & B. In

those sessions Ms. Levesque introduced the Ayco representative. As part of that introduction, Ms. Levesque reminded the employees to "keep in mind that this is a voluntary program. You are free to make your own decision. No one at Verizon will pressure you about your decision." CR 925, 932, id., ¶ 7; Ex. C (emphasis in original).

On October 1, 2003, Verizon sent an e-mail to the same distribution list announcing that the voluntary separation period had begun. CR 935, 994-96, Hankins Decl., ¶ 9; Exhibit D. A Notification Letter was available to each employee who was eligible to volunteer via the company intranet, describing the severance, pension and other benefits, and indicating, "If you decide to volunteer for the program, you must submit the Volunteer form either electronically or by fax . . . by November 14, 2003." CR 935, 998-1000, id., Exhibit E. Verizon's program required accepting employees to execute a Separation Agreement and Release. CR 935, 1002-06, id., ¶ 10; Exhibit F. The deadline to volunteer was later extended for one day. ⁵ CR 935, 1008, id., ¶ 11; Exhibit G.

On November 14, 2003, Verizon sent an e-mail to All Management Employees with the subject heading (which appears even

before the e-mail is opened), "ADMINISTRATIVE CLARIFICATION - MANAGEMENT SEPARATION VOLUNTEERS CAN CHANGE THEIR MINDS UNTIL NOV. 22, 2003." The body of the e-mail indicated that Verizon would "honor ALL rescissions made until 11:59 p.m., Nov. 22, 2003." CR 935, 1011-12, id., ¶ 12; Exhibit H.

On November 17, 2003, almost one week prior to rescission deadline, Verizon sent an e-mail to "All Employees" informing them that because about 10 percent of Verizon's total employee base had chosen to take advantage of the voluntary separation program, Verizon expected to backfill some of the positions. CR 935-36, 1014-16, id., ¶ 15; Exhibit I. In fact, that process had already started, with 37 management openings posted before the rescission deadline. CR 925, Levesque Decl., ¶ 8. Nationwide, 760 Verizon employees rescinded their voluntary elections. CR 935, Hankins Decl., ¶ 14. Approximately 16,000 management employees ultimately chose to take advantage of the voluntary program and left the company on November 22, 2003. CR 936, id., ¶ 16. In December, 2003, over 3,000 jobs were posted for recruitment nationwide. CR 936, id., ¶ 17.

(...continued)

⁵ This extension was not because of any attempt to increase participation, but because of an initial miscalculation of a legal deadline.

Approximately 260 management employees nonetheless filed unemployment claims in Washington after choosing to take advantage of this wholly voluntary program. The Department initially issued Determination Notices holding that the claimants were disqualified from receiving unemployment compensation benefits pursuant to the voluntary quit provisions of RCW 50.20.050; the Department subsequently reversed itself and issued Redetermination Notices, holding the claimants were not subject to disqualification. CR 84-817. Verizon appealed.

On September 30, 2004, Administrative Law Judge Christy Gerhart Cufley approved claimants' motion for summary judgment which was filed by Jon Rosen, an attorney representing 92 of the claimants. CR 63-83. December 23, 2004, Commissioner's Review Judge Rhonda J. Brown affirmed the order. CP 58 - 83. Snohomish County Superior Court Judge David A. Kurtz affirmed the Commissioner's Order on May 11, 2007, concluding - contrary to the holdings of this Court - that "by far the most important [factor]" was that Verizon "use[d] the term, reduction in force," transforming a wholly voluntary program into an involuntary layoff. RP 3, 4, 8. The Judge also noted that although this case raised a "close issue," based in part on "the equities," affirming the Commissioner's decision was "the right thing to do". CP 55 - 57; RP 8, 9.

V. ARGUMENT

A. Standard of Review.

In reviewing administrative action, the Court of Appeals applies the standards of the Administrative Procedure Act (APA) directly to the record before the agency. Valentine v. Department of Licensing, 77 Wn. App. 838, 843 (1995) (citing Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 402 (1993) (citing Macey v. Department of Empl. Sec., 110 Wash.2d 308 (1988))). Because the Court reviews the same record on the same basis as the Superior Court, findings of fact and conclusions of law entered by the Superior Court are "superfluous." Id. at 844. The Court reviews the findings and decision of the Commissioner, not the underlying ALJ order. Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 405-06 (1993).

The Court is to grant relief from an agency order in an adjudicative proceeding if it determines that the agency erroneously interpreted or applied the law. RCW 34.05.570(3) (d). Legal determinations of administrative agencies are reviewed under, an error of law standard which permits a reviewing court to substitute its interpretation of the law for that of the agency. Overlake Fund v. Shorelines Hearings Board, 90 Wn. App. 746, 754 (1998) (citations omitted). The Court is also to grant relief if it determines that the order is not supported by substantial evidence.

"Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." Western Ports Transp., Inc. v. Employment Sec. Dep't. 110 Wn. App. 440, 449 (2002) (citations omitted). Although the Court gives deference to the agency's legislative regulations, the Court owes no deference to the interpretive regulation at issue here. Assoc. of Wash. Business v. Dep't. of Revenue. 155 Wn.2d 430, 446-47 (2005). Moreover, it is ultimately the Court's responsibility to see that the rules are applied consistently with the underlying policy of the statute. Safeco Ins. Cos. v. Meyering. 102 Wn.2d 385, 392 (1984).

The Employment Security Department has adopted the model rules of procedure for administrative agencies adopted by the office of the Attorney General. WAC 192-04-010. In turn, the Attorney General's model rules prescribe a standard for summary judgment in administrative proceedings very much like that employed by the superior courts: "A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WAC 10-08-135. This Court reviews a grant of summary judgment de novo, assuming facts most favorable to the nonmoving party. Hartley v.

State, 103 Wn.2d 768, 774 (1985). The standard for summary judgment is high, "particularly for the Office of Administrative Hearings." CR 44, ALJ Cufley, Tr. 44:9-15. Even where facts are uncontroverted, if reasonable minds may draw different conclusions from them, summary judgment is inappropriate. Chelan County Deputy Sheriffs' Ass'n v. Chelan County, 109 Wn.2d 282, 296 (1987). Indeed, reasonable minds do differ, at least as to the decision reached by the Commissioner in this case: this Court and Division II recently interpreted the regulation at issue to deny benefits on facts indistinguishable from those in the present case. Employees of Intalco Aluminum v. Empl. Sec. Dep't, 128 Wn. App. 121 (Div. I, 2005); Broschart, 123 Wn. App. 257. Summary judgment against Verizon is improper here and should be reversed; instead, Verizon should be granted summary judgment in its favor.

B. The Verizon Voluntary Separation Management Plan was an early separation incentive plan pursuant to WAC 192-150-100(2), not a layoff or reduction in force contemplated by WAC 192-150-100(1).

WAC 192-150-100 provides:

- (1) You will not be considered to have been separated from employment for a disqualifying reason when:
 - (a) Your employer takes the first action in the separation process by announcing in writing to its employees that:

- (i) The employer plans to reduce its work force through a layoff or reduction in force, and
 - (ii) That employees can offer to be among those included in the layoff or reduction in force;
 - (b) You offer to be one of the employees included in the layoff or reduction in force; and
 - (c) Your employer takes the final action in the separation process by accepting your offer to be one of the employees included in the layoff or reduction in force, thereby ending your employment relationship.
- (2) This section does not apply to situations where an employer modifies benefits or otherwise encourages early retirement or early separation, but the employer and employee do not follow the steps in subsection (1)(a) through (c).

All of the requirements of WAC 192-150-100(1) must be met for a claimant to qualify for benefits. Broschart, 123 Wn. App. at 268. The Commissioner's conclusions that the first and third requirements were met here are erroneous.⁶

⁶ Moreover, nothing in the Regulation or the case law interpreting it suggest, as the judge found, that any one factor is more important than the other. RP 3.

C. The Commissioner's conclusion that Broschart is distinguishable is not supported by substantial evidence.

In the only decision interpreting WAC 192-150-100(1) at the time of the Commissioner's Order, Division II had announced that to qualify for benefits, the claimant must prove the employer announced, in writing, an "inevitable layoff or reduction in force." Broschart, 123 Wn. App. at 267. Analyzing the history of the rule, the Court explained that "the first act" must be "the announcement of *impending* layoffs :.. [which were] *inevitable* ... [The] program ... would ultimately lead to *involuntary* layoffs. The question was not whether, but when." *Id.* (emphasis supplied) (quoting Nielsen v. Emp. Sec. Dep't., 93 Wn. App. 21, 39, 44 (1998)). "The rule was to apply only when the layoffs or reductions in force were inevitable, not where there was a potential for a layoff at some unknown future time." *Id.*

Intalco, decided by this Court after the Commissioner's Order, arose out of the same set of facts as were present in Broschart. Intalco, 128 Wn. App. at 125, 125 n.1. This Court agreed with Division II that although the "voluntary severance options in fact achieved a reduction in force, [it was] . . . not by means of layoff . . . defined as 'the termination of employment at the employer's instigation.'" *Id.* at 128, 128 n.14 (citing Black's Law Dictionary 90-6 (8th ed. 2004)). Relying on the

administrative history explaining the intended purpose of the rule, this Court agreed that "[w]ritten announcement of layoffs fulfill the inevitability requirement whereas potential future layoffs do not." Id. at 129.

In reaching her conclusion that the program in Broschart was distinguishable from Verizon's voluntary separation program, the Commissioner focused again on the fact that Verizon used the term "reduction in force," whereas the employer in Broschart "simply told its employees about an early retirement program and voluntary furlough programs." CP 59, Order at 1. This is a distinction without a difference, however: the employer there referred to its program as a "voluntary severance program," Broschart, 123 Wn. App. at 261, and the employee relations administrator even referred to a "reduction in [Intalco's] workforce." Intalco, 128 Wn. App. at 128. Similarly, Verizon referred to its program as a "voluntary separation program" and a "voluntary separation incentive." See, CR 939-44, Exhibit 14-A (September 17 electronic communication to employees), CR 989-92, Exhibit 14-C (September 22 communication), CR 998-1000, Exhibit 14-E (October 1 communication) and CR 946-987, Exhibit 14-B (Verizon's 43 pages of Questions and Answers about the program). There, as here, the internal

memos "merely described ... voluntary options, which were not layoffs, and the phrase `reduction of the work force' described a design to encourage people to take early severance or early retirement." Intalco, 128 Wn. App. at 128. Broschart and Intalco make clear that the mere use of the term "RIF" is not dispositive. "The voluntary severance options in fact achieved a reduction in force, but not by means of layoff. The documents were not the equivalent of a written layoff announcement." Intalco, 128 Wn. App. at 128. See also Ortega v. Employment Security Dep't. 90 Wn. App. 617 (1998) (denying benefits to participants in voluntary reduction in force plan), review granted, 136 Wn.2d 1028 (1998), petition for review withdrawn, January 13, 1999. The Broschart and Intalco Courts emphasized the voluntary nature of the program, not the label affixed to it by the employer.

Verizon respectfully requests that the Court examine the entire record, which establishes the voluntary nature of Verizon's program, rather than focusing on isolated references to a "RIF." Just as in Broschart and Intalco, Verizon did not provide a written notice that layoffs or reductions were inevitable, Broschart, 123 Wn. App. at 260, Intalco, 128 Wn. App. at 129, or that if employees did not volunteer for the program, they would be involuntarily terminated. Broschart, 123 Wn. App. at 270.

As here, the employer emphasized that its severance program was voluntary, Broschart, 123 Wn. App. at 261, and employees had seven days to change their mind on whether to proceed with voluntary separation. Broschart, 128 Wn. App. at 262, Intalco, 128 Wn. App. at 125. As here, Intalco had no plans for involuntary layoffs, and although it mentioned the possibility of losing 100 positions, and had already laid off 24 employees, it had not decided on a specific number of people it wanted to accept the voluntary separation offers. Broschart, 128 Wn. App. at 261, 270; Intalco, 128 Wn. App. at 124 - 25. As here, the claimants n Broschart and Intalco failed to establish that the employer's program was involuntary, and benefits were denied.

D. The Commissioner's conclusion that Verizon's MVSP was "implicitly an involuntary one" is both an erroneous application of the law and not supported by substantial evidence.

The plain meaning of the regulation cannot support the conclusion that Verizon's program was "implicitly" involuntary. CP 59, Order at 1. To meet the "written announcement" requirement, the employer must "announc[e] in writing to its employees that [t]he employer *plans* to reduce its work force through a layoff or reduction in force." WAC 192-150-100(1)(a)(i) (emphasis added). The involuntary nature of the reduction in force cannot be implied; it must be made explicit. Broschart,

123 Wn. App. at 260 (employer "did not provide a written notice that layoffs or reductions were inevitable"). Any interpretation that transforms the regulation's requirement for a written notice of an involuntary reduction in force into an implicit notice that a layoff might or might not occur is an erroneous application of the law. "Reading [former WAC 192-16-070]⁷ to require a claimant to "involuntarily volunteer" results in an absurdity unsupported by the administrative rule ...". Ortega, 90 Wn. App. at 625 (1998). Where, as here, the employer never stated that if employees did not volunteer for the program, they would be involuntarily terminated, the program was voluntary, and benefits were not payable. *Id.* at 270.

The Commissioner viewed Verizon's September 17, 2003 electronic communication to its management employees, CR 939-944, Exhibit 14-A, and the statements of its executive vice president found therein, as evidence of the "coercion inherent in any involuntary reduction in force." CP 60, Order at 2. The Commissioner accurately noted the statements *contrasted* Verizon's voluntary program with its alternative, an

Although the rule applied in those Ortega, former WAC 192-16-070, was substantially different than WAC 192-150-100, the Broschart court observed that Ortega and Nielsen support the denial of benefits where the employees voluntarily elect to participate in a non-mandatory program. Broschart, 123 Wn. App. at 268.

involuntary program, under which employees might not be eligible for separation benefits. The voluntary program was "better for morale, and the organization rebounds faster than it would under an involuntary program." CR 940, Exhibit 14-A at 2. Indeed, Intalco presented its employees with just such a contrast. Intalco, 128 Wn. App. at 131 ("Alcoa will not involuntarily terminate employees due to the curtailment, but may design and offer a voluntary program for employee separation.") There, as here, the fact that the employer acknowledged the difference between a voluntary and an involuntary program does not create an "atmosphere of inevitable layoffs." *Id.* Where, as here, the voluntary program was presented as distinct from, and superior to, a program of involuntary layoffs (which was never imminent), it is implausible to conclude that coercion transformed the voluntary program here into a mandatory layoff. The Commissioner's conclusion to the contrary is not supported by substantial evidence.

Moreover, the vice president's statements, read in context, cannot be read as "evok[ing] the coercion inherent in any involuntary reduction in force." CP 60, Order at 2. The substantive portion of the communication, which constitutes approximately three pages, contains no fewer than eighteen references to the program's voluntary nature. Like the voluntary

program in Broschart and Intalco, where employees were told that "times were very uncertain," Broschart, 123 Wn. App. at 262, Verizon's communication acknowledges Verizon's desire to "reposition itself to remain successful," but it does not refer or even allude to future involuntary layoffs. CR 940. The Court should not find coercion where it did not exist.

E. The Commissioner's conclusion that "the reduction in force was inevitable" is not supported by - indeed, is contrary to - substantial evidence.

The Commissioner viewed Exhibit No. 144, an electronic communication to employees dated November 17, 2004, as evidence that the reduction in force was inevitable. CP 60, Order at 2. The communication, sent two days *after* the final date to volunteer for the program, quotes the vice chairman and president of Domestic Telecom as saying, "These reductions are also the inevitable outcome of public policies designed to artificially create competition at the expense of the traditional phone business ..." CR 1015, Exhibit 144 at 2. Reading this statement in context, however, leads to a different conclusion: "By achieving this reduction through voluntary programs, we are doing the right thing for our business and our employees." CR 1015, *id.* Again, Verizon consistently characterizes the voluntary separation program as what it actually was - voluntary. Moreover, an announcement that post-

dates the entire program can hardly be construed as the employer's "first action in the separation process" announcing involuntary reductions. WAC 192-150-100(1)(a).

Remembering that this proceeding arose on cross motions for summary judgment, the record as a whole contains the following undisputed facts:

- A. While Verizon had announced plans to reduce its total workforce nationwide by 5,000 employees in 2003 - out of a total workforce of over 220,000 - most of the 5,000 target had been achieved before the 1VIVSP was announced. CR 936, Exhibit 14, ¶18.
- B. As of September 2003, Verizon had no plans to reduce its workforce in Washington, and a week prior to the deadline to volunteer, had begun backfilling positions. CR 935-36, *id.* at 1115, 1119.
- C. Verizon prepared and distributed 43 pages of detailed Q and A's, including repeated assurances that the separation program was completely voluntary. CR 934, 948, 950, 955, 972, 975, Exhibit 14, ¶7; Exhibit 14-B, Q & A #1, 5, 25, 65, 74.
- D. Verizon assured employees in a public broadcast that there would be **no involuntary layoffs** for the remainder of 2003, CR 863, Exhibit 10, ¶6, and assured employees that "No one at Verizon will pressure you about your decision." CR 932, Exhibit 13-C.
- E. Verizon gave volunteering employees eight days to change their minds and assured them that Verizon would "honor ALL rescissions made." CR 935, 1011-12, Exhibit 14, ¶12; Exhibit 14-H. Indeed, *prior to the rescission deadline* Verizon notified employees that about 10% of the workforce had chosen to take advantage of the voluntary program and the Company would be *backfilling some positions*. CR 935-36, 1014-16, *id.*, ¶15, Ex. 14-I.

The record is clear: Verizon never stated mandatory layoffs were imminent or even planned - indeed, Verizon assured its employees of precisely the opposite, that there would be no involuntary layoffs for the remainder of 2003. That fact is **undenied** in the record of this summary judgment proceeding. The fact that Verizon accepted all the employees who volunteered to participate in the program does not lead to the "inescapable conclusion that the employer would have involuntarily reduced its workforce had not employees not participated," CP 60, Order at 2; it simply establishes that Verizon disclaimed the power to reject any employee who did volunteer. Moreover, the fact that Verizon backfilled some of the positions left vacant by volunteers is clear evidence that Verizon would *not* have involuntarily reduced its workforce had the employees not participated.

F. The Commissioner's conclusion that Verizon took the "final action" required by WAC 192-150-100(c) by "...selecting the employees to whom the announcement was made, and then in automatically accepting the employees' participation" in the program, "while retaining the power to reject those employees who were not eligible for such participation" is both an erroneous interpretation of the law and not supported by substantial evidence.

The Commissioner also erroneously interpreted the "final action" requirement of WAC 192-150-100(1)(c) by conflating Verizon's broadly defined initial eligibility determination, made at the announcement of the

program, WAC 192-150-100(a) ("the first action") with an employer's acceptance of an individual employee's offer to be one of those employees included in the layoff or reduction in force, WAC 192-150-100(1)(c) ("the final action"). CP 60, Order at 2. To meet the "final action" requirement, an employer must retain the "power to decide *which* employees to accept in the program." Broschart, 123 Wn. App at 268 (emphasis added). However, if the employer "could not deny them the right to the program" once employees accept the offer of voluntary separation, the employer does not take the "final action," and the requirements of WAC 192-150-100(1)(c) are not met. Broschart, 123 Wn. App. at 271. Because Verizon did not retain the right to deny any eligible employee the right to the program, it did not take the "final action."

Verizon did not "automatically accept" anything: it sent an automatic electronic *confirmation* of receiving *volunteers' acceptance* of the offer of voluntary separation. CR 847, Exhibit 6. Merely processing "clerical paperwork is not the final action contemplated by the regulation." Intalco, 128 Wn. App. at 130. "Under Washington law, an offer is accepted and becomes contractually binding by the actions of a person signing an agreement presented as an offer." *Id.* (citation omitted). Because Intalco, like Verizon, retained no control over who volunteered to

participate, once its offer was formally accepted by the employee, "the deal was binding on Intalco. Under these circumstances, the employees who accepted the severance package took the final action in the separation process." Id. at 130.

WAC 192-150-100 is an interpretive rule that was not intended to change the prior policy of the department. ("Section 201, chapter 403, Laws of 1995, does not apply to this rule adoption. The proposed rule clarifies, but does not change, existing policy and procedure." WSR 01-04-082.) Thus the text of the former rule is instructive. Former WAC 192-16-070 provided,

A layoff or reduction-in-force will not be considered to be a voluntary quit pursuant to RCW 50.20.050, if:

- (1) The employer announced a layoff or reduction-in-force; and
- (2) The claimant volunteered to be one of the people included in the layoff or reduction-in-force; and
- (3) The employer determines *which individuals* are laid off or released through a reduction-in-force; and
- (4) the employer accordingly laid off or released the claimant due to a reduction-in-force.

Ortega, 90 Wn. App. at 619 (emphasis supplied). It is evident from a plain reading of the former regulation that it was the employer's determination of *which individuals* would be released *after the layoff is announced and the claimant volunteered* that was refashioned into the "final action" requirement in the new regulation. An interpretation that conflates the

"first action" with the "final action" is an erroneous interpretation of the law.

The Commissioner emphasizes the fact that Verizon "selected" the employees who were eligible to participate in the MVSP (the "first action"). CP 60, Order at 2. But identifying a large group of employees who are eligible for the voluntary program is not the same as taking the final action. WAC 192-150-100(1)(a)(ii) calls for the employer to announce "that employees can offer to be among those included in the layoff or reduction in force." It does *not* say, "that *all* employees can offer..." or "that *every* employee can offer to be among those included...". In Broschart and Intalco, the employer offered the voluntary severance program to all union or hourly employees. Intalco, 128 Wn. App. at 124-125 ("Intalco reached an agreement with the union representing its production and maintenance workers ... Intalco sent a memorandum to hourly employees announcing three voluntary severance programs ...").⁸ Like Intalco, Verizon identified a large subset of its employees as eligible. CR 939, Exhibit 14-A at 1 ("Almost all Verizon management and nonunion employees"). The critical fact was that once the offer was made

⁸ Judge Kurtz acknowledged that the Intalco program was made available to only hourly or union employees, but still concluded the program was "all-encompassing" (...continued)

to employees, the employer did not retain the power to decide *whether to accept an employee who volunteered*. There, as here, "it was the employee, not the employer, who took the final step toward separation by signing the ... agreement." Broschart, 123 Wn. App. at 268. Verizon did not reserve the right to accept or decline participation in the MVSP by any of the eligible employees. CR 935, Exhibit 14, ¶13. The fact that Verizon did not make the program available to every employee in the corporation has no bearing on the fact that the employees, not Verizon, took the final action to end the employment relationship.

Moreover, the fact that Verizon backfilled some of the positions left vacant by volunteers is clear evidence that Verizon did not retain the power to decide whether to accept an employee who volunteered. Had it retained the power to take the "final action," it would have simply declined applications by volunteers when it had reached its "target." The Commissioner's conclusion that Verizon took the "final action" by accepting volunteers' applications for early severance is not supported by substantial evidence.

G. In the alternative, if the Court finds WAC 192-150-100(1) applicable to the completely voluntary program at issue here,

(...continued)

and therefore distinguishable from Verizon's program. Nothing in the record supports this distinction. RP 6.

the Trial Court erred by concluding that the Department did not exceed its statutory authority in adopting the rule.

The Court *shall* declare an agency rule invalid if it finds that the rule exceeds the statutory authority of the agency. RCW 34.05.570(2)(c) (emphasis added). The Employment Security Department is charged by statute with administering the Unemployment Compensation Act. "The commissioner shall administer this title. He shall have the power and authority to adopt, amend, or rescind such rules and regulations ... as he deems necessary or suitable to that end ...". RCW 50.12.010. But the agency only has the authority that the Legislature grants it by statute; moreover, "an agency cannot promulgate rules that amend or change legislative enactments." Edelman v. Public Disclosure Comm'n. 116 Wn. App. 876, 881-82 (2003), affirmed. 152 Wn.2d 584, (2004) (citations omitted). "[A]n agency's rule that conflicts with a statute is beyond the agency's authority and *requires* invalidation of the rule." *Id.* at 886 (emphasis added).

As noted supra and explained more fully in § V.G.3, the Department promulgated WAC 192-150-100 to clarify, not modify its position that voluntary participation in a non-mandatory layoff disqualifies an employee from unemployment benefits. The claimants in this case argue that the new regulation "clearly sets forth the reasoning in Nielsen."

apparently based on the addition of Nielson's "first and last step" idiom to the regulation. This argument is implausible and cannot be credited for the reasons set forth above; however, if the Court finds the Commissioner correctly interpreted the rule, the result is that WAC 192-150-1.00 is invalid, because it exceeds the Department's authority to promulgate rules consistent with the statute it is charged with administering.

1. The Plain Meaning of the Statute

The plain meaning of RCW 50.20.050(1)⁹ disqualifies claimants from receiving benefits when "he or she has left work *voluntarily* without good cause." RCW 50.20.050(1) (2003) (emphasis added).

In determining under this subsection whether an individual has left work voluntarily without good cause, the commissioner shall only consider *work-connected factors* such as the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness for the work, the individual's ability to perform the work, and such other *work connected factors* as the commissioner may deem pertinent...

⁹ The statute was amended in 2003 by establishing criteria for claims with an effective date before January 4, 2004, and those with an effective date on or after January 4, 2004. Ch. 4, Laws of 2003, Second Special Session. Because all of the claimants here left employment in November 2003, RCW 50.20.050(1) (2003) applies to the claims at issue here and the Commissioner's December 2004 decision. This Court has since struck down § 4 of ch. 4, Laws of 2003, Second Special Session (and ch. 12, Laws of 2006) on grounds that the enacting legislation violated our State constitutional subject in title rule. Batey v. Emp. Sec. Dep't., 137 Wn App 506, 514 (2007). However the 2003 legislation made no substantive changes to the statute as it applied to claims made before January 1, 2004.

RCW 50.20.050(1)(c) (2003) (emphasis added). The statute defines neither the term "voluntary" nor the phrase "work-connected factor." Moreover, WAC 192-150-100 does not define the terms "layoff" or "reduction in force." Where the statute does not define terms commonly used by laypersons, a court may consult a dictionary for aid in interpreting the statute. Western Farm Service, Inc. v. Olsen, 151 Wn.2d 645, 657 (2004) (Sanders, J., dissenting) (citing Am. Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 8 (1991); Rainier Nat'l Bank v. Bachmann, 111 Wn.2d 298, 303 (1988)).

Voluntary - adj. 1. proceeding from the will: produced in or by an act of choice.

RIF - n. A process of reduction of personnel (as of a government organization) esp. for reasons of economy....

Webster's Third New International Dictionary of the English Language.

(unabridged) c. 2002, Merriam Webster, Inc.

Layoff - n. A termination of employment at the will of employer.

Black's Law Dictionary, 6th Ed. C. 1990, West Publishing Co.

Although the Nielsen court declined to read "involuntary" into the definition of "layoff," 93 Wn. App. at 36, it would be redundant to do so: there is nothing "voluntary" about termination that results from the will of the employer, or the fact that an employer had implemented a "reduction

of personnel" it employed. As the court in Ortega, Goewert, Broschart and Intalco rightly observed, "layoff" means "involuntary layoff." Ortega, 90 Wn. App. at 624 (SVROF not a "true layoff"); Goewert v. Anheuser Busch, Inc., 82 Wn. App. 753, 758 (1996); Broschart, 123 Wn. App. at 267; Intalco, 128 Wn. App. at 128 (layoff or reduction-in-force means involuntary terminations of employment).

2. The Purpose of the Statute

"When reviewing an unambiguous statute, we determine its meaning from the statutory language alone; if a statute is ambiguous, we may look to other sources." Superior Asphalt & Concrete v. Dep't of Labor and Indus., 84 Wn. App. 401, 406 (1996), rev. denied, 132 Wn.2d 1009 (1997). Here, the purpose of the statute is to "prevent [the] spread and lighten [the] burden" of "*involuntary* unemployment." RCW 50.01.010 (emphasis added).

The Employment Security Act was enacted to award unemployment benefits to those unemployed through no fault of their own. ... [W]hether the job separation is a discharge or is voluntary, in order for a claimant to be eligible for benefits, the act requires that the reason for the unemployment be external and apart from the claimant.

Safeco, 102 Wash.2d at 392 (citing Cowles Pub'g Co. v. Department of Empl. Sec., 15 Wn. App. 590, 593 (1976)). Where, as here, employees are told that their employer will allow participation in a severance program

which is not a mandatory plan, the employees' decision to resign is for personal reasons, not reasons "external and apart from the claimant."

The commissioner erroneously interpreted the phrase 'reduction-in-force' to include all situations in which an employer reduces the number of its employees, not the 'involuntary' situations required under RCW 50.20.050. The employer must announce a layoff or a reduction-in-force, meaning involuntarily terminations of employment. To hold otherwise would contravene the purpose of the Employment Security Act of providing a source of income to those workers who are unemployed through "no fault of their own" and its purpose of reducing "involuntary unemployment."

Ortega, 90 Wn. App. at 625 (quoting Goewert, 82 Wn. App. at 758).

3. WAC 192-150-100 is not a "change in position" from the Department's earlier regulation - RIF *still* means "involuntary RIF."

The Department promulgated WAC 192-150-100 to replace former WAC 192-16-070. Washington State Register 01-04-082, Proposed Rule (February 7, 2001); Washington State Register 01-12-009, Permanent Rule (May 24, 2001). The Department's *announced position* prior to promulgation of the rule was that WAC 192-16-070 did not apply to voluntary reductions in force because the employees had a choice to participate. Ortega, 90 Wn. App. at 620, citing In re Marinkovic, Dept Empl. Sec. Comm'r Dec. (2d) 848 (1995). In Marinkovic, the Administrative Law Judge initially granted the claimant unemployment benefits on the basis that she satisfied the elements of WAC 192-16-070;

the employer *and the Department* appealed; and the Commissioner's Delegate set aside the All's decision. Ortega, 90 Wn. App. at 619-20. Clearly, the Department's position was that benefits were not properly payable. This position had been ratified as the proper interpretation of RCW 50.20.050 in Read, Goewert and Ortega. The anomaly, Nielsen v. Employment Security Dept., 93 Wn. App. 21 (1998), rejected the requirement that the announced layoff be mandatory and inevitable.

In announcing the proposed rule, the Employment Security Department explained the need for a new rule:

Recent conflicting opinions by Divisions I and III of the Court of Appeals [later citing Ortega and Nielson] have resulted in confusion regarding how the current rule is to be interpreted. The department proposes this rule to clarify the conditions under which benefits will be paid to individuals participating in an employer-instituted layoff or reduction in force.

The proposed rule *clarifies the department's position* that, when the first and last actions in the termination are taken by the employer, the worker will not be considered to have been separated from work for a disqualifying reason.

The new rule is similar to the existing rule, but adds language *clarifying* that the first and final steps in the layoff must be taken by the employer. Language is also added *clarifying* that the rule does not apply in situations when an employer modifies benefits in an effort to encourage early

retirement or staff turnover, but does not announce plans to reduce the workforce.

Section 201, chapter 403, Laws of 1995, does not apply to this rule adoption. The proposed rule clarifies, but does not change, existing policy and procedure.

WSR 01-04-082 (emphasis supplied). The Department's announcement that Section 201, Chapter 403, Laws of 1995 (the Regulatory Reform Act of 1995) does not apply is instructive. WAC 192-150-100 was exempt from the Regulatory Reform Act only because it was intended to "*clarify language of a rule without changing its effect.*" RCW 34.05 .328(5)(b)(iv) (emphasis added). This unambiguous statement can have either one of two meanings. If WAC 192-150-100 does change the effect of WAC 192-16-070, then the new rule was adopted without compliance with the Regulatory Reform Act, and it is therefore invalid. RCW 34.05.570(2)(c). Alternatively, the Department's statement meant what it said and WAC 192-150-100 did not change existing policy. In either event, the Department's "clarification" of its policy by enacting WAC 192-150-100 did *not* modify the requirement that the employer announce a mandatory¹⁰ layoff or reduction in force. As the Intalco court observed, "The

¹⁰ Indeed, any other finding would render the new regulation invalid, for the reasons identified in Section B(1) above.

requirement of a writing is recent. Former WAC 192-16-070 (1993) required only that the employer announce a layoff. [The 2001] amendment require[ed] that the layoff announcement be made in writing." Intalco, 128 Wn. App. at 127. Thus the 2001 regulation added the requirement of a writing: it did not change the requirement that the layoff be mandatory.

Just as the 1993 promulgation of WAC 192-16-070 did not expand the statutory obligation to pay unemployment benefits to employees who participate in a voluntary early retirement program or voluntary reduction in force, the 2001 promulgation of WAC 192-150-100 did not expand the obligation. Under any of the regulations interpreting RCW 50.20.050, a voluntary resignation disqualifies the claimant from unemployment benefits unless the resignation is pursuant to an employer's mandatory layoff or reduction-in-force.

4. No deference owed to the Department's statutory interpretation

The Court need not accord the Department's admittedly interpretive rule special deference. Although the courts give weight to an administrative agency's legislative rules, interpretive rules are not subject to the same degree of deference.

Therein lies the true difference between interpretive and legislative rules: their effect on the courts. Legislative rules

bind the court if they are within the agency's delegated authority, are reasonable, and were adopted using the proper procedure. Interpretive rules, however, are not binding on the courts at all: Reviewing courts are not required to give any deference whatsoever to the agencies' views on that subject [correctness and desirability of the agencies' interpretations]. Legislative rules therefore have greater finality than interpretive rules because courts are bound to give some deference to agency judgments embodied in the former, but they need not defer to agency judgments embodied in the latter.

[Interpretive rules] are not binding on the courts and are afforded no deference other than the power of persuasion. Accuracy and logic are the only clout interpretive rules wield.

Assoc. of Wash. Business, 155 Wn.2d at 446-47 (emphasis added) (quotations, citations, footnotes omitted). By the Department's own admission, WAC 192-150-100 is an interpretive rule that was not intended to change the prior policy of the department. Thus the Court must focus on the meaning and purpose of the statute, and may consider the Department's interpretive rule as persuasive only insofar as it is a logical interpretation of the statute.

The Courts have cast doubt on the validity of the predecessor regulation, WAC 192-16-070, when the Department interpreted it to allow for benefits to a claimant who participated in a non-mandatory reduction in force. In Goewert, the Court did not reach the question of whether the

Department was within its authority to enact WAC 192-16-070, but noted that a regulation that grants benefits to claimants disqualified by statute would be invalid. Goewert, 82 Wn. App. at 758. The Ortega Court, in rejecting the claimants' arguments that they left employment involuntarily because they were unsure of their future with the company, reasoned that deference to interpretative administrative regulations must yield to an interpretation that is consistent with the underlying statute. Ortega, 90 Wn. App. at 622. In upholding the Department's denial of benefits, the Court concluded, "The Department's interpretation that WAC 192-16-070 creates only a narrow exception [to the rule that a voluntary quit disqualifies claimant from benefits] is consistent with the statutory policy that employees who leave work 'voluntarily without good cause' are disqualified from unemployment benefits." *Id.* at 626.

Judge Kurtz rejected - without analysis - Verizon's argument that if the interpretive regulation here was properly applied, it is an invalid exercise of the Department's authority. RP 3. Verizon respectfully requests this Court consider the plain meaning and purpose of the statute, and follow the Legislature's command that regulations that exceed the agency's authority shall be declared invalid. RCW 34.05.570(2)(c).

A similar result was recently reached by the Appellate Division of the Superior Court in New Jersey. In re Adoption of N.J.A.C. 12:17-9.6 by the State of New Jersey Department of Labor, Docket No. A-4026-05T3 (N.J. Super. Ct. App. Div., August 1, 2007) (approved for publication August 1, 2007) (attached as Appendix A). The court there construed New Jersey's unemployment statute which, like Washington's, disqualifies from benefits any person who "has left work voluntarily without good cause attributable to such work." N.J. Stat. Ann. § 43:21-5(a). The relevant state agency had promulgated a regulation that expressly permitted benefits to employees who participated in a "voluntary layoff and/or early retirement incentive policy or program in effect during a reduction-in-force" so that another employee may continue to work. N.J. Admin. Code tit. 12, § 17-9.6(a). The New Jersey appellate division did not hesitate to strike down that regulation, "first and foremost" because it permitted unemployment benefits to an employee who left work voluntarily even though the employee had no reasonable fear of an involuntary layoff. App. A, at 19-20. If WAC 192-150-100 achieves that result, this Court should similarly not hesitate to strike the regulation down as inconsistent with the controlling statute.

H. The Commissioner Erred by Failing to Apply RCW 50.12.050 and WAC 192-16-009 to Find that Claimants' Quit was "Voluntary" and Not for "Good Cause."

Since WAC 192-150-100 does not apply (or is invalid), the Commissioner should have applied the general rule enunciated in RCW 50.12.050 and WAC 192-16-009, which disqualifies claimants from receiving benefits when their resignation was voluntary and not for good cause. The claimants here voluntarily participated in Verizon's MVSP and elected a sizeable monetary payout in lieu of continued employment. Their reasons for electing this option were personal, not work-connected factors as required by statute.

Under RCW 50.20.050(1), a worker may be disqualified from receiving unemployment benefits if the commissioner determines he or she voluntarily left work without good cause. Terry v. Employment Sec. Dep't. 82 Wn. App. 745, 749 (1996). According to WAC 192-16-009, the employee must satisfy three factors to establish good cause for a voluntary quit: (1) that the employee left because of work-connected factors; (2) that the factors were sufficiently compelling to cause a reasonably prudent person to terminate employment; and (3) that the employee had exhausted all reasonable alternatives to resigning (but the employee need not perform futile acts). Terry, 82 Wn. App. at 749 (citing WAC 192-16-009).

Participating in a voluntary reduction in force, alone, is not a work connected factor, because the decision to leave work was not "separate and apart from the claimant." A compelling reason is one that "forces or constrains a person to quit her employment against her will. Good cause must be based upon existing facts as contrasted to conjecture, and reasons for leaving employment must be significant. Thus, mere uncertainty about an employment situation is not good cause to quit.

Terry, 82 Wn. App. at 751. As explained in detail above, Verizon's program was unambiguously voluntary, with no mandatory aspect to it. There are simply no "work connected factors" are presented by claimants' voluntary decisions to leave Verizon's employment. RCW 50.20.050(1)(c). As such, summary judgment for claimants is clearly inappropriate -- but Verizon is entitled to judgment in its favor.

VI. CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the trial court's Order Affirming the Decision of the Commissioner of the Washington Employment Security Department.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that on the date indicated below that the foregoing **Brief of Appellant** was caused to be served via First-Class U.S. Mail on the individuals and/or offices at the addresses listed on the attached Appendix A:

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APPENDIX A

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4026-05T3

IN RE ADOPTION OF
N.J.A.C. 12:17-9.6 BY
THE STATE OF NEW JERSEY
DEPARTMENT OF LABOR

APPROVED FOR PUBLICATION

August 1, 2007

APPELLATE DIVISION

Argued: April 17, 2007 - Decided: August 1, 2007

Before Judges Coburn, Axelrad and R.B.
Coleman.

On appeal from the adoption of N.J.A.C.
12:17-9.6 by the Department of Labor.

Francis J. Vernioia argued the cause for appellants Verizon New Jersey Inc., Verizon Services Group, Verizon New York Inc., Empire City Subway Co. Ltd., Verizon Services Corp., BA Investments Development Inc., Chesapeake Directory Sales Co., Codetel Int'l Comm Inc., Global Solutions Inc., Verizon Connected Solutions Inc., Verizon Directory Services, Inc., Verizon Network Integration Corp, and Verizon Corporate Svcs Corp. (Genova, Burns & Vernioia, attorneys; Mr. Vernioia, of counsel and on the brief; Kathleen Barnett Einhorn, on the brief).

John C. Turi, Deputy Attorney General, argued the cause for respondent State of New Jersey (Stuart Rabner, Attorney General, attorney; Mr. Turi, on the brief).

The opinion of the court was delivered by

AXELRAD, J.T.C. (temporarily assigned).

This appeal challenges the facial validity of N.J.A.C. 12:17-9.6, which provides that employees who leave their employment to participate in "a written voluntary layoff and/or early retirement incentive policy or program . . . so that another employee may continue to work" are qualified to receive unemployment compensation benefits. We hold the regulation is invalid as a matter of law as it contravenes the legislative policies underlying the Unemployment Compensation Act, N.J.S.A. 43:21-1 to -71, and is inconsistent with the Supreme Court's interpretation of N.J.S.A. 43:21-5(a).

On July 7, 2003, the New Jersey Department of Labor ("DOL")¹ adopted the challenged regulation, N.J.A.C. 12:17-9.6, which provides:

(a) Notwithstanding any other provision of this subchapter, when an employer has a written voluntary layoff and/or early retirement incentive policy **or** program in effect during a reduction-in-force that permits or induces an employee to leave work so that another employee may continue to work, the following applies:

1. The individual who participates in the program will not be subject to disqualification for voluntarily leaving work in accordance with N.J.S.A. 43:21-5(a); and

¹The DOL is now the Department of Labor and Workforce Development.

2. The individual must otherwise meet all of the other eligibility requirements of the Unemployment Compensation Law to be eligible to receive unemployment insurance benefits.

Verizon² filed a timely notice of appeal challenging the validity of the regulation as violative of the Unemployment Compensation Act ("Act"). R. 2:2-3(a)(2).³ In its appeal, Verizon argues that N.J.A.C. 12:17-9.6 is invalid and ultra vires of the DOL's authority because: (1) it is inconsistent with the express language of N.J.S.A. 43:21-5(a); (2) it contravenes the legislative policies underlying the Act and is inconsistent with N.J.S.A. 43:21-5(a) as interpreted by the New Jersey Supreme Court in Brady v. Board of Review, 152 N.J. 197 (1997); (3) it is inconsistent with and contravenes N.J.A.C. 12:17-9.1; and (4) it disregards the express requirements set forth in N.J.S.A. 43:21-5(c).

According to Verizon, on its face the regulation contravenes the unequivocal Legislative policy that employees

²Although there are multiple appellants, we collectively refer to them as "Verizon."

³The appeal was dismissed as interlocutory because of administrative proceedings concerning claims for unemployment compensation benefits made by certain former Verizon employees who left their employment pursuant to a voluntary separation program. On April 10, 2006, Verizon re-filed its appeal challenging the facial validity of this regulation following the final administrative decision in the employees' appeal.

are disqualified from receiving unemployment compensation benefits unless they are "involuntarily" terminated from employment. This is so because the regulation operates to qualify employees for unemployment compensation benefits who voluntarily choose to resign their positions of employment to accept lucrative early retirement or separation packages, not because they are threatened with an imminent loss of their own employment, but simply because they choose to resign "so that another employee may continue to work." N.J.A.C. 12:17-9.6(a). Furthermore, according to Verizon, in a manner inconsistent with the Act, specifically N.J.S.A. 43:21-5(c), this regulation impermissibly allows employees to qualify for unemployment compensation benefits where their jobs remain open and available, but they refuse continued employment.⁴

The DOL responds that the regulation is consistent with the agency's statutory authority to administer the unemployment compensation law and that Verizon has failed to satisfy its burden of overcoming the strong presumption of validity enjoyed by administrative regulations. According to the DOL, N.J.A.C. 12:17-9.6 is consonant with the language of the Act and its

⁴Based on our invalidation of N.J.A.C. 12:17-9.6 as inconsistent with the Supreme Court's interpretation of N.J.S.A. 43:21-5(a), we need not address Verizon's argument respecting N.J.S.A. 43:21-5(c).

purpose of providing benefits to persons who satisfy certain work and earnings requirements and who subsequently become involuntarily unemployed. The DOL argues the challenged regulation provides a practical response to the involuntary loss of "a job" caused by workforce reduction in today's era of corporate downsizing, and thus is consistent with the legislative policies underlying the unemployment compensation law as interpreted by the courts. The agency insists it is not fatal to the validity of the regulation that the person subject to the potential loss of employment would have been a co-worker and not the resigning claimant.

I

N.J.S.A. 43:21-5(a) states that an individual shall be disqualified from the receipt of unemployment compensation benefits "[f]or the week in which the individual has left work voluntarily without good cause attributable to such work

." In Brady, the Court addressed whether employees, who elected to participate in an early retirement plan, were disqualified for benefits under this provision, and held that such resignation would be deemed with "good cause attributable to such work" only in a very limited and defined circumstance. The claimants were former employees of a GM plant located in Trenton who accepted early retirement plans offered by GM when

management announced its intention to close the plant by the end of 1993. Brady, supra, 152 N.J. at 203-04. They subsequently sought and were granted unemployment benefits that were reversed by the Board of Review, which found the claimants to be disqualified under N.J.S.A. 43:21-5(a) because they "left work voluntarily without good cause attributable to such work." Id. at 204.

The Supreme Court upheld the disqualification. Applying a two-part test for determining "good cause" under the statute, the Court held that individuals are disqualified for unemployment benefits if they voluntarily accept a retirement incentive package unless they "establish by 'definite objective facts,' (1) a well-grounded fear of 'imminent layoff' and (2) that they 'would suffer a substantial loss by not accepting early retirement.'" Id. at 222; see Fernandez v. Bd. of Review, 304 N.J. Super. 603, 605 (App. Div. 1997); Trupo v. Bd. of Review, 268 N.J. Super. 54, 61 (App. Div. 1993).

In its analysis, the Court reviewed the legislative intent underlying the Act and the case law interpreting the "good cause" requirement of N.J.S.A. 43:21-5(a). The Court noted the phrase "good cause" is not statutorily defined but has been construed by our courts to mean "'cause sufficient to justify an employee's voluntarily leaving the ranks of the employed and

joining the ranks of the unemployed.'" Brady, supra, 152 N.J.
at 214 (quoting Domenico v. Bd. of Review, 192 N.J. Super. 284,
287 (App. Div. 1983)). The Court elaborated:

The test of "ordinary common sense and
prudence" must be utilized to determine
whether an employee's decision to leave work
constitutes good cause. Such cause "must be
compelled by real, substantial and
reasonable circumstances not imaginary,
trifling and whimsical ones."

[Ibid. (internal citations omitted).]

The Brady Court emphasized the legislative history and the
Legislature's declaration of public policy, acknowledging that
even though the Act is to be construed liberally in favor of
claimants to achieve its remedial purposes, "it is also
important to preserve the [unemployment insurance trust] fund
against claims by those not-intended to share in its benefits.
The basic policy of the law is advanced as well when benefits
are denied in improper cases as when they are allowed in proper
cases.'" Id. at 212 (quoting Yardville Supply Co. v. Bd. of
Review, 114 N.J. 371, 374 (1989)). In other words, the Act was
"designed to serve not simply the interest of the unemployed,
but also the interest of the general public." Ibid. Since
"[u]nemployment compensation is an insurance, not an
entitlement, program designed to provide a cushion for workers
who are involuntarily unemployed through no fault or act of

their own," employees are required to do "'whatever is necessary and reasonable' in order to remain employed." Id. at 222 (quoting Heulitt v. Bd. of Review, 300 N.J. Super. 407, 414 (App. Div. 1997)).

The Court held the claimants were properly disqualified from unemployment benefits because they failed to establish they had a subjective fear of imminent layoff based on definitive objective facts and they would have suffered significant economic harm if they had chosen not to retire. Id. at 218-19. The management notices did not specifically target particular employees or establish a definite closing date and the claimants could have continued to work for several months, considering their contractual seniority and associated transfer rights, and management's tentative closing schedule. Ibid. Moreover, if the employees had elected to remain at the plant and it had closed as planned, they would have received pension or other supplementary income benefits from their employer in excess of the maximum weekly unemployment compensation rate with no appreciable loss of medical benefits. Id. at 220-21. The Court found claimants were "not the type of workers the Act is designed to protect" because "rather than being involuntarily laid off and receiving no income, [they made a personal choice

and] elected an attractive early retirement package." Id. at 221.

The DOL enacted N.J.A.C. 12:17-9.1, which became effective on June 1, 1998.¹ The regulation recited the statutory language of N.J.S.A. 43:21-5(a), and defined "good cause attributable to such work" as "a reason related directly to the individual's employment, which was so compelling as to give the individual lb choice but to leave the employment." N.J.A.C. 12:17-9.1(b). The regulation lists "[v]oluntary retirement" as an example of a "separation from employment" to be "reviewed as a voluntarily leaving work issue." N.J.A.C. 12:17-9.1(e)8. In adopting this regulation, the DOL acknowledged the Legislative policy inherent in the Act, and implicitly as interpreted by the Supreme Court in Brady,² by limiting a claimant's qualification for benefits to

⁵The regulation was proposed a week before Brady was decided. ²⁹ N.J.R. 5158(a) (Dec. 15, 1997). Nevertheless, upon enactment, the agency's response to the comment that its promulgated standard was "too extreme and restrictive" and should be "whether a reasonable person, under all the circumstances, would have chosen to leave" was: "The proposed standard ensures that the individual's leaving is compelled by real substantial and reasonable circumstances and not imaginary, trifling and whimsical ones." ³⁰ N.J.R. 2027(a), 2029 (June 1, 1998). This is a quote from Domenico, supra, ¹⁹² N.J. Super. at 288, cited in Brady, supra, ¹⁵² N.J. at 214.

The same comment was made when N.J.A.C. 12:17-9.1 was readopted on June 13, 2003, requesting the term "substantial" be substituted for "compelling." ³⁵ N.J.R. 2874(b), 2875 (July 7, 2003). This time the agency expressly cited Brady, stating,

(continued)

situations where, due to reasons related "directly" to the claimant's employment, which are "so compelling," the claimant had "no choice but to leave the employment." N.J.A.C. 17:12-9.1(b). Thus, N.J.A.C. 17:12-9.1 establishes that it is the conditions of the employee claimant's "individual" employment, and not those of any other employee, upon which a determination as to eligibility must be made.

II

Verizon contends the challenged regulation, N.J.A.C. 12:17-9.6, improperly circumvents the requirements of N.J.S.A. 43:21-5(a) as interpreted by the Court in Brady, and eviscerates the stringent two-part test that an employee who voluntarily resigns to accept an employer's early separation or retirement plan has to meet to collect unemployment benefits. According to Verizon, rather than requiring the resigning employee to demonstrate he or she is in fear of an "imminent layoff," N.J.A.C. 12:17-9.6 makes such employee's own employment status irrelevant. Contrary to the Court's holding in Brady, an employee who has no

(continued)

in pertinent part: "The State's courts have interpreted [N.J.S.A. 43:21-5(a)] to mean that the reasons for leaving work must be compelling in order to avoid the disqualification. See, for example, Brady v. Board of Review, 152 N.J. 197 (1997); Fernandez v. Board of Review, 304 N.J. Super. 603 (App. Div. 1997); Domenico v. Board of Review, 192 N.J. Super. 284 (App. Div. 1983). Thus, the Division must abide therewith and incorporate same within these regulations." 35 N.J.R. at 2875.

fear of layoff, imminent or otherwise, qualifies for unemployment compensation benefits under this regulation if the employee voluntarily and gratuitously resigns pursuant to a "written voluntary layoff and/or early retirement incentive policy or program in effect during a reduction-in-force" simply so "another employee may continue to work." N.J.A.C. 12:17-9.6(a). Furthermore, Verizon argues, the regulation permits a resigning employee to qualify for unemployment benefits without any showing that he or she would suffer an economic loss, let alone a "substantial" one, by remaining in the job and not electing to participate in the employer's early separation plan. As emphasized by Verizon, the regulation allows the incongruous result of qualifying the resigning employee for the receipt of unemployment benefits when both the resigning employee and the employee whose job is saved would be disqualified under Brady.

Verizon further asserts that N.J.A.C. 12:17-9.6 contravenes N.J.A.C. 12:17-9.1, a post-Brady regulation promulgated by the DOL defining the phrase "good cause" that is consistent with the Supreme Court's interpretation of the legislative policy underlying the Act. Contrary to N.J.A.C. 12:17-9.1, under the challenged regulation an employee becomes qualified for benefits for reasons totally unrelated to the employee's "individual" employment, i.e., choosing to resign for reasons related to the

employment of another employee. Moreover, N.J.A.C. 12:17-9.6 confers unemployment benefits on an employee who can continue employment but chooses to leave, which directly conflicts with the standard set forth in N.J.A.C. 12:17-9.1 of requiring the employee to prove the departure from work was for a "compelling reason" directly related to the individual's employment. As Verizon notes, "[a]ction by a State agency in contravention of State statutes and its own regulations is per se arbitrary and capricious because it violates express and implied legislative policy." County of Monmouth v. Dep't of Corr., 236 N.J. Super. 523, 525 (App. Div. 1989). Moreover, Verizon urges that N.J.A.C. 12:17-9.6 is an impermissible modification of the express limitations set forth in N.J.A.C. 12:17-9.1, in violation of the Administrative Procedures Act. See N.J.S.A. 52:14B-4(a) (requiring an agency to provide express notice and a hearing in order to amend, modify or repeal an existing regulation).

The DOL responds that N.J.A.C. 12:17-9.6 is consistent with the unemployment compensation law as interpreted by the Supreme Court in Brady. The agency contends the challenged regulation does not establish a per se rule automatically exempting under N.J.S.A. 43:21-5(a) every employee who accepts an employer's offer of a separation package. Rather, consistent with the

statute, the regulation applies only in very specific situations where the employer has instituted a workforce reduction program that permits an employee to voluntarily resign so another may continue to work, all of which the DOL asserts are circumstances attributable to "the work." The DOL urges that the Brady requirements are implicit in N.J.A.C. 12:17-9.6. According to the agency, the regulation recognizes that an employee who accepts a "voluntary layoff and/or early retirement" incentive package "during a reduction-in-force" assists in reducing the employer's workforce and thereby avoids, or substantially reduces, the real possibility of an involuntary separation of either himself or a co-worker, which effectuates the policy of the Act. The agency does not read the language "good cause attributable to such work" contained in N.J.S.A. 43:21-5(a) or the Brady decision to limit the potential job loss to the claimant for eligibility for unemployment benefits; rather, it construes the term broadly to mean work attributable to "such employer" and the imminent loss of "a job" due to an employer's reduction-in-force.

Moreover, the DOL contends it is not fatal to the challenged regulation that when the employee accepts the employer's offer, it is "unknown whether the employer's goal in reducing its workforce will be reached," because Brady does not

mandate a showing of definite termination. Rather, Brady requires only that the employee had "a well-grounded fear of 'imminent layoff'" based on "definite objective facts." Brady, supra, 152 N.J. at 222.

The DOL then asserts that "[u]nder N.J.A.C. 12:17-9.6," the agency "must weigh the evidence and judge the credibility of the parties in reaching a determination as to whether an employee accepting a separation package had a well-founded fear of an imminent layoff." According to the DOL, "[i]t does this, in part, by determining whether the employee reduced by one the number of employees who would have been laid off if the employer's planned incentive program were successful and the employer carried out a scheme of involuntary layoffs to accomplish the desired reduction in its workforce." The DOL also argues the "substantial economic loss" prong of Brady is implicit in N.J.A.C. 12:17-9.6(a)2, which provides that a claimant who accepts an employer's separation package, in addition to satisfying the criteria set forth in paragraph (a), "must otherwise meet all of the other eligibility requirements of the Unemployment Compensation Law to be eligible to receive unemployment insurance benefits." N.J.A.C. 12:17-9.6(a)2. The agency provides no explanation for either argument.

The DOL insists N.J.A.C. 12:17-9.6 is consistent with its prior regulation, N.J.A.C. 12:17-9.1, for the same reasons the challenged regulation is consistent with N.J.S.A. 43:21-5(a). Nevertheless, the agency submits it is permitted to "waive its own duly-enacted regulations" if authorized by a statute or other regulation. County of Hudson v. Dep't of Corr., 152 N.J. 60, 71 (1997). The DOL contends it did so in N.J.A.C. 12:17-1.1(d) by authorizing the Commissioner "to relax these rules for good cause on a case-by-case basis."

III

Regulations adopted by administrative agencies are accorded substantial deference provided they are consistent with the governing statutes' terms and objectives. Nelson v. Bd. of Educ. of Twp. of Old Bridge, 148 N.J. 358, 364 (1997); Matter of Musick, 143 N.J. 206, 216 (1996). Moreover, a regulation is presumed to be reasonable and valid. N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 222 (1999); Matter of Repeal of N.J.A.C. 6:28, 204 N.J. Super. 158, 160 (App. Div. 1985). "To be valid, a regulation must be within the fair contemplation of the delegation of the enabling statute." Lewis v. Catastrophic Illness in Children Relief Fund Comm'n, 336 N.J. Super. 361, 369-70 (App. Div. 2001).

An administrative agency may not "extend the statute to give it a greater effect than its language permits." GE Solid State, Inc. v. Dir., Div. of Taxation, 132 N.J. 298, 306 (1993). Thus, "when the provisions of the statute are clear and unambiguous, a regulation cannot amend, alter, enlarge or limit the terms of the legislative enactment." N.J. Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 N.J. 57, 82 (1980); see also In re Adoption of Amendments to N.J.A.C. 6:28-2.10, 3.6 and 4.3, 305 N.J. Super. 389, 401-02 (App. Div. 1997) --(reiterating that a regulation will be set aside if it "plainly transgresses the statute it purports to effectuate or if it alters the terms of the statute or frustrates the policy embodied in it" (internal citations omitted)).

Indeed, where there is a conflict, the statute prevails over the regulation. Siri v. Bd. of Trs. of the Teachers' Pension and Annuity Fund, 262 N.J. Super. 147, 152 (App. Div. 1993). "Statutes, when they deal with a specific issue or matter, are the controlling authority as to the proper disposition of that issue or matter. Thus, any regulation or rule which contravenes a statute is of no force, and the statute will control." L. Feriozzi Concrete Co., Inc. v. Casino Reinvestment Dev. Auth., 342 N.J. Super. 237, 251 (App. Div.

2001) (quoting Terry v. Harris, 175 N.J. Super. 482, 496 (Law Div. 1980)).

When it is clear that an agency action is inconsistent with the legislative mandate, courts will and must act to intervene. See Williams v. Dep't of Human Servs., 116 N.J. 102, 108 (1989). "[W]e have invalidated regulations that flout the statutory language and undermine the intent of the Legislature." In re, Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 450 (1992). Our role in reviewing an administrative agency action is limited to four inquiries, specifically, whether:-- (1) the -action -of-fends --the State or Federal Constitution; (2) the action violates express or implied legislative policies; (3) the record contains substantial evidence to support the agency's findings; and (4) in applying the legislative policy to the facts, the agency erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. Brady, supra, 152 N.J. at 211; George Harms Constr. Co., Inc. v. N.J. Turnpike Auth., 137 N.J. 8, 27 (1994).

IV

We find Verizon's arguments persuasive and the agency's arguments completely unavailing. It is clear that N.J.A.C. 12:17-9.6 is inconsistent with and "plainly transgresses" the Act, alters the terms of N.J.S.A. 43:21-5(a), and violates the

legislative policies underlying the Act as interpreted by the our Supreme Court in Brady. In addition, the regulation is directly contrary to the agency's own regulation defining "good cause" enacted following the Brady decision, N.J.A.C. 12:17-9.1. As the challenged regulation cannot withstand the crucible of legal scrutiny, it must be set aside.

N.J.A.C. 12:17-9.6(a) states that an individual who participates in a program of "an employer [who] has a written voluntary layoff and/or early retirement incentive policy or program in effect during--a- reduction-in-force that permits or induces an employee to leave work so that another employee may continue to work" will not be disqualified for unemployment benefits under N.J.S.A. 43:21-5(a), and is eligible for such benefits provided the individual "otherwise meet[s] all of the other eligibility requirements of the Unemployment Compensation Law."

This regulation, which removes the N.J.S.A. 43:21-5(a) disqualification for unemployment benefits for an employee who voluntarily resigns to accept a lucrative early retirement or separation package during an employer's reduction-in-force without the requirement that his or her job is in jeopardy, is inconsistent with the purpose of the Act, which is "'to provide some income for the worker earning nothing, because he is out of

work through no fault or act of his own." Brady, supra, 152 N.J. at 212 (quoting Yardville, supra, 114 N.J. Super. at 375). It is also contrary to the claimant's "'responsibility to do whatever is necessary and reasonable in order to remain employed.'" Id. at 214 (quoting Heulitt, supra, 300 N.J. Super. at 414). The claimants, upon whom eligibility for unemployment compensation benefits is conferred under the challenged regulation, clearly are "not the type of workers the Act is designed to protect" because "rather than being involuntarily laid off and receiving no income," they can choose to resign for personal reasons and elect an attractive early retirement or separation package. Brady, supra, 152 N.J. at 221.

Furthermore, contrary to the agency's bald assertion, N.J.A.C. 12:17-9.6 does not implicitly incorporate the two-part Brady test. To the contrary, the regulation effectively overrules the Supreme Court's interpretation of the Act by expressly permitting the receipt of unemployment compensation benefits without the claimant's satisfaction of either prong. First and foremost, directly contrary to Brady, an employee who has no fear of his or her own layoff, imminent or otherwise, but who gratuitously elects to participate in an early retirement or layoff plan and who leaves work during a reduction-in-force "so another employee may continue to work," qualifies for

unemployment benefits-under the regulation. Even assuming the agency's position that the phrase "such work" in N.J.S.A. 43:21-5(a) encompasses a co-worker's job, which we do not believe is a viable argument following Brady, there is nothing in the language of N.J.A.C. 12:17-9.6 that requires, or even suggests, that the DOL must determine "whether an employee accepting a separation package had a well-founded fear of an imminent layoff." The regulation merely requires there be a reduction-in-force but provides no causal requirement of an imminent loss of any job, nor does it set forth any definitive objective factors of an imminent layoff, such as particularly targeting for layoff the resigning employee or the one who may continue to work, management's tentative layoff schedule, seniority list and projected number of layoffs. See Brady, supra, 152 N.J. at 218-19. Thus N.J.A.C. 12:17-9.6 qualifies for unemployment compensation benefits a resigning employee who voluntarily takes advantage of an employer's retirement or separation plan to potentially save the employment of a co-worker, where neither is in fear of an imminent layoff, and both would be disqualified for benefits under Brady. This is an incongruous result that cannot be reconciled with the Court's decision in Brady.

In addition to not requiring a resigning employee to demonstrate he or she was in fear of imminent layoff, N.J.A.C.

12:17-9.6 also does not require any showing that the resigning employee would suffer any economic loss, let alone a substantial one, if the employee remained in the job and did not choose to accept the benefits of the early separation plan. Brady, supra, 152 N.J. at 215. In contrast, because all that is required under N.J.A.C. 12:17-9.6(a) is that the decision to resign be for the purpose that "another employee may continue to work," a resigning employee who applies for unemployment benefits would never be able to meet the "substantial economic loss" prong of the Brady test. This is so because the regulation does not require the employee who volunteers to leave to establish that his or her job was in jeopardy during the work reduction, or even subject to a decrease in salary or benefits, or any other reason that would amount to cause sufficient to justify leaving the ranks of the employed, for eligibility for unemployment benefits. Thus, such employee could elect not to accept the separation incentive and resign, but remain on the job under the status quo, thereby avoiding any economic harm.

N.J.A.C. 12:17-9.6(a)2 simply requires that the claimant who voluntarily accepts the employer's early separation incentive package, though not subject to the "good cause" disqualification of N.J.S.A. 43:21-5(a), must otherwise meet the eligibility requirements of the Unemployment Compensation Law.

This general language cannot logically be read as implicitly incorporating the two-part Brady test and does not cure any of the previously discussed deficiencies of this regulation. "[W]hen there is a conflict between general and specific provisions of a statute, the specific provision will control." Wilson v. Unsatisfied Claim and Judgment Fund Bd., 109 N.J. 271, 278 (1988). N.J.A.C. 12:17-9.6(a)1, a separate and discrete provision from (a)2, specifically addresses the N.J.S.A. 43:21-5(a) "good cause" disqualification in a manner directly contrary to the Supreme Court's interpretation of that statute. That is why the regulation is invalid. It is immaterial that the claimant would also have to satisfy the other eligibility requirements of the Act, which are unrelated to the "good cause" criteria to be eligible for benefits.

v

N.J.A.C. 12:17-9.6 renders the "good cause" statutory disqualification set forth in N.J.S.A. 43:21-5(a) a nullity by deeming those claimants not in fear of an "imminent" involuntary termination and who would not suffer a "substantial economic loss" if they did not resign and accept the employer's early separation incentive package qualified for the receipt of unemployment compensation benefits. In doing so, the challenged regulation impermissibly results in the qualification of

employees for such benefits under circumstances in which the Supreme Court has determined N.J.S.A. 43:21-5(a) mandates disqualification.

We are satisfied N.J.A.C. 12:17-9.6 is legally deficient as it contravenes the legislative policies of the Unemployment Compensation Act and is inconsistent with the Supreme Court's interpretation of N.J.S.A. 43:21-5(a). We thus invalidate N.J.A.C. 12:17-9.6.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

M. C. Hr.
OF THE APPELLATE DIVISION