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NO. 93383-9

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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MICHAEL BOISE,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT  
SECURITY,

Respondent.

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**ANSWER TO PETITION FOR REVIEW**

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## I. INTRODUCTION

Under RCW 50.20.050(2)(b)(x), an employee who is able to show that his “usual work was changed to work that violates the individual’s religious convictions or sincere moral beliefs” may quit and still receive unemployment benefits. Following a full administrative hearing, the Commissioner of the Employment Security Department denied Boise’s benefits claim, reasoning that Boise failed to establish that his work violated his sincere moral beliefs. On appeal, however, the superior court remanded because it determined that the Commissioner failed to specifically find (1) whether a *change* in Boise’s work conditions occurred and, if so, (2) whether that change violated Boise’s sincere moral beliefs. On remand, the Commissioner found on the existing record that no change in Boise’s work conditions occurred and affirmed.

The Court of Appeals properly held that the superior court’s remand order instructed the Commissioner to first make an additional finding about whether a change in work occurred based on the existing record. *Boise v. Emp’t Sec. Dep’t*, No. 33202-1-III, slip op. at 9-10 (Wash. Ct. App. June 14, 2016). There was no need to reopen the record to make this finding, as Boise claims, because the record already contained the written agreements identifying the terms to which Boise objected. Further,

Boise never actually contended a change in work conditions occurred. *Id.* at 11.

This case does not merit the Court's review under Rule of Appellate Procedure (RAP) 13.4(b). The Court of Appeals decision is consistent with the Administrative Procedures Act (APA), involves no conflict of law or significant constitutional question, and does not implicate issues of substantial public interest. The Court should deny review.

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

If this Court accepts review, the issue will be:

When a court remands an administrative decision to make a factual finding, and the administrative record contains substantial evidence on the issue, may the finding be based on the existing record?

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

Boise worked as a building sales specialist for Cleary Building Corporation beginning February 1, 2013, until he quit on February 18, 2013. CP 20-21, 133. He agreed to an initial weekly salary of \$580. CP 21, 46, 134. At the time he was hired, Boise signed an Employment Agreement stating that his compensation would be paid according to the Cleary Sales Specialist Pay Plan ("Pay Plan"). CP 77, 133-34. Boise initialed each page of the Employment Agreement and signed the final

page, which included the statement that the “Employee acknowledges and understands all of the terms of [the] Agreement and verifies he/she has read all the terms of [the] Agreement.” CP 44, 76-81, 134.

Boise also signed a Pay Plan that same day, though he later claimed to not have received a full copy of the plan at that time. CP 43-46, 87, 134. The plan explained that after 60 days, his weekly salary could be reduced if he failed to meet certain sales targets. CP 82, 134. The plan also explained the terms of the employer’s “subcontract incentive program.” CP 82-86, 134. To participate in the program and earn incentive pay, sales specialists added a negotiated markup to a contractor’s bid. CP 31, 39, 82, 86, 134. Boise was uncomfortable with this because it was inconsistent with his previous experiences with commission and sales. CP 30-32, 134. The employer, however, testified that the markup was a common industry practice and that all of the dollars are disclosed to the client as part of the contract process. CP 39-40, 134-35.

After signing the Employment Agreement and Pay Plan, Boise left for two weeks of training in Wisconsin. CP 25, 134. Boise testified that during this training, he received a copy of the Pay Plan and only then learned the details of how he would be compensated. CP 43-46, 134. After Boise completed the two week training he quit, telling his manager that he could not risk the reduction in pay. CP 29, 34, 75, 133. The branch

manager offered to let Boise stay on to work through any issues. CP 30, 75, 134. Boise declined, and at that point mentioned his disapproval of Cleary's subcontractor incentive program. CP 30, 75, 134.

Boise applied for unemployment benefits. On his application, he stated his principal reason for quitting was "Cleary did not disclose I would lose salary amount if I did not have over \$48,000 in sales per month." CP 61. He disclosed that he told Cleary he quit because of "[p]ersonal-reasons, my concern I would lose salary." CP 61. The questionnaire asked whether Boise's decision to quit was based on a "[c]hange in customary job duties which was against [his] religious or moral beliefs." CP 65. Boise answered "no." CP 65. The form asked what conditions had changed since Boise was hired. He answered "none." CP 65. Boise indicated that another factor in his decision to quit was that his employer gave him a dirty work car. CP 65. The Department denied benefits. CP 54-58.

Boise appealed the denial to the Office of Administrative Hearings (OAH). CP 55, 133. At the hearing, Boise argued he had good cause to quit due to a 25 percent reduction in his usual compensation under RCW 50.20.050(2)(b)(v), and because his "usual work was changed to work that violates [his] . . . sincere moral beliefs," under

RCW 50.20.050(2)(b)(x).<sup>1</sup> The Administrative Law Judge (ALJ) concluded that Boise failed to establish both. CP 99 (Conclusion of Law 7).

The Department's Commissioner adopted the ALJ's findings and conclusions and affirmed the ALJ's order. CP 97-101, 111-13. The ALJ rejected Boise's claim that his moral beliefs were violated and indicated that Boise "acknowledged" Cleary's billing practices were common. CP 97 (Finding of Fact 9), 99 (Conclusion of Law 7), 111. The order, however, contained no finding on the question of whether there had been a change in Boise's work conditions. CP 97-101, 111.

Boise appealed to superior court. The court determined there was not substantial evidence to support the finding that Boise acknowledged Cleary's billing practices were common. CP 130. The court further held that evaluating Boise's moral beliefs on the markup practices based on their prevalence in the industry improperly applied an objective standard inconsistent with RCW 50.20.050. CP 130. Finally, the court determined that the Commissioner failed to make a finding on whether there was a change in Boise's usual work as required by RCW 50.20.050. CP 131. Accordingly, the court remanded to the Commissioner to "issue a decision after employing a subjective analysis of whether a change in the

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<sup>1</sup> Boise abandoned his argument that he established good cause to quit based on a 25 percent reduction in usual compensation.

conditions of employment violated a sincerely held moral belief of the petitioner.” CP 131.

The Department moved for reconsideration. In its order denying the motion, the court clarified that the question of whether a change in Boise’s work conditions occurred should be analyzed objectively:

The application of RCW 50.20.050(2)(b) requires the examination of three matters: Does the employee have a sincere moral belief? Have work duties changed to where continued employment would offend the employee’s sincere moral belief? Was the change in work duties [and] that employee’s sincere moral belief the reason for termination of the employment relationship? The Court agrees that the second and third questions must be analyzed objectively. . . . The first question, however, must involve a subjective analysis.

CP 127.

On remand, the Commissioner adopted some of the findings of fact from the initial order and made additional findings regarding Boise’s signing and receipt of the Employment Agreement and Pay Plan. CP 133-35. In particular, the Commissioner found there was no change in Boise’s usual work:

The terms of the employer’s subcontract incentive program were clearly set forth in the Payment Plan referenced in the Employment Agreement. Although the claimant chose not to read the Plan before signing the Agreement, he nonetheless was apprised of the employer’s practice because he signed a document that explicitly referenced the markup of subcontract bids.

CP 136-37. The Commissioner further found that Boise read the payment plan on the second day of training but did not quit until two weeks later. CP 134-35. Thus, the Commissioner concluded that Boise's continued participation in the training despite learning this information was inconsistent with someone whose sincere moral beliefs had been violated and affirmed. CP 137.

Boise again appealed, arguing that the superior court's remand order implicitly found a change in work occurred and that the Commissioner should have taken additional evidence on the question of his sincere moral beliefs. The superior court disagreed and affirmed. CP 162-64.

The Court of Appeals also affirmed in an unpublished opinion. *Boise v. Emp't Sec. Dep't*, No. 33202-1-III (Wash. Ct. App. June 14, 2016). In affirming, the Court rejected Boise's contention that that the Commissioner's action exceeded the scope of the superior court's remand order and that further evidentiary proceedings were required.<sup>2</sup> *Boise*, slip op. at 9.

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<sup>2</sup> The Court of Appeals also concluded that three of the four findings Boise challenged on appeal were supported by substantial evidence. And although one of the Commissioner's findings was not supported by substantial evidence, the Court found Boise failed to demonstrate any resulting prejudice. *Boise*, slip op. at 12. These findings have not been appealed.

#### IV. REASONS WHY REVIEW SHOULD BE DENIED

The superior court's order remanding to the Commissioner was authorized by law. The Commissioner then properly complied with the remand order by entering a necessary finding on the existing record. Boise fails to show that the Court of Appeals decision recognizing this warrants review under any of the criteria set forth in RAP 13.4(b).

##### A. **There Is No Conflict in the Case Law, or Statute, Regarding the Reviewing Court's Authority to Remand a Case for Additional Findings Based on the Record**

This appeal does not meet any of the criteria for review under RAP 13.4(b). The Court of Appeals decision is consistent with the case law. It has long been the case that where the record contains sufficient evidence from which the trier of fact can address an issue, it need not reopen the record. *Washington Pub. Emps. Ass'n v. Cmty Coll. Dist. 9*, 31 Wn. App. 203, 213, 642 P.2d 1248 (1982). That is what happened here. It was unnecessary to take additional evidence because the record already contained sufficient information to make a factual determination as to whether the conditions of Boise's employment had changed.

In seeking to create a conflict, Boise wrongly relies on *Suquamish Tribe v. Central Puget Sound Growth Management Hearings Board*, 156 Wn. App. 743, 235 P.3d 812 (2010). *Boise*, slip op. at 10; Pet. at 6. In that case, the superior court remanded for further factual proceedings because

the record was insufficient to perform the required analysis. *Suquamish Tribe*, 156 Wn. App. at 778-79. *Suquamish Tribe* did not hold that an agency must always perform additional fact finding where it failed to decide an issue. *See* Pet. at 6. In the present case, there was extensive information in the record, including uncontested documents signed by Boise, and testimony. Any additional fact finding would have been duplicative. As the Court of Appeals explained, “common sense suggests the existing agency record might sometimes be sufficient.” *Boise*, slip op. at 11.

Boise does not discuss the RAP in his Petition for Review. He claims, however, that the Court of Appeals opinion implicates due process under the Washington State Constitution and the Administrative Procedure Act. Pet. at 6. But the Commissioner properly made an additional finding on remand based on the existing evidence in the record. Indeed, the Court of Appeals decision demonstrates that this case involves a straightforward reading of the superior court’s remand order and presents none of the bases for review set forth in RAP 13.4(b). Accordingly, the Court should deny review.

Boise has cited no cases, no section of the APA, and no provision of the Washington Constitution that conflicts with the Court of Appeals’ analysis. To the contrary, the decision is consistent with existing case law

allowing appellate courts to make a common sense determination of whether new proceedings are required. In addition, nothing in the APA or the Washington Constitution requires repetitive proceedings when the record contains the information needed to make the required fact findings.

**B. There Was Sufficient Evidence in the Administrative Record for the Commissioner to Determine Whether There Was a Change in Boise's Work**

The Court of Appeals properly found that the superior court ordered the Department to enter a finding on whether a change in Boise's work occurred. *Boise*, slip op. at 11-12. The Commissioner complied with this order by entering the missing finding based on the existing record. CP 133-37. Once the Commissioner determined that no change occurred, it was unnecessary to determine whether Boise's sincere moral beliefs were violated because he could no longer meet the legal standard necessary to establish good cause to quit under RCW 50.20.050(2)(b)(x).

In general, the Act reserves unemployment funds for the benefit of those "unemployed through no fault of their own." RCW 50.01.010. A claimant is therefore disqualified from benefits if he "left work voluntarily without good cause." RCW 50.20.050(2)(a). To receive benefits, the claimant who quits must show at least one of eleven statutory good causes, one of which is that his "usual work was changed to work that violates the individual's religious convictions or sincere moral

beliefs.” RCW 50.20.050(2)(b)(x). Boise was therefore required to show both a change in work conditions and a violation of his sincere moral beliefs to establish good cause under the Act.

The initial Commissioner’s decision did not find whether a change in Boise’s work conditions occurred and, according to the superior court, improperly applied an objective analysis on the question of Boise’s sincere moral beliefs. CP 127-28, 129-31. The Commissioner thus took the appropriate step on remand by making that necessary finding. CP 133-37. And as the Court of Appeals concluded, by determining that no change in Boise’s work occurred, the Commissioner complied with the superior court’s remand order and committed no errors of law. *Boise*, slip op. at 10.

The Court of Appeals found this true for two reasons. First, the superior court specifically ruled that the Commissioner “erred in not making a finding of fact on whether or not there was a change in the usual work, as required by RCW 50.20.050.” *Boise*, slip op. at 9 (citing CP 131). Second, the court found the context of the order clearly directed the Commissioner to supply the missing finding: “But when the court’s order is read as a whole, it is clear the court intended for the Commissioner to address the overlooked factual issue of whether Mr. Boise’s usual work had changed.” *Boise*, slip op. at 9.

This reasoning is sound. The superior court's remand order plainly requires the Commissioner to enter a finding on whether or not Boise's work had changed. Not only is this finding legally necessary to meet the standard set out in RCW 50.20.050(2)(b)(x), but the superior court also expressly determined the Commissioner erred by omitting the finding. CP 131. No other reading is possible on the record before the Court.

#### V. CONCLUSION

Boise provides no basis for the Court's review under RAP 13.4(b). He makes no showing that the Court of Appeals' decision in this case conflicts with a decision of the Supreme Court or another division of the Court of Appeals. The case does not involve a significant question of law under the constitution or an issue of substantial public interest that this Court should determine. To the contrary, the Court of Appeals' decision is consistent with the Employment Security Act and prior case law and raises no issue justifying review by this Court. Therefore, the Department respectfully asks the Court to deny review.

RESPECTFULLY SUBMITTED this 8th day of September, 2016.

ROBERT W. FERGUSON  
Attorney General



JACOB DISHION, WSBA #46578  
Assistant Attorney General  
Attorneys for Respondent

**PROOF OF SERVICE**

I, ROXANNE IMMEL, hereby state and declare as follows:

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

2. That on the 8th of September 2016, I caused to be served a true and correct copy of **Answer to Petition for Review**, as follows to:

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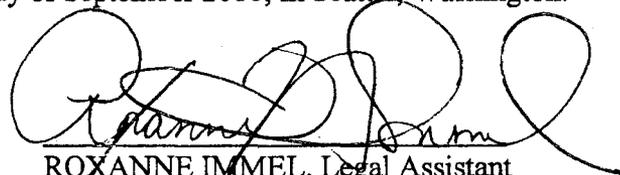
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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED this 8th day of September 2016, in Seattle, Washington.



ROXANNE IMMEL, Legal Assistant

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Dear Clerk,

Attached for filing is the Department's Answer to Petition for Review in *Michael Boise v. Washington State Employment Security Department*, No. 93383-9.

The attorney for the Petitioner is cc'd on this email. A hard copy will follow by mail.

Sincerely,

*Roxanne Immel*

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