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74116-1

NO. 74116-1

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

(Whatcom County Cause No. 14-2-01267-1)

NADENE RAPADA,

Respondent,

vs.

NOOKSACK INDIAN TRIBE

and

STATE OF WASHINGTON,

DEPT. OF EMPLOYMENT SECURITY,

Appellants.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Record does not contain substantial evidence to support the Commissioner's conclusion of disqualifying misconduct. The Commissioner made six (6) findings of fact, only one (1) of which outlined the facts which lead to Respondent Nadene Rapada's (Rapada) discharge. CP 326, Finding V. In light of the entire record, the Commissioner's Finding of Fact Nos. III and V are not supported by substantial evidence and do not support the conclusion of statutory misconduct. When the whole record is reviewed, the Commissioner's conclusion of statutory misconduct was legal error.

Rapada was not involved in an intentional act to violate the employer's policy. Rather, there was a misunderstanding, simply caused by an error in judgment. Rapada simply failed to confirm whether the reimbursement request had been signed off on before she left with the check. CP 76: 15-17; CP 77:3-5.

The Commissioner's Finding of Fact Nos. III and V, disregard and/or misrepresent the evidence, including but not limited to: Rapada worked for the Nooksack Indian Tribe (NIT) for nearly 30

years; the reimbursement requested was for \$11.86¹; Rapada's salary was \$99,340.80; Rapada did not hide her reimbursement request from the controller; she had received reimbursement for going to work for the sole purpose of changing the clocks in the past; the employer's policy at issue was routinely not followed; and, Rapada was not issued any prior warnings regarding the policy.

II. ASSIGNMENTS OF ERROR OF THE COMMISSIONER'S DECISION

Respondent Nadene Rapada assigns error to the following decisions of the Commissioner:

01. The Commissioner erred when he entered Finding of

Fact No. III, to wit:

The employer has a policy dealing with the process of requesting and obtaining reimbursement for travel expenses. This policy requires written signature approval of the employer's Chief Financial Officer (CFO) for reimbursement of such expenses. The claimant was aware of this policy.

CP 326.

02. The Commissioner erred when he entered Finding of

Fact No. V, to wit:

¹ The total mileage reimbursement requested was \$65.54, however; only \$11.86 of that amount was contested by NIT as improper. CP 67-68.

On or about December 20, 2013, after being informed that Ames was attending a meeting in a separate building, but would be available via phone or e-mail, the claimant submitted a request, including a Mileage Report and a Requisition, for mileage reimbursement. In the absence of the employer's CFO, both forms required the approval of Ames. Instead of contacting Ames regarding the mileage reimbursement request, the claimant had a coworker (related to the claimant) process the request and print out a check for mileage. The coworker was subsequently discharged for so doing. The claimant was well-aware that completing such a transaction without the approval of the CFO or his designate violated the employer's regularly reinforced accounting policies. Within one hour after leaving work, the claimant cashed the travel reimbursement check at the employer's casino.

CP 326.

03. The Commissioner erred when he entered the

Additional Conclusion of Law, to wit:

Applying the facts of this matter to the legal criteria set forth in adopted Conclusions of Law Nos. 1 through 6, we conclude the claimant's discharge precipitating conduct has been shown, by a preponderance of substantial evidence of record, to have been in willful and wanton disregard of the rights, title and interests of her employer. RCW 50.04.294(1)(a). Specifically, said conduct was in violation of a reasonable employer policy, which policy was known to the claimant. RCW 50.04.294(2)(f). The claimant submitted a reimbursement request, without proper approval, in clear violation of the employer's accounting policies, policies well known to her and for which she, as the employer's accounting director, had enforcement responsibilities. Misconduct, as that term is

contemplated by RCW 50.20.066(1), has been established.

CP 327.

III. ISSUES PRESENTED

1. Whether the Commissioner's finding No. III was supported by substantial evidence, viewed in light the whole record? [No.]

2. Whether the Commissioner's finding No. V was supported by substantial evidence, viewed in light the whole record? [No.]

3. Whether the Commissioner's Additional Conclusion of Law, concluding that Rapada's actions constituted statutory misconduct was legal error? [Yes.]

IV. RESTATEMENT OF THE CASE

Rapada was employed by the NIT for nearly thirty (30) years, from 1984 until 2013. CP 70:18-21; CP 39. At the time her employment was terminated, Rapada's job title was Accounting Director and her annual salary was \$99,340.80. CP 70:22-24; 71:6-9. As Accounting Director, Rapada was responsible for accounts receivable, accounts payable, payroll, cash flow and employee benefits. CP 130-131.

Rapada's employment with NIT was terminated on December 27, 2013, over a mileage reimbursement in the amount of \$11.86, issued to Rapada a week earlier, on December 20, 2013. CP 73. The total mileage reimbursement requested was \$65.54, however; only \$11.86 of that amount was contested by NIT as improper. CP 67-68. The mileage reimbursement Rapada requested was for twenty-one (21) miles to drive into work for the express purpose of changing the clocks for daylight savings time in November 2013, on a day that Rapada was otherwise not scheduled to be at work. CP 67-68.

On December 20, 2013, there was limited staff working due to snow. CP 64:12-14. The NIT CFO, Jeff Meyer, was on vacation and he delegated his signing authority for accounting documents to Rapada or Elizabeth Ames (fka Fiones), NIT Controller. CP 41. Both Ames and Katherine Canete, General Manager, were both in a meeting, in a different building, but were expected to be back by the end of the day. CP 64; 61; 74:20-25.

On that day, Rapada was processing payroll and waiting for payroll checks to come in because the NIT would be closed the following week for the holidays. CP 75:1-5. Jennifer George was

processing Christmas checks and reimbursement checks. CP 75:6-7. Rapada asked George to process her reimbursement request, along with the other reimbursements George was already processing. It was understood that Ames would sign the requests when she got back. CP 75:7-8. George processed the reimbursement request and gave all the reimbursement requests to another employee, Frank Lava [sic]. Lava then processed the reimbursement checks before Ms. Ames signed the requests. CP 75:9-12.

Later that day, checks were signed by a Council Member, but needed a second signature. The partially signed checks were placed on Rapada's desk to await a second signature. CP 75:12-15. Another Council Member stopped by later in the day and signed the checks. CP 75:16-18.

Around 5:00 p.m., Ames came back into the office. CP 75:20-23. Ames and Rapada discussed the reimbursement paperwork. CP 75:24-5. Ames told Rapada she couldn't get reimbursed for the \$11.86 of mileage for changing the clocks. Rapada told Ames she had always been reimbursed for changing the clocks. CP 76:2-5. Ames asked Rapada if she had the checks,

to which Rapada responded yes, they were on her desk. CP 76:12-14. Ames then walked away and no further discussion was had after that. CP 76:5. Ames and Rapada continued to work together for the next two (2) hours, on and off; Ames did not instruct Rapada not to take the check or ask for the checks back. CP 68-69; 76:6-8. Later that evening, Canete came into the office; she and Rapada discussed the incoming payroll checks, which still had not arrived. CP 76:8-11. Canete did not speak to Rapada about the reimbursement request. CP 76.

The check remained on Rapada's desk until 7:00 p.m., when Rapada left for the day. CP 76:12-14. Rapada acknowledged, in hindsight, that she should have gone back to ask before she left to make sure the reimbursement request had been signed. However, because she heard nothing more from Ames and she had always been reimbursed for changing the clocks, she assumed everything was fine, left for the day, and took the reimbursement check at issue with her. CP 76-77.

Rapada did not hear anything more about the reimbursement check until December 27, 2013, when Tribal police officers came to her home to give her all her personal items from

her office and told her she was terminated because she was a "thief." CP 76:17-22. Rapada was never written up for a violation of an accounting policy. CP 57-58.

A former NIT accounting department employee, Leah Zapata, testified that the policy that reimbursement requests be signed before a check was cut was often not followed. She also testified that paperwork would often get signed after the fact of the checks being run. CP 79: 15-16. Zapata testified as follows:

Q: Um, during your job at the Tribe, have you ever witnessed documents that were not properly signed or processed for payment?

A: Yes, on a daily basis.

Q: When would this -- these documents get signed?

A: Uh, sometimes within the day. Sometimes within a month. It's always after the fact of the checks being run.

Q: And who asked you to, um, process these documents?

A: It was -- majority of the time would be Jeff Meyer.

Q: Was this against the policy, as -- as the testimony from all these people today?

A: Yes, it is against policy.

CP 79:10-20.

NIT admitted that Rapada had changed the NIT clocks for daylight savings in the past. CP 85-86.

Meyers testified on cross examination as follows:

Q: Um, okay. In the years working for me, did you ever think I was a threat to the department?

A: No.

Q: Did I ever steal from the Tribe?

A: No.

Q: Was I ever dishonest or tried to hide anything from you?

A: No.

CR 52:4-11. The employer, who was represented by counsel, did not cross examine Rapada. CP 77.

Rapada's unchallenged testimony was as follows:

- "I've worked here, you know, forever, and I know I've gotten paid for this before. And -- and then she (Elizabeth Ames) walked away." CP 76:3-5.
- "And the whole time that this was happening between 5:00 and 7:00, that check, and all the other checks were sitting on my desk still." CP 76:12-14.
- "And I thought everything was good when I left at the end of the day. So I grabbed the check off of my desk and left and -- for the day." CP 76: 15-17.
- "And at that point, is when I found out that Elizabeth had never signed the paperwork that she had in her hand on the afternoon of the 20th." CP 76:21-24.
- "It's my -- my biggest mistake that I did not go back to her before I left or after, [and ask] 'Did you sign that paperwork?'" CP 77:3-5.

V. PROCEDURAL HISTORY

The NIT appealed the Employment Security Department's initial decision allowing Rapada unemployment benefits. CP 94-

100. On March 20, 2014, a telephone hearing was held before Administrative Law Judge (ALJ) James L. Studt. CP 16. Rapada was pro se; NIT was represented by counsel. CP 16-17.

On March 21, 2014, ALJ Studt issued his decision and affirmed the Employment Security Department's decision determining that Rapada was eligible for unemployment benefits. CP 303-307. ALJ Studt's decision laid out twenty-three (23) detailed Findings of Fact and ten (10) Conclusions of Law. *Id.* ALJ Studt ultimately concluded that "the interested employer has not met the burden of proof to establish that the claimant was discharged for 'misconduct' as defined by RCW 50.04.294. . . . The claimant's decision to cash the check for the entire amount prior to resolving the details of the mileage reimbursement request was an error in judgment . . . [but] that it was a good faith error in judgment." CP 306, Conclusion of Law 9.

On or about April 17, 2014, the NIT appealed ALJ Studt's decision via its Petition for Review sent to the Employment Security Department, Commissioner's Review Office. CP 313-322. On or about May 9, 2014, Commissioner John Sells issued his decision and reversed ALJ Studt's decision and finding statutory misconduct

based on a violation of a reasonable employer policy, which was known to the employee. CR 325-327. Commissioner Sells declined to adopt the Findings of Fact of ALJ Studt. CP 325. Instead Commissioner Sells made six (6) Findings of Fact. CP 325-326. Commissioner Sells adopted all but two of ALJ Studt's Conclusions of Law, declining to adopt ALJ Studt's Conclusions of Law Nos. 9 and 10. CP 326. Commissioner Sells made one Additional Conclusion of Law. CP 327.

Because of Rapada's disqualification of benefits based upon misconduct, Rapada must repay to the Department, all benefits paid in error. CP 328. Rapada's Response to NIT's Petition for Review was apparently not received and was not considered by the Commissioner. CP 325.

On June 2, 2014, Rapada filed her timely Petition for Review of the Commissioner's Decision with the Whatcom County Superior Court, seeking review and reversal of Commissioner Sells' decision denying her unemployment benefits. CP 1-9.

On or about May 7, 2015, a hearing was held before the Honorable Charles R. Snyder. No additional testimony was provided. On that same date, Judge Snyder, issued his oral

decision, reversing Commissioner Sells' decision. On September 21, 2015, an Order on Petition for Review was entered by Judge Snyder, reversing the Commissioner's May 9, 2014, decision and awarding Rapada unemployment benefits. CP 342-345

Subsequently, an Agreed Order on Attorney Fees was entered, awarding Rapada \$3,200, for attorney fees and costs. Cross CP 88-89. This appeal follows.

VI. LEGAL ARGUMENT

A. Standard of Review

The Washington Administrative Procedure Act, chapter 34.05 RCW, governs review of a decision by an Employment Security Department Commissioner. *Verizon Nw., Inc. v. Employment Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). In reviewing an administrative action, the reviewing court applies the Administrative Procedure Act standard directly to the agency's administrative record. *Superior Asphalt and Concrete Co. v. Dep't of Labor Indus.*, 112 Wn.App. 291, 296, 49 P.3d 135 (Div. 2, 2002); *see also Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *Anderson v. Employment Sec. Dept. of State*, 135 Wn.App. 887, 893, 146 P.3d 475 (Div. 2,

2006). An administrative decision will be reversed if it is (1) based on an error of law, (2) not based on substantial evidence, or (3) arbitrary or capricious. *Tapper v. Employment Sec. Dep't*, 122 Wn.2d at 402; RCW 34.05.570(3).

Under the Washington Administrative Procedure Act, agency findings of fact will be upheld if they are supported by evidence that is substantial when viewed against the record as a whole. "We review findings of fact for substantial evidence in light of the whole record." *Kirby v. State, Dept. of Employment Sec.*, 179 Wn.App. 834, 842-3, 320 P.3d 123 (Div. 1, 2014); *see also* RCW 34.05.570(3)(e); *Lee's Drywall Co., Inc. v. Dep't of Labor & Indus.*, 141 Wn.App. 859, 864, 173 P.3d 934 (Div. 2, 2007). "Substantial evidence is 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (*citing Callecod v. Wash. State Patrol*, 84 Wn.App. 663, 673, 929 P.2d 510 (1997)); *see also Heinmiller v. Department of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995).

“Whether a claimant engaged in misconduct connected with work is a mixed question of law and fact.” *Kirby v. Washington State Dept. of Employment Sec.*, 185 Wn.App. 706, 713, 342 P.3d 1151 (Div. 1, 2014).

Analytically, resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts. The characterization of “misconduct” as a mixed question of law and fact does not mean that we are free to substitute our judgment for that of the agency as to the facts; instead, the factual findings of the agency are entitled to the same level of deference which would be accorded under any other circumstance. *See Franklin Cy.*, 97 Wash.2d at 329–30, 646 P.2d 113. **The process of applying the law to the facts, however, is a question of law and is subject to de novo review.** *Henson*, 113 Wash.2d at 377, 779 P.2d 715; *Johnson v. Department of Empl. Sec.*, 112 Wash.2d 172, 175, 769 P.2d 305 (1989).

Tapper, 122 Wn.2d at 403 (emphasis added).

This Court reviews the commissioner’s decision, based on only the administrative record before the commissioner. *Markam GCP., Inc., P.S. v. State Dep’t of Employment Sec.*, 148 Wn.App. 555, 560-61, 200 P.3d 748 (Div. 3, 2009); *Kelly v. State*, 144 Wn.App. 91, 95, 181 P.3d 871 (Div. 3, 2008), *review denied*, 165 Wash.2d 1004, 198 P.3d 511 (2008).

Unemployed workers are generally eligible for benefits, absent a statutory disqualification. *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 388–389, 687 P.2d 195 (1984). Construction of the benefits statute which “would narrow the coverage of the unemployment compensation laws” is viewed “with caution.” *Shoreline Comm. College Dist. No. 7 v. Emp’t Sec. Dep’t*, 120 Wn.2d 394, 406, 842 P.2d 938 (1992).

B. The Commissioner’s Findings of Fact No. III and V Are Not Supported By Substantial Evidence

Relief from an agency decision will be granted when the order is not supported by substantial evidence. RCW 34.05.570(3). RCW 34.05.464(4) provides that the Commissioner “shall give due regard to the presiding officer's opportunity to observe the witnesses.” Although the Commissioner was not required to defer to the ALJ's credibility determinations, federal case law suggests that heightened scrutiny should apply to substantial evidence review of any substituted finding of fact where the reviewing officer ignores or reverses the credibility finding of the hearing officer. *See, e.g. Sorenson v. Bowen*, 888 F.2d 706, 711 (10th Cir. 1989); *see also Regan v. Dep’t of Licensing*, 130 Wn.App. 39,

59, 121 P.3d 731 (Div. 2, 2005). "Given the particular solicitude of RCW 34.05.464(4) for the credibility findings of the hearing officer, some such rule would seem to be warranted." *Tapper*, 122 Wn.2d at 405, n. 3.

Here, the Commissioner declined to adopt any of the Findings of Fact of the ALJ, who performed the role of the trial judge, having heard the evidence and testimony first hand. No explanation is provided as to why the Commissioner disregarded the ALJ's Findings of Fact. Apparently, the Commissioner ignored the findings of the ALJ because the Commissioner incorrectly believed he was in a better position than the hearing judge to determine credibility.

In order to apply the substantial evidence standard to the Commissioner's findings of fact, the Court must consider the record as a whole. *Kirby*, 179 Wn.App. at 842-3. When the facts of this case are considered in light of the entire record, substantial evidence does not support the Commissioner's Findings of Fact.

When viewing the entire record, it is clear that Rapada made nothing more than a good faith error of judgment. This was not a willful, intentional act to violate the employer's policy in order to

allegedly steal \$11.86. Rapada did not hide her reimbursement request. She was reimbursed for changing the clocks previously. NIT never asked for the check back. The policy was often not followed. Rapada was never disciplined for violation of an accounting policy.

1. Finding of Fact No. III

Substantial evidence does not support the Commissioner's

Finding of Fact No. III:

The employer has a policy dealing with the process of requesting and obtaining reimbursement for travel expenses. This policy requires written signature approval of the employer's Chief Financial Officer (CFO) for reimbursement of such expenses. The claimant was aware of this policy.

CP 326. Although, the employer had a written policy regarding obtaining reimbursement for travel expenses and Rapada was aware of the policy, it was not contested that the policy was routinely not followed. Signatures were routinely obtained after the fact for reimbursements.

2. Finding of Fact No. V

Substantial evidence does not support the

Commissioner's Finding of Fact No. V:

On or about December 20, 2013, after being informed that Ames was attending a meeting in a separate building, but would be available via phone or e-mail, the claimant submitted a request, including a Mileage Report and a Requisition, for mileage reimbursement. In the absence of the employer's CFO, both forms required the approval of Ames. Instead of contacting Ames regarding the mileage reimbursement request, the claimant had a coworker (related to the claimant) process the request and print out a check for mileage. The coworker was subsequently discharged for so doing. The claimant was well-aware that completing such a transaction without the approval of the CFO or his designate violated the employer's regularly reinforced accounting policies. Within one hour after leaving work, the claimant cashed the travel reimbursement check at the employer's casino.

CP 312. Rapada did not intentionally go around Ames and have another coworker process her check. The coworker was already processing a number of other checks. The day at issue was busy and short-staffed due to snow and impending holidays. Rapada was attempting to be efficient while waiting for the payroll checks to arrive.

Additionally, Rapada did not intentionally abscond with the \$11.86. What occurred was a system failure. Rapada simply neglected to double-check that the \$11.86 was completely approved before she left for the day. She relied on her nearly 30

years of experience of working for NIT. She made an erroneous assumption and did not strictly comply with the policy, which was policy routinely ignored by others. CP 76: 15-17; CP 77:3-5.

C. **Rapada's Actions Do Not Constitute Statutory Misconduct**

1. NIT Failed to Meet Its Burden of Proof.

The initial burden of establishing misconduct is on the employer. Misconduct must be established by a preponderance of the evidence. 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. *S. Yamamoto v. Puget Sound Lumber Co.*, 84 Wash. 411, 146 P. 861 (1915).

Mr. Meyer's testimony consisted almost completely of hearsay, as he was on vacation at the time of Rapada's discharge. Additionally, Canete's testimony regarding the underlying facts which led to Rapada's discharge were also based on hearsay, as she was out of the building. Although admissible in an administrative proceeding, this testimony should have been given

the proper weight. Hearsay testimony cannot meet the employer's burden of establishing misconduct.

2. Good Faith Error in Judgment is Not Statutory Misconduct.

(1) "Misconduct" includes, but is not limited to, the following conduct by a claimant:

(a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee

RCW 50.04.294(1). "Violation of a company rule if the rule is reasonable and the claimant knew or should have known of the existence of the rule" is considered statutory misconduct. RCW 50.04.294(2)(f). The Department's regulations define "willful" as "intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer." WAC 192-150-205(1).

"Misconduct does not include 'good faith errors in judgment or discretion.'" RCW 50.04.294(3)(c) (Emphasis added). "Mere incompetence, inefficiency, erroneous judgment, or ordinary negligence does not constitute misconduct for purposes of denying unemployment compensation." *Dermond v. Emp. Sec.*

Dept. of State of Wash., 89 Wn.App. 128, 133, 947 P.2d 1271 (Div.1, 1997)

Rapada made a “good faith error in judgment” in taking and cashing the \$11.86 reimbursement check. She did not lie to or steal from her employer. Again, good faith errors in judgment or discretion are excluded from the statutory definition of misconduct. RCW 50.04.294(3); *see also Kirby*, 179 Wn.App. 834 at 845; *Michaelson v. Employment Sec. Dept.*, 187 Wn.App. 293, 349 P.3d 896 (Div. 3, 2015).

[W]hether a particular employee's behavior constitutes ‘misconduct connected with his or her work’ is a mixed question of law and fact, in that it requires the application of legal precepts (the definition of ‘misconduct connected with his or her work’) to factual circumstances (the details of the employee’s discharge).

Kirby, 179 Wn.App. at 845.

In *Kirby*, the ALJ found the claimant’s testimony credible and concluded that the claimant “acted out of apprehension and confusion, rather than out of a conscious intent to harm the employer,” and that her “failure to give more of an explanation or to attempt to write something down on June 10, 2011, was at

worst the kind of error of judgment that the statute states is not misconduct." *Id.*

In *Michaelson*, the Court found that "[t]he record lacks evidence to support a conclusion that Mr. Michaelson's carelessness or negligence was of 'such degree or recurrence to show an intentional or substantial disregard of [FSA's] interest.'"

Michaelson v. Employment Sec. Dept., 187 Wn.App. 293, 349 P.3d 896 (Div. 3, 2015). The Court ultimately determined that,

[a]lthough Mr. Michaelson's carelessness or negligence in the last year of his employment justified his discharge according to FSA policy, considering his long, generally good driving record, we cannot say his chargeable accidents evidence the necessary misconduct to disqualify him from receiving unemployment benefits.

Id. at 302. Similarly, the ALJ here concluded that Rapada's actions did not amount to statutory misconduct under the following reasoning:

The claimant's decision to cash the check for the entire amount prior to resolving the details of the mileage reimbursement request was an error in judgment, but the undersigned concludes that it was a good faith error in judgment as the claimant had been paid each time she had changed the clocks. There was no evidence that the claimant was attempting to obfuscate her actions or that she was behaving in a dishonest manner. The undersigned concludes that the claimant's actions were a

good faith error of judgment, and therefore because RCW 50.04.294 specifically excludes good faith errors in judgment from the definition of "misconduct", the claimant is not subject to disqualification . . . pursuant to RCW 50.20.066.

CP 306, ¶ 9.

Again, the Commissioner's conclusion of statutory misconduct is not supported by the record as a whole. Rapada was employed by NIT for nearly thirty (30) years. Rapada's employment was terminated on December 27, 2013, over mileage reimbursement in the amount of \$11.86, issued to Rapada on December 20, 2013.

Rapada requested the mileage reimbursement, as was customary, for a work related trip to NIT to change the clocks for daylight savings time. It was never disputed that the mileage was actually driven. NIT knew about Rapada's mileage reimbursement request and issued the check on December 20, 2013. NIT did nothing to prevent Rapada from taking the check or cashing the check. It was not until Rapada was notified that her employment was terminated on December 27, 2013, via the Tribal Police, that she first learned that her request for reimbursement had never

been signed off on by a NIT controller. This was a system failure, not statutory misconduct.

Whether Rapada made a minor error in judgment or NIT had other motivations to terminate Rapada's employment, it cost her the loss of well-paying job of nearly thirty (30) years. Under Washington law, it cannot also cost Rapada her unemployment benefits.

D. Attorney Fees - RCW 50.32.160

In the event that this Court affirms the Superior Court's decision, reversing the Commissioner's decision, Rapada respectfully requests an award of reasonable attorney fees pursuant to RCW 50.32.160. This Court may grant a request for attorney fees and costs on appeal when permitted by applicable law. *Pruitt v. Douglas County*, 116 Wn.App. 547, 560, 66 P.3d 1111 (2003). Pursuant to RCW 50.32.160, a claimant must recover reasonable attorney fees and costs from the unemployment compensation administration fund when an appellate court reverses or modifies the decision of the commissioner.

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VII. CONCLUSION

For the reasons stated above, the Court should affirm the trial court's reversal of the Commissioner's decision, and find that Rapada's actions constitute nothing more than a good faith error in judgment and do not amount to statutory misconduct. The Appellants asks this Court to inappropriately review certain facts of this case in a vacuum, disregarding the record as a whole. Rapada's employment was terminated over a disagreement regarding mileage reimbursement in the amount of \$11.86. Rapada admittedly made a mistake when she cashed the check, not realizing that the controller had not yet signed off on the reimbursement check. However, her good faith error in judgment does not amount to statutory misconduct. Rapada should be allowed benefits.

DATED this 3rd day of February, 2016.

SHEPHERD AND ABBOTT



Douglas R. Shepherd, WSBA #9514
Bethany Allen, WSBA #41180

DECLARATION OF SERVICE

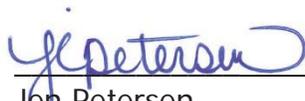
I, Jen Petersen, declare that on February 3, 2016, I caused to be served a copy of **Respondent's Brief** in the above matter, on the following person, at the following address, in the manner described:

R. July Simpson, Esq.	<input checked="" type="checkbox"/> U.S. Mail
Assistant Attorney General	<input type="checkbox"/> Express Mail
PO Box 40110	<input type="checkbox"/> Fax
1125 Washington Street SE	<input type="checkbox"/> E-Mail
Olympia, WA 98504-0110	<input type="checkbox"/> Messenger Service

Rickie W. Armstrong, Esq.	<input checked="" type="checkbox"/> U.S. Mail
Nooksack Indian Tribe	<input type="checkbox"/> Express Mail
Office of Tribal Attorney	<input type="checkbox"/> Fax
PO Box 63	<input type="checkbox"/> E-Mail
5047 Mt. Baker Highway	<input type="checkbox"/> Messenger Service
Deming, WA 98244	

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of February 2016, at Bellingham, Washington.



Jen Petersen

APPENDIX A

RCW 50.04.294

Misconduct—Gross misconduct.

With respect to claims that have an effective date on or after January 4, 2004:

(1) "Misconduct" includes, but is not limited to, the following conduct by a claimant:

(a) Willful or wanton 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;

(c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or

(d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

(2) The following acts are considered misconduct because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee. These acts include, but are not limited to:

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

(b) Repeated inexcusable tardiness following warnings by the employer;

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

(d) Repeated and inexcusable absences, including absences for which the employee was able to give advance notice and failed to do so;

(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 and if the claimant knew or should have known of the existence of the rule; or

(g) Violations of law by the claimant while acting within the scope of employment that substantially affect the claimant's job performance or that substantially harm the employer's ability to do business.

(3) "Misconduct" does not include:

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

(b) Inadvertence or ordinary negligence in isolated instances; or

(c) Good faith errors in judgment or discretion.

(4) "Gross misconduct" means a criminal act in connection with an individual's work for which the individual has been convicted in a criminal court, or has admitted committing, or conduct connected with the individual's work that demonstrates a flagrant and wanton disregard of and for the rights, title, or interest of the employer or a fellow employee.

[2006 c 13 § 9. Prior: 2003 2nd sp.s. c 4 § 6.]

APPENDIX B

RCW 50.20.066(1)

**Disqualification from benefits due to misconduct—
Cancellation of hourly wage credits due to gross
misconduct.**

With respect to claims that have an effective date on or after January 4, 2004:

(1) An individual shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has been discharged or suspended for misconduct connected with his or her work 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. Alcoholism shall not constitute a defense to disqualification from benefits due to misconduct.

APPENDIX C

RCW 34.05.570(3)

Judicial review.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

APPENDIX D

RCW 34.05.464(4)

Review of initial orders.

(4) The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.

APPENDIX E

RCW 50.32.160

Attorneys' fees.

It shall be unlawful for any attorney engaged in any appeal to the courts on behalf of an individual involving the individual's application for initial determination, or claim for waiting period credit, or claim for benefits to charge or receive any fee therein in excess of a reasonable fee to be fixed by the superior court in respect to the services performed in connection with the appeal taken thereto and to be fixed by the supreme court or the court of appeals in the event of appellate review, and if the decision of the commissioner shall be reversed or modified, such fee and the costs shall be payable out of the unemployment compensation administration fund. In the allowance of fees the court shall give consideration to the provisions of this title in respect to fees pertaining to proceedings involving an individual's application for initial determination, claim for waiting period credit, or claim for benefits. In other respects the practice in civil cases shall apply.

[1988 c 202 § 48; 1971 c 81 § 121; 1945 c 35 § 132; Rem. Supp. 1945 § 9998-270. Prior: 1941 c 253 § 4.]