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Washington State
Court of Appeals
Division Two

August 21, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LAWRENCE C. LITTLE, Appellant, vs. STATE OF WASHINGTON, EMPLOYMENT SECURITY DEPARTMENT, Respondent.	No. 50189-9-II UNPUBLISHED OPINION

MAXA, C.J. – Lawrence Little appeals the superior court's order affirming the decision of the commissioner of the Employment Security Department (ESD) that he was ineligible to receive unemployment benefits during certain periods.

We hold that the commissioner did not err in ruling that Little was ineligible to receive unemployment benefits (1) during the time that he was enrolled in a full-time college program, based on a finding that he was not willing to drop his classes to accept conflicting work; and (2) during a week in which he failed to attend a mandatory meeting, based on a finding that he missed the meeting without good cause.

Accordingly, we affirm the commissioner's rulings regarding Little's eligibility for unemployment benefits.

FACTS

Little claimed unemployment benefits beginning in February 2016. His previous employment had been as a certified occupational therapist assistant.

Little began attending classes full-time at Grays Harbor College in April 2016, pursuing a Bachelor of Science degree. He was enrolled in 15 course hours of credits, and had a class 9:00-10:00 AM five days per week, a class 10:00-11:00 AM four days per week, a class 6:00-8:00 PM two days per week, and a lab 11:00 AM -12:00 PM once a week. Little stated that he spent four hours per day in class, class preparation, and study.

ESD subsequently sent Little a student eligibility questionnaire, which he completed. One question asked, "If you were offered work that conflicts with your class schedule, would you drop the classes to accept the job?" Administrative Record (AR) at 34. Little checked "No." AR at 34. For an explanation, Little wrote,

> I was planning on going back to school full time while I was employed at Pacific Care. The work schedule there was perfect for a full time student. I was wrongfully terminated, but I can work the same schedule for any local skilled nursing home and I'm available full time.

AR at 34. In addition, he stated that if employers asked about his availability for work he would tell them he was available for full-time employment. But Little also stated that he was not willing to forfeit his tuition if the school would not give him a refund.

ESD notified Little that he was required to attend a mandatory meeting on May 18. Little did not attend the meeting because he had a chemistry lab scheduled at the same time and he believed that he would fail the course if he missed the lab.

ESD also sent Little an application for Commissioner Approved Training (CAT), which if approved would allow him to attend full-time training and receive unemployment benefits without looking for work. Little completed the application.

In separate determination notices, ESD informed Little that he was ineligible for benefits during the time in which he was unavailable for work because he was enrolled as a full-time

student, that he was ineligible for benefits during the week that he missed the mandatory meeting, and that his CAT application was denied.

Little appealed these determinations, and they were consolidated for a hearing before an administrative law judge (ALJ). In a letter submitted in support of his appeal, Little confirmed that he was a full-time student, but stated that if he was offered a job that could not accommodate his status as a student he would have dropped his classes. He also testified at the hearing that he would have dropped the classes in order to take a full-time job. In another letter and in testimony, Little stated that he had been absent from the mandatory meeting because it conflicted with his course schedule.

In separate rulings, the ALJ affirmed all three ESD determinations. Regarding Little's availability to work, the ALJ made a finding of fact that Little was attending classes full-time at Grays Harbor College, that he attended classes daily from 9:00 AM until noon, and that he indicated on the questionnaire that he was unwilling to accept employment that conflicts with his classes. The ALJ concluded,

> Claimant in this case is unwilling to change or drop his classes to accept conflicting employment. Claimant is thus disqualified under RCW 50.20.010 for the time period beginning April 11, 2016, and until Claimant demonstrates that he is fully available for work.

AR at 107.

Regarding the mandatory meeting, the ALJ made a finding of fact that ESD had mailed Little a notice requiring him to attend a mandatory meeting on May 18, 2016 and that he chose not to attend because it conflicted with his classes. The ALJ concluded that a conflict with school classes is not good cause for failing to attend a mandatory meeting, and therefore that Little was disqualified for unemployment benefits for the week of the missed meeting.

Regarding the CAT application, the ALJ concluded that Little was disqualified from CAT because four-year bachelor's degrees are excluded from the definition of "training." AR at 94.

Little filed a petition for review of the ALJ's rulings to the ESD commissioner. The commissioner reviewed the entire record and expressly adopted the ALJ's findings of fact and conclusions of law. The commissioner affirmed the ALJ's ruling on Little's unavailability to accept full-time work, his failure to attend the meeting, and the denial of his application for CAT.

The commissioner stated that actual availability for work under RCW 50.20.095(3) was based on all of the circumstances, not just on a claimant's testimony that he or she would quit school if offered work. The commissioner noted Little's initial response that he would not drop his classes, and agreed with the ALJ's finding that Little's initial statement was more credible than his testimony at the hearing. The commissioner concluded that the ALJ's finding that Little was unavailable for full-time work was not in error. The commissioner also concluded that Little's course schedule substantially restricted his availability for work during the customary working hours of a certified occupational therapist assistant.

The commissioner also agreed with the ALJ's conclusion that Little did not establish good cause for failing to attend the mandatory meeting. Therefore, Little was ineligible for benefits during the entire week of the missed meeting under RCW 50.20.044.[1]

Little appealed the commissioner's ruling to superior court. The superior court filed a memorandum decision affirming the commissioner of the ESD's decision. The court also issued

[1] Little apparently did not raise any argument regarding the CAT denial. The commissioner affirmed the ALJ's ruling on that issue without analysis.

findings of fact and conclusions of law, in which it ruled that the commissioner's findings of fact were supported by substantial evidence, the commissioner's conclusions of law did not constitute an error of law, and the commissioner's order was not arbitrary and capricious.

Little appeals the superior court's order affirming the commissioner's decision.

ANALYSIS

A. Standard of Review

We review an appeal of the ESD commissioner's decision in an unemployment benefits case under the Administrative Procedures Act, Chapter 34.05 RCW. *Cuesta v. Emp't Sec. Dep't*, 200 Wn. App. 560, 569, 402 P.3d 898 (2017). We sit in the same position as the superior court and review the administrative record directly. *Id.* We review the commissioner's decision, not the decisions of the superior court or the ALJ, except where the commissioner has adopted the ALJ's findings of fact. *Id.*

Unless a statute or agency rule is challenged, our scope of review generally is limited to whether the decision is based on an error of law, unsupported by substantial evidence, or arbitrary and capricious. *Id.* at 569-70; RCW 34.05.570(3). Under the error of law standard, we review questions of law de novo. *Cuesta*, 200 Wn. App. at 570. We review findings of fact to determine if they are supported by substantial evidence. *Id.* Substantial evidence is that which is sufficient to persuade a reasonable person of the truth of the premise asserted. *Id.* Unchallenged findings of fact are verities on appeal. *Id.* at 570.

An agency's decision is arbitrary and capricious if it is 'willfully unreasonable, without consideration and in disregard of facts or circumstances.' " *Swanson Hay Co. v. Emp't Sec. Dep't*, 1 Wn. App. 2d 174, 187-88, 404 P.3d 517 (2017) (quoting *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 450, 41 P.3d 510 (2002)).

We presume that the commissioner's decision is correct and view all evidence and reasonable inferences from the evidence in the light most favorable to the party who prevailed at the administrative hearing below. *Cuesta*, 200 Wn. App. at 569-70. We do not review the finder of fact's determinations of credibility or reweigh evidence. *DeFelice v. Emp't Sec. Dep't*, 187 Wn. App. 779, 787, 351 P.3d 197 (2015). The party challenging the agency action has the burden of demonstrating its invalidity. *Cuesta*, 200 Wn. App. at 569.

B. COLLEGE STUDENT'S AVAILABILITY FOR WORK

Little argues that the ALJ's and commissioner's findings that he was unavailable for work while enrolled at Grays Harbor College was not supported by substantial evidence. He argues that he could have maintained full-time employment despite his course schedule and that he would have dropped classes for conflicting full-time employment. We disagree.

1. Legal Principles

Unemployment benefits are conditionally available for persons seeking employment who meet certain criteria. RCW 50.20.010(1). One of the criteria for establishing eligibility for unemployment benefits is that the person is available for work in any trade or profession for which he or she is reasonably qualified. RCW 50.20.010(1)(c). To be available for work for the purposes of the statute, the person must "be ready, able, and willing, immediately to accept any suitable work which may be offered to him or her." RCW 50.20.010(1)(c)(ii).

Under RCW 50.20.095, an individual who is enrolled for 12 course credit hours or more in a school program generally is disqualified from obtaining unemployment benefits. However, a person enrolled in a school program may be eligible if he or she can demonstrate by a preponderance of the evidence that he or she is actually available for work, considering his or her

prior work history, scholastic history, labor market attachment, and efforts to seek work.[2] RCW 50.20.095(3).

> Persons are available for work if they
>
> (a) Are willing to work full-time, part-time, and accept temporary work during all of the usual hours and days of the week customary for [their] occupation.
> . . . .
> (b) Are capable of accepting and reporting for any suitable work within the labor market in which [they] are seeking work;
> (c) Do not impose conditions that substantially reduce or limit [their] opportunity to return to work at the earliest possible time;
> (d) Are available for work during the hours customary for [their] trade or occupation.

WAC 192-170-010(1).

2. Analysis

Here, the ALJ found that Little was enrolled full time at Grays Harbor College. Little admitted that he was a full-time student and does not challenge this finding. Therefore, under RCW 50.20.095, Little was disqualified from receiving unemployment benefits unless he could demonstrate by a preponderance of the evidence that he was actually available for work.

The ALJ found that Little was not willing to drop his classes to accept conflicting work and therefore concluded that he was disqualified from receiving unemployment benefits until he could show he was fully available for work. The commissioner adopted the ALJ's findings and conclusions on this issue.

Little argues that he presented evidence that he was available for work. He did state in a letter and in testimony that he would have dropped his classes if he had been offered work. In

[2] Under RCW 50.20.095(1), a full-time student may still be eligible for benefits if the academic program qualifies as CAT under RCW 50.20.043. Little does not appeal the ALJ's and the commissioner's rulings that Little was not eligible for CAT. Instead, Little argues that his eligibility for CAT is immaterial.

addition, in his questionnaire he stated that if employers asked about his availability for work he would tell them he was available for full-time employment. In his letters to the ALJ, Little explained that he would drop classes if they conflicted with employment, but that he had always been able to make his own work schedule.

However, there was conflicting evidence regarding whether Little was willing to drop classes to accept employment. Both the ALJ and the commissioner emphasized Little's initial statement in the ESD questionnaire that he was not willing to accept employment that conflicted with his classes. The commissioner stated that the ALJ found Little's initial statement more credible than his subsequent statements. As the commissioner noted, Little's testimony at the administrative hearing was self-serving and was made "after [he] learned of the consequences of not being willing to drop his classes." AR at 133.

We must view all evidence and reasonable inferences from the evidence in the light most favorable to ESD. *See Cuesta*, 200 Wn. App. at 569-70. Little's initial statement on the ESD questionnaire constitutes sufficient evidence that he was not actually available for work under RCW 50.20.095(3). Although some evidence also supported Little's position, we do not weigh evidence or make credibility determinations. *DeFelice*, 187 Wn. App. at 787.

Accordingly, we hold that substantial evidence supports the ALJ's finding that Little was not available for work while he was enrolled as a full-time student.

C. FAILING TO ATTEND MANDATORY MEETING

Little argues that the ALJ and the commissioner erred by finding that his failure to attend a mandatory reemployment services meeting was not for good cause. He argues that the commissioner misapplied the law and that he should have been excused from attendance because he was acting as a reasonably prudent person. We disagree.

1. Legal Principles

Individuals must participate in reemployment services to be eligible for benefits. RCW 50.20.010(1)(e). Under RCW 50.20.044, a person who fails without good cause as determined by the commissioner to attend a job search workshop or training/retraining course as directed by ESD is ineligible for benefits for any week in which the failure occurred.

WAC 192-140-090(4) states that justifiable cause for failing to participate in reemployment services "will include factors specific to you which would cause a reasonably prudent person in similar circumstances to fail to participate." Examples of justifiable cause include, but are not limited to, illness or disability, conflicting employment or presence at a job interview, and severe weather conditions precluding safe travel.[3] WAC 192-140-090(4)(a)-(c).

2. Analysis

Here, the ALJ found that Little did not attend the meeting because it conflicted with his college classes. Little admitted that he missed the meeting because he was attending class and does not challenge this finding. Therefore, under RCW 50.20.044, Little was ineligible for benefits for the week in which the meeting occurred unless he could show that he missed the meeting for "good cause." The ALJ concluded that a conflict with school courses was not a good cause to miss a mandatory meeting and the commissioner adopted this conclusion.

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[3] ESD notes that WAC 192-140-090 applies only to "reemployment services," while RCW 50.20.044 applies to a "job search workshop or a training or retraining course." ESD argues that these are different types of employment services, and therefore the "reasonably prudent person" standard in WAC 192-140-090(4) does not apply to RCW 50.20.044. However, it appears that a "job search workshop or a training or retraining course" falls within the broader term "reemployment services." WAC 192-140-090(2) identifies a number of reemployment services, many of which relate to job search training. Therefore, we hold that WAC 192-140-090 applies to RCW 50.20.044.

A conflict with a college class is not one of the categories of justifiable cause for failing to participate in reemployment services listed in WAC 192-140-090(4). Subsection (b) does identify scheduling conflicts with employment or a job interview as justifiable causes, but those activities directly relate to keeping or obtaining current work. Taking classes toward a bachelor's degree potentially *prevents* a person from being available to work, as RCW 50.20.095 generally recognizes.

However, the list in WAC 192-140-090(4) is not exclusive, and therefore we must determine whether attending a college class that might make the difference between passing and failing would cause a reasonably prudent person to miss a mandatory meeting for purposes of WAC 192-140-090(4). Little argues that he did not need to attend a remedial job search workshop because he had worked for over 40 years and already knew how to look for a job. He argues that as a reasonably prudent person, he did not want to miss his chemistry lab and possibly fail the class.

However, Little's standing in the class does not create the kind of unavoidable conflict that would provide good cause for failing to attend a mandatory reemployment services meeting. The circumstances surrounding the scheduling conflict suggest that Little could have at least attempted avoided the conflict. For example, a reasonably prudent person would attempt to work with the professor to accommodate his attendance at the meeting. Or a reasonably prudent person might ask ESD to allow him to attend a different meeting – WAC 192-140-090(2) lists a number of available services – that would not conflict with his class. Instead, Little simply did not show up for the meeting without excuse or explanation.

In addition, although the list in WAC 192-140-090(4) is not exclusive, it is illustrative of the types of situations that constitute justifiable cause. Subsections (a) and (c) involve

unavoidable conditions beyond the claimant's control. Subsection (b) involves keeping or finding current work. A conflict with a college class does not fall into either category.

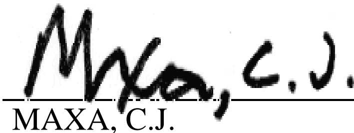
Little also argues that even if he did not have good cause to miss the mandatory meeting, he should only be ineligible for the benefits on the day of the meeting, not for the entire week. But RCW 50.20.044 unequivocally states that a person who misses a mandatory meeting is ineligible for benefits for the *entire week* of the meeting.

Accordingly, we hold that the commissioner did not err in ruling that Little failed to participate in reemployment services without good cause.

CONCLUSION

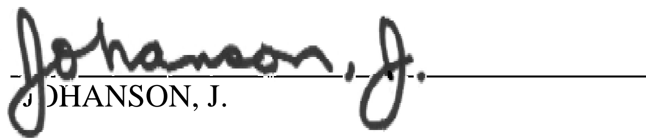
We affirm the commissioner's rulings regarding Little's eligibility for unemployment benefits.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

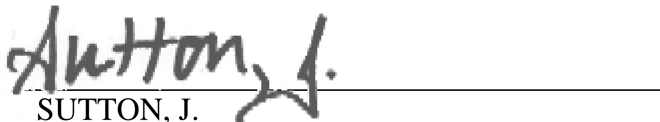


MAXA, C.J.

We concur:



JOHANSON, J.



SUTTON, J.