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IN THE SUPREME COURT OF THE STATE OF IDAHO

MARK W. MUSSMAN,

Claimant/Respondent,

vs.

KOOTENAI COUNTY,

Employer/Appellant,

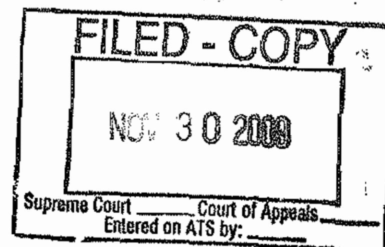
and

STATE OF IDAHO,
DEPARTMENT OF LABOR,

Respondent.

SUPREME COURT NO. 36693-2009

BRIEF OF ~~APPELLANT~~ RESP.
DEPARTMENT OF LABOR




ON APPEAL FROM THE INDUSTRIAL COMMISSION
STATE OF IDAHO
R. D. MAYNARD, CHAIRMAN

EMPLOYER KOOTENAI COUNTY

BY: Darrin L. Murphey
Civil Deputy Prosecuting Attorney
451 N. Government Way
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MARK W. MUSSMAN
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IDAHO DEPARTMENT OF LABOR

BY: LAWRENCE G. WASDEN
ATTORNEY GENERAL
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Deputy Attorney General
Idaho Department of Labor
317 W. Main Street
Boise, ID 83735

COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|---|---|---|
| MARK W. MUSSMAN, <br><br> Claimant/Respondent, <br><br> vs. <br><br> KOOTENAI COUNTY, <br><br> Employer/Appellant, <br><br> and <br><br> STATE OF IDAHO, <br> DEPARTMENT OF LABOR, <br><br> Respondent. | ) | SUPREME COURT NO. 36693-2009 <br><br> BRIEF OF APPELLANT <br> DEPARTMENT OF LABOR |

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## STATEMENT OF THE CASE

(1) Nature of the Case:

Kootenai County, (hereinafter "Employer") appeals the Industrial Commission's (hereinafter "Commission") Decision and Order concluding that Mark W. Mussman, (hereinafter "Claimant"), was eligible for unemployment benefits because Employer believes the Commission inappropriately reweighed the evidence in the record and made findings of fact not supported by the evidence.

(2) Course of the Proceedings Below:

Claimant filed a claim for unemployment insurance benefits after his employment with Employer ended. On January 12, 2009, the Idaho Department of Labor (hereinafter "Department") issued an Eligibility Determination (hereinafter "Determination") finding Claimant eligible for unemployment insurance benefits. Exhibit 3. In the Determination, the Department found Employer discharged Claimant, but not for misconduct in connection with employment pursuant to Idaho Code §72-1366(5). Exhibit 3. Employer filed a timely appeal of the Determination with the Department's Appeals Bureau. Exhibit 4.

On March 10, 2009, an appeals examiner held a hearing in the matter. Tr. p. 4, L. 1. Claimant testified at the hearing and Mr. Joseph Clark testified for Employer. In a Decision mailed to the parties on March 24, 2009, the appeals examiner reversed the Determination. R. pp. 1-6. Claimant filed a timely appeal of the appeals examiner's decision with the Commission. R. pp. 7-9.

Claimant submitted a document entitled "Claimant's Brief" to the Commission. R. pp. 17-34. Claimant appended additional documents to his Brief that were not part of the record before the appeals examiner. R. p. 35. In an Order dated May 6, 2009, the Commission treated the submission of those additional documents as a request for a new hearing. R. pp. 35-38. The Commission denied that request, but allowed the parties to submit briefs. R. pp. 35-38.

The Commission conducted a *de novo* review of the record before the appeals examiner consisting of the audio recording of the hearing and all of the exhibits entered at that hearing before the appeals examiner. On June 4, 2009, the Commission filed a Decision and Order reversing the appeals examiner's decision. Appendix A. In its Decision and Order, the Commission made it clear to the parties that it did not consider the documents appended to Claimant's Brief in making its decision. Appendix A, p. 16. On July 13, 2009, Employer filed a Notice of Appeal to this Court. R. pp. 57-65.

(3) Statement of Facts:

Claimant began working for Employer on August 27, 2001. Tr. p. 5, Ll. 16-18; p. 17, Ll. 1-3. When his employment ended, Claimant was working as a planner. Tr. p. 5, Ll. 19-23; p. 10, Ll. 15-22; p. 17, Ll. 7-8. In 2006, Claimant signed an affidavit without prior approval from his supervisor. Tr. p. 20, Ll. 13-25; p. 22, Ll. 3-18. Claimant received a corrective action in March of 2007 from his former supervisor, Employer's interim building and planning director, Cheri Howell. Tr. p. 7, Ll. 1-12; p. 17, Ll. 20-25.

In June 2008, Claimant signed another affidavit without prior approval from his supervisor. Tr. p. 20, Ll. 13-25; p. 22, Ll. 19-25; p. 23, Ll. 1-3. Employer does not have a

written policy, nor did Employer say anything to Claimant about signing affidavits. Tr. p. 20, Ll. 11-12. Before October 14, 2008, Employer never disciplined Claimant for signing affidavits without prior approval. Tr. p. 20, Ll. 13-25; p. 22, Ll. 10-25; p. 23, Ll. 1-3.

While Claimant was still under Ms. Howell's supervision, the building and planning department worked on a development project called the "Graham Project." The Graham Project required Ms. Howell to resolve questions about the interpretation of certain county building code provisions. Tr. p. 19, Ll. 3-9; p. 24, L. 12. The building and planning department was still working on the Graham Project when Employer hired Mr. Clark to be the building and planning director. He then became Claimant's immediate supervisor. Tr. p. 5, Ll. 14-15; p. 5, Ll. 12-13; p. 5, Ll. 24-25; p. 6, Ll. 1-3; p. 19, Ll. 10-16.

On August 8, 2008, Mr. Clark sent Claimant a written "administrative interpretation" of county building code provisions regarding setback issues for the Graham Project that differed from earlier interpretations. Tr. p. 24, Ll. 11-25. Claimant, Mr. Clark and others discussed Mr. Clark's interpretation at length on August 11, 2008, and Claimant agreed to the written interpretation, but opposed its application to the Graham Project. Tr. p. 25, Ll. 6-9.

On August 28, 2008, at the request of a representative of the Graham Project's property owner, Claimant signed an affidavit containing a statement on the historical interpretation of county building code provisions dealing with structure setbacks for the Graham Project and other projects that had been established prior to Claimant's employment. Tr. p. 18, Ll. 1-16; p. 20, Ll. 4-8; p. 29, Ll. 13-19. Claimant did not seek Mr. Clark's approval prior to signing the affidavit. Tr. p. 18, Ll. 6-8. Mr. Clark reviewed the affidavit shortly after Claimant signed it, but did not

say anything to Claimant about it until October 14, 2008. Tr. p. 10, Ll. 5-12. On October 14, 2008, Mr. Clark gave Claimant a memorandum of pending disciplinary action and at the same time, Mr. Clark discharged Claimant. Tr. p. 6, Ll. 6-14; p. 13, Ll. 4-15; p. 23, Ll. 18-25; p. 24, Ll. 1-5.

## ADDITIONAL ISSUE ON APPEAL

Is there substantial and competent evidence in the record to support the Industrial Commission's factual findings and conclusion that Claimant was eligible for unemployment benefits because Employer did not discharge Claimant for misconduct in connection with employment?

## STANDARD OF REVIEW

In appeals from decisions of the Commission, this Court's review is limited to questions of law. Idaho Constitution Article V, § 9; Pimley v. Best Values, Inc., 132 Idaho 432, 434, 974 P.2d 78, 80 (1999). When this Court reviews a Commission decision, "it exercises free review over questions of law, but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings." Oxley v. Medicine Rock, 139 Idaho 476, 479, 80 P.3d 1077, 1080 (2003). Whether an employee's conduct constitutes misconduct is a factual determination that will be upheld unless not supported by substantial and competent evidence. Harris v. Electrical Wholesale, 141 Idaho 1, 3, 105 P.3d 267, 269 (2004). Where conflicting evidence is presented that is supported by substantial, competent evidence, the findings reached by the Commission will be sustained regardless of whether the Court may have reached a different conclusion. Harris, 141 Idaho at 3, 105 P.3d at 269. Substantial and

competent evidence is relevant evidence which a reasonable mind might accept to support a conclusion. Oxley, 139 Idaho at 479, 80 P.3d at 1080. The Court has described the appropriate test for substantial and competent evidence for the purposes of judicial review as requiring a court to determine whether an agency's findings of fact are reasonable. Steen v. Denny's Restaurant, 135 Idaho 234, 237, 16 P.3d 910, 913 (2000).

It is for the Commission to determine the credit and weight to be given to the testimony admitted. Bullard v. Sun Valley Aviation, Inc., 128 Idaho 430, 432, 914 P.2d 564, 566 (1996). The Commission's conclusions regarding the credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous. In reviewing a decision of the Commission, the Court views all facts and inferences in the light most favorable to the party who prevailed before the Commission. Oxley, 139 Idaho at 479, 80 P.3d at 1080.

## ARGUMENT

### I.

There is substantial and competent evidence in the record to support the Industrial Commission's factual findings and conclusion that Claimant was eligible for unemployment benefits because Employer did not discharge Claimant for misconduct in connection with employment.

Employer misunderstands the nature of the Commission's review of the record. Idaho Code § 72-1368(7) gives the Commission authority to affirm reverse, modify, set aside or revise the decision of the appeals examiner. It provides in pertinent part:

> (7) The commission shall decide all claims for review filed by any interested party in accordance with its own rules of procedure not in conflict herewith. The record before the commission shall consist of the record of proceedings before the appeals examiner, unless it appears to the commission that the interests of justice

> require that the interested parties be permitted to present additional evidence. In that event, the commission may, in its sole discretion, conduct a hearing or may remand the matter back to the appeals examiner for an additional hearing and decision. On the basis of the record of proceedings before the appeals examiner as well as additional evidence, if allowed, the commission shall affirm, reverse, modify, set aside or revise the decision of the appeals examiner or may refer the matter back to the appeals examiner for further proceedings.

Idaho Code § 72-1368(7) (Emphasis added.)

This Court has consistently held that Idaho Code §72-1368(7) provides for a *de novo* review by the Commission based on the record before the appeals examiner. Scrivner v. Service Ida Corporation, 126 Idaho 954, 958, 895 P.2d 555, 559 (1995); DesFosses v. State Department of Employment, 123 Idaho 746, 748, 852 P.2d 498, 500 (1993); In re Guajardo, 119 Idaho 639, 809 P.2d 500 (1991); Spruell v. Allied Meadows Corporation, 117 Idaho 277, 787 P.2d 263 (1990).

This Court has explained that *de novo*, in the context of a standard of review, means generally "a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was heard and a review of [the] previous hearing" in which "the court hears the matter as a court of original and not appellate jurisdiction." "The term *'de novo'* generally means a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was heard and a review of previous hearing. On such a hearing the court hears the matter as a court of original and not appellate jurisdiction." Monroe v. Chuck & Del's, Inc., 123 Idaho 627, 629 n.2, 851 P.2d 341, 343 n.2 (1993), citing Beker Indus. Inc. v. Georgetown Irr. Dist., 101 Idaho 187, 190, 610 P.2d 546, 549 (1980). See, also Scrivner, 126 Idaho at, 958, 895 P.2d at 559.

Employer brings this appeal because it believes the Commission inappropriately reweighed the evidence in the record and made findings of fact that were not supported by the evidence. Employer contends that the Commission should give deference to the appeals examiner's findings of fact. Suggesting that the Commission cannot function as a fact finder, Employer argues that the appeals examiner functions as the fact finder and decision maker and that the appeals examiner has to responsibility of developing all the evidence reasonably available. Appellant's Brief, p. 8. Employer argues the Commission applied a "heightened evidentiary standard, raised for the first time after the record is closed that was prejudicial and unfair." Appellant's Brief, p. 8.

In a case cited by Appellant, Idaho State Insurance Fund v. Hunnicutt, 110 Idaho 257, 715 P.2d 927 (1986), this Court discussed the nature of a *de novo* review of a hearing officer's decision by a commission, in that case, the Personnel Commission. Hunnicutt, 110 Idaho at 259, 715 P.2d at 929. In Hunnicutt, the Personnel Commission, like the Industrial Commission in this case, engaged in a *de novo* review of a hearing officer's decision. Hunnicutt, 110 Idaho at 259, 715 P.2d at 929. This Court found that when a commission engages in a *de novo* review of the record, the decision of the Commission is not a mere reversal of a lower tribunal, rather it becomes a new decision effectively displacing the hearing officer's decision. Id. See also, Spencer v. Kootenai County, 145 Idaho 448, 453, 180 P.3d. 487, 492 (2008); and Department of Health and Welfare v. Sandoval, 113 Idaho 186, 189, 742 P.2d 992, 995 (1987). This Court also held it was not the place of the reviewing court to determine whether the hearing officer's

determination was reasonable in light of the record, or to weigh the decision of the hearing officer against that of the Commission. Hunnicutt, 110 Idaho at 259, 715 P.2d at 929.

In unemployment compensation cases, this Court has declined to adopt findings of fact at variance with the Commission's findings of fact where such facts are supported by substantial and competent evidence regardless of whether witnesses have personally appeared before the Commission. Booth v. City of Burley, 99 Idaho 229, 233, 580 P.2d 75, 78 (1978). The substantial and competent evidence rule requires this Court in an unemployment benefits case to determine whether the Commission's "findings of fact are reasonable." Steen, 135 Idaho at 237, 16 P.3d at 913, quoting Hunnicutt, 110 Idaho at 260, 715 P.2d at 930.

As the ultimate fact-finder for determining unemployment benefit eligibility status, the Commission is entitled to consider all the evidence and issues presented to the appeals examiner. Scrivner, 126 Idaho at 959, 895 P.2d at 560. This Court has held that the Commission's conclusions regarding the credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous. Oxley v. Medicine Rock Specialties, Inc., 139 Idaho 476, 479, 80 P.3d 1077, 1080 (2003).

In its Decision and Order, the Commission concluded Employer discharged Claimant, but not for misconduct in connection with employment. Appendix A, p. 23. Idaho's Employment Security Law provides that "an employee who has been discharged on grounds of work-related misconduct is ineligible for unemployment compensation benefits." Roll v. City of Middleton, 105 Idaho 22, 25, 665 P.2d 721, 724 (1983); Idaho Code § 72-1366(5) (2006). The focus is not on whether Employer had reasonable grounds for discharging Claimant, but rather whether the

reasons for the discharge constituted misconduct in connection with his employment. Beaty v. City of Idaho Falls, 110 Idaho 891, 892, 719 P.2d 1151, 1152 (1986). This Court has defined misconduct in connection with employment in three ways. To establish misconduct, Employer must show Claimant's conduct was a willful, intentional disregard of its interests; a deliberate violation of its rules; or a disregard of the standards of behavior it had a right to expect of its employees. Harris, 141 Idaho at 3, 105 P.3d at 269.

In its Decision and Order, the Commission found Employer discharged Claimant for insubordination for submitting an affidavit without prior approval of the Director. Appendix A, p. 17. The record supports the Commission's finding of fact. Employer did not offer a copy of the notice of pending disciplinary action it gave to Claimant on October 14, 2008. Rather, Mr. Clark testified that he discharged Claimant because Claimant signed an affidavit which contained interpretations of county building code provisions related to a specific project. Claimant also made statements regarding what the director knew or didn't know in the affidavit without review or authorization from the director. Tr. p. 6, Ll. 10-14. Employer did not offer any evidence beyond this statement concerning the statements in the affidavit Employer found objectionable. However, later in the hearing, Mr. Clark testified that Claimant was terminated for insubordination for providing interpretations in the affidavit without consulting the director. Tr. p. 13, Ll. 1-15.

The Commission concluded that Claimant's conduct did not deliberately violate Employer's rules. The Commission found there was "no evidence of a specific policy stating affidavits must be approved by the director." Appendix A, p. 19. The record supports the

Commission's finding. Claimant testified there was "no policy written or verbally communicated regarding the signing of affidavits." Tr. p. 20, Ll. 11-12. Employer offered no evidence that it had a policy regarding affidavits.

Under the circumstances, the Commission concluded Claimant's conduct would be better assessed under a standards of behavior analysis. Appendix A, p. 19. The record and legal precedent support the Commission's analysis. This Court has defined insubordination in the context of unemployment insurance proceedings. Insubordination is defined as the deliberate or willful refusal by an employee to obey a reasonable order or directive, which an employer is authorized to give, and is entitled to have obeyed. Avery v. B. B. Rental Toilets, 97 Idaho 611, 614, 549 P.2d 270, 273 (1976). In Folks v. Moscow School District #281, 129 Idaho 833, 933 P.2d 642 (1997), this Court discussed where insubordination fits within the three categories of misconduct. Such behavior, this Court concluded, "is merely one way by which an employer can prove misconduct as a disregard of the standards of behavior which the employer has a right to expect." Folks, 129 Idaho at 837, 933 P.2d at 646.

This Court employs a two part test in a standards of behavior inquiry by asking first, whether the employees conduct fell below a standard of behavior the employer had a right to expect and second, whether the employer's expectations were objectively reasonable under the circumstances. Id. Unlike the test for a willful, intentional disregard of its interests or the test for a deliberate violation of its rules, the claimant's subjective state of mind is irrelevant. There is no requirement that the claimant's conduct be willful, intentional, or deliberate. Harris, 141 Idaho at 4, 105 P.3d at 270.

Under the standards of behavior test for misconduct Employer's expectations must be objectively reasonable. An "employer's expectations are ordinarily reasonable only where they have been communicated to the employee." Folks, 129 Idaho at 838, P.2d at 647. Employer must show by a preponderance of the evidence that it communicated its expectations to Claimant, or that its expectations "flow normally" from the employment relationship. Id. "A preponderance of the evidence means that when weighing all of the evidence in the record, the evidence on which the finder of fact relies is more probably true than not." Oxley, 139 Idaho at 476, 80 P.3d at 1082.

The Commission concluded Employer's expectations were not adequately communicated to Claimant. Appendix A, p. 21. At the hearing, Mr. Clark and Claimant both testified that Claimant received a corrective action in March 2007 from Employer's interim director, however, there was no evidence in the record that this corrective action addressed affidavits. The Commission found that there was no evidence in the record that Claimant was aware "that he needed prior approval for affidavits regarding interpretations." Appendix A, p. 21. Claimant testified that there was no policy written or verbally communicated to him regarding the signing of affidavits. Tr. p. 20, Ll. 11-12. Claimant's testimony that in 2006 and June of 2008 he signed affidavits without prior approval and without objection from Employer was not disputed. Tr. p. 22, Ll. 10-25; p. 23, Ll. 1-3.

In its Brief, Employer argues that the Commission failed to recognize that Claimant acknowledged that Employer required him to seek prior authorization when he was making certain interpretations of county building code provisions. Appellant's Brief p. 7. Claimant

testified he was required to seek authorization when he made interpretations of county building code provisions that were questionable. Tr. p. 17, Ll. 21-25.

The Commission found Mr. Clark's testimony concerning the expectations communicated to Claimant in the March 2007 corrective action was hearsay and found it less credible. Appendix A, p.21. Mr. Clark was not present when Claimant received the corrective action document and had no personal knowledge as to whether Claimant actually received this warning. The Commission determines the credit and weight to be given to the testimony admitted. Bullard, 128 Idaho at 432, 914 P.2d at 566. The Commission is given latitude to exclude hearsay evidence. Higgins v. Larry Miller Subaru, 145 Idaho 1, 5, 175 P.3d 163, 167 (2007). The Commission can disregard hearsay evidence. Wulff v. Sun Valley Co., 127 Idaho 71, 77, 896 P.2d 979, 984 (1995). As a fact-finding administrative agency, the Commission cannot make a finding of fact based on hearsay. Citizen's Utilities Company v. Shoshone Natural Gas Company, 82 Idaho 208, 214, 351 P.2d 487, 490 (1960).

However, even if the Commission found Mr. Clark's testimony credible, the only instruction given to Claimant was to "[r]eview interpretations and policy decision with the director and legal counsel before implementation." Tr. p. 7. Ll. 11-12. Claimant testified that he did not interpret an ordinance in the affidavit he signed on August 28, 2008. Rather, he merely provided "the historical interpretation of the structure setbacks on this particular piece of property." Tr. p. 18, Ll. 11-18. There is no evidence in the record to suggest Claimant should have known that providing a historical interpretation of structure setbacks violated Employer's policy.

Mr. Clark testified that Claimant did interpret an ordinance in the affidavit, but offered nothing from the actual affidavit to support that conclusion. Tr. p. 11, Ll. 9-13. The Commission concluded that Mr. Clark's testimony alone could not meet Employer's burden of proof. The Commission concluded that without the affidavit and the corrective action documentation, it could not determine whether Claimant made something other than a historical interpretation. Without the affidavit, the Commission found it could not determine whether Claimant's conduct adversely affected Employer's interest. Appendix A, p.22.

The Commission properly conducted a *de novo* review of the record. Each finding of fact and conclusion of law is supported by substantial and competent evidence. Acting as ultimate fact-finder, the Commission weighed the evidence and rejected hearsay evidence relied on by the appeals examiner. This does not in and of itself render the record insufficient, requiring additional evidence. The Commission is not required to consider additional evidence and the decision to consider additional evidence is discretionary. Idaho Code §72-1368(7) (2006). Exercising its discretion the Commission concluded the interests of justice did not require a new hearing. Appendix B, p. 26. The burden of proving misconduct by a preponderance of the evidence is on the Employer. Harris, 141 Idaho at 3, 105 P.3d at 269. Employer's reliance on hearsay to meet its burden of proof was unfortunate, but the failure to offer evidence ultimately found reliable by the fact-finder does not offend the interests of justice. The Commission noted that the record lacked "key pieces of evidence" to support Employer's contentions. Appendix A, p. 7. It was evidence Employer had available to it that it simply chose not to present.

## CONCLUSION

Because the record contains substantial and competent evidence to support the Commission's conclusion that Employer discharged Claimant, but not for misconduct in connection with his employment, making Claimant eligible for benefits pursuant to Idaho Code § 72-1366(5), the Department asks this Court to affirm the Commission's Decision.

Respectfully submitted,

Tracey K. Rolfsen
Deputy Attorney General
Idaho Department of Labor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 30th day of November, 2009, I served two true and correct copies of the foregoing Brief of Respondent Department of Labor upon each of the following by depositing said copies in the United States mail, first class, postage prepaid:

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RECEIVED
JUN - 5 2009
ID DEPT. OF LABOR
LEGAL

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

| | |
|---|---|
| MARK W. MUSSMAN,<br>Claimant,<br>vs.<br>KOOTENAI COUNTY,<br>Employer,<br>and<br>IDAHO DEPARTMENT OF LABOR. | **IDOL # 2300-2009**<br>**DECISION AND ORDER**<br>FILED<br>JUN 04 2009<br>INDUSTRIAL COMMISSION |

Claimant, Mark W. Mussman, appeals a Decision issued by the Idaho Department of Labor ("IDOL") finding that Claimant is ineligible for unemployment insurance benefits. The Appeals Examiner ruled that Employer discharged Claimant for misconduct related to the employment. After filing his appeal, Claimant submitted a brief which included additional documents that were not originally entered into the record. We construed this as a request for a hearing. In a May 6, 2009 Order, we denied Claimant's request for a new hearing to offer the additional evidence, but granted a briefing schedule. Claimant timely submitted a revised brief. Employer submitted a timely reply brief.

In his revised brief, Claimant wanted clarification if any of the additional documents he supplied would be considered by the Commission in this decision. The only evidence being considered by the Commission in this claim are those documents marked as exhibits and admitted into the record by the Appeals Examiner at the hearing. None of the proposed exhibits included with Claimant's brief will be considered in this decision. We direct Claimant back to our May 6, 2009, Order which explains why they are not considered.

The undersigned Commissioners have conducted a *de novo* review of the record in accordance with Idaho Code § 72-1368(7) and Idaho Supreme Court opinions. The Commission has relied on the audio recording of the hearing the Appeals Examiner held on March 10, 2009, along with the exhibits [1 through 4] admitted into the evidentiary record during that proceeding.

## FINDINGS OF FACT

Based on the testimony and the evidence in the record, the Commission sets forth its own Findings of Fact as follows.

1. Claimant was employed by Employer from August 27, 2001, until October 14, 2008. He worked as a planner III since December, 2005.

2. In March, 2007, Claimant received a corrective action plan from the interim Director.

3. In 2007 and early 2008, Claimant signed affidavits without the Director's approval.

4. On August 8, 2008, the Director, Joseph Scott Clark, sent an email to Claimant which provided Mr. Clark's interpretation of County code to a specific project. On August 11, 2008, Claimant, Mr. Clark, and others met to discuss the project. Claimant did not agree with Mr. Clark's interpretation but the group had a productive meeting.

5. On August 28, 2008, Claimant provided an affidavit interpreting the County code and the project at the request of a property representative. Claimant did not have the affidavit reviewed by Mr. Clark or the legal department. Mr. Clark felt the affidavit was in direct contradiction with his interpretation and reflected negatively on the County. Claimant was subsequently discharged on October 14, 2008, for signing an affidavit without the approval of the Director.

## DISCUSSION

The Idaho Employment Security Law provides unemployment insurance benefits to claimants who become unemployed due to no failure of their own. In the case of a discharge, as was the cause for the separation here, the issue is whether the claimant committed some form of employment-related misconduct that would render him or her ineligible for unemployment

employment-related misconduct that would render him or her ineligible for unemployment benefits pursuant to Idaho Code § 1366(5). The burden of proving misconduct by a preponderance of the evidence falls strictly on the employer. Appeals Examiner of Idaho Dept. of Labor v. J.R. Simplot Co., 131 Idaho 318, 320, 955 P.2d 1097, 1099 (1998). If the discharging employer does not meet that burden, benefits must be awarded to the claimant. Roll v. City of Middleton, 105 Idaho 22, 25, 665 P.2d 721, 724 (1983); Parker v. St. Maries Plywood, 101 Idaho 415, 419, 614 P.2d 955, 959 (1980).

What constitutes "just cause" in the mind of an employer for dismissing an employee is not the legal equivalent of "misconduct" under Idaho's Employment Security Law. The two issues are separate and distinct. Therefore, whether the employer had reasonable grounds according to the employer's standards for dismissing a claimant is not controlling of the outcome in these cases. Our only concern is whether the reasons for discharge constituted "misconduct" connected with the claimant's employment such that the claimant can be denied unemployment benefits. Beaty v. City of Idaho Falls, 110 Idaho 891, 892, 719 P.2d 1151, 1152 (1986).

The Idaho Supreme Court has defined misconduct as a willful, intentional disregard of the employer's interest; a deliberate violation of the employer's rules; or a disregard of standards of behavior which the employer has a right to expect of its employees. Gunter v. Magic Valley Regional Medical Center, 143 Idaho 63, 137 P.3d 450 (2006) (*citing* Johns v. S. H. Kress & Company, 78 Idaho 544, 548, 307 P.2d 217, 219 (1957)). In addition, the Court requires the Commission to consider all three grounds in determining whether misconduct exists. Dietz v. Minidoka County Highway Dist., 127 Idaho 246, 248, 899 P.2d 956, 958 (1995).

Employer contends that Claimant was discharged because Claimant signed an affidavit without authorization of the Director. (Audio Recording). Employer alleges that this constituted

insubordination and that it adversely affected the County. (Audio Recording). In addition, Employer argues that according to its policies, insubordination or conduct that reflects adversely on the County is grounds for termination. There is no evidence of a specific policy stating that affidavits must be approved by the Director. Therefore, because the alleged policy violation is based on Claimant's conduct, we find that assessing whether the conduct was insubordinate or reflected negatively on the County can be better assessed under the analysis of the standards-of-behavior and a willful, intentional disregard of Employer's interest.

Under the "standards-of-behavior" analysis, the employer must show by a preponderance of the evidence that it communicated its expectations to the claimant, or that its expectations "flowed normally" from the employment relationship. Further, the employer must demonstrate that those expectations were objectively reasonable as applied to the claimant. As the Idaho Supreme Court has pointed out, an "employer's expectations are ordinarily reasonable only where they have been communicated to the employee." Folks v. Moscow School District No. 281, 129 Idaho 833, 838, 933 P.2d 642, 647 (1997).

Here, Employer contends that Claimant's actions of submitting an affidavit interpreting code on a specific project without prior approval of the Director was insubordinate. Employer alleges that Claimant was previously warned by the interim director in a March, 2007, corrective action plan that any interpretation must be approved by the Director and the legal department. (Audio Recording). According to the Idaho Supreme Court, insubordination connotes a deliberate or willful refusal by an employee to obey a reasonable order or directive that an employer is authorized to give and entitled to have obeyed. Avery v. B.B. Rental Toilets, 97 Idaho 611, 614, 549 P.2d 270, 273 (1976). Employer argues that it had a reasonable expectation that Claimant would follow the interim Director's alleged mandate that Claimant have all

interpretations reviewed by the Director and the legal department.

While employers usually have a reasonable expectation that its employees will perform their job duties as directed, the key issue here is whether or not this expectation was adequately communicated to Claimant. What communication did or did not take place between the employer and the claimant becomes a key element in these cases. An employee can only be held accountable for breaching those expectations that he or she understood, explicitly or implicitly, and was capable of satisfying. Puckett v. Idaho Department of Corrections, 107 Idaho 1022, 695 P.2d 407 (1985).

In this case, Employer did not submit into the record a copy of the affidavit or the corrective action plan. Instead, it relied solely on the testimony of its Director, Mr. Clark. Mr. Clark read into the record that the corrective action plan required Claimant to have all interpretations reviewed by the Director and the legal department. (Audio Recording). However, Claimant testified that he was never told, either in writing or verbally, that he needed prior approval by the Director or the legal department. (Audio Recording). Because both parties provided equally credible evidence, we cannot find that Employer's testimony is more persuasive that of Claimant.

Not only do the parties testimony conflict, but we are without the best evidence of the corrective action. Without a copy of the corrective action plan, we cannot determine what was truly written on the form. While a technical rule and not generally applicable to administrative hearings, we find that reference to the best evidence rule is particularly relevant here. DiLucent Corp. v. Pennsylvania Prevailing Wage Board, 692 A.2d 295, 298 (1997). The rule states, in general, that "to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required." ID R. Evid. Rule 1002. In this case, we assume that a

hard copy of the corrective action plan was available to submit into the record since Employer read its alleged contents into the record. We also note that the corrective action plan was written by the interim director, not Mr. Clark. Since the interim director did not testify, the evidence read into the record is considered hearsay. Therefore, based on the above reasons, the corrective plan read into the record carries little weight.

There is also evidence that Claimant continued to write interpretations after the corrective action plan without prior approval from the director with no consequence. Claimant stated that he had previously written two affidavits without director approval. (Audio Recording). While it is unclear whether both came after his corrective action plan, at least one dated late 2008 came after the corrective action. There is no indication that Claimant received discipline about failing to obtain prior approval.

As a result, we cannot determine by a preponderance of the evidence that Claimant was aware that he needed prior approval for affidavits regarding interpretations. Absent the corrective action plan document, we cannot conclude that the corrective action plan warned Claimant that he needed prior approval from the Director and Claimant contends that he received no such instruction. Furthermore, Claimant wrote at least one affidavit after the corrective action plan that was not subject to the Director's review. There is no evidence in the record that Claimant received discipline for this affidavit. Therefore, we cannot find that Employer's expectation was adequately communicated to Claimant or, subsequently, that Claimant's behavior fell below that standard.

Employer also contends that Claimant's behavior constituted a willful, intentional disregard of Employer's interest. In support of this conclusion, Mr. Clark stated that he sent Claimant an email on August 8, 2008, with Mr. Clark's interpretation of the project. (Audio

Recording). Mr. Clark testified that his interpretation was in direct conflict with the interpretation that Claimant sent. (Audio Recording). Therefore, since Claimant was aware of the Director's interpretation, Mr. Clark believes that Claimant willfully and intentionally sent out a conflicting interpretation that disregarded Employer's interest. (Audio Recording).

Claimant argues that the interpretation was a historical interpretation. (Audio Recording). He testified that he, the Director, and other employees met to discuss Mr. Clark's interpretation. (Audio Recording).. Claimant maintains that the meeting was productive regarding the interpretation and that at the conclusion of the meeting, Claimant understood the final decision was up to the Director. (Audio Recording). The interpretation Claimant provided was not a new interpretation, but provided the developer with the historical view.

While Claimant's actions are of some concern, there is insufficient evidence to find by a preponderance of the evidence that Claimant's affidavit constituted a disregard of Employer's interest. Claimant maintains that the interpretation was historical, that he did not make a new interpretation, and that he understood that the final decision was up to the Director. Without the affidavit, we cannot definitively decipher if it adversely affected Employer's interest.

As one court stated, "Unemployment compensation is not a gratuity which may be withheld frivolously." Wyoming Department of Employment v. Rissler & McMurry Company, 837 P.2d 686, 690 (1992). Therefore, it bears repeating that when an employer discharges an employee, that employer must meet its burden of demonstrating that the claimant committed misconduct as described in the Idaho Employment Security Law. Employer has not met that burden. The record lacks the key pieces of evidence to support Employer's contentions. They may very well be accurate, but without copies of the corrective action, we cannot determine whether the need for Director's approval was adequately communicated to Claimant. Additionally, without the affidavit, we cannot decipher the context of the information provided

or assess whether it harmed Employer. As a result, we cannot find that Claimant's conduct was a willful, intentional disregard of Employer's interest. Furthermore, the record also does not contain a copy of Employer's policies or rules. While Employer read into the record a policy stating that insubordination or conduct that reflects negatively on the County can result in termination, as just mentioned, there is insufficient evidence to find insubordination or conduct that reflected negatively on the County. Therefore, we cannot find by a preponderance of the evidence that Claimant was discharged for misconduct. Claimant is eligible for benefits.

As a side note, Claimant alleges that Employer's counsel has a conflict of interest because counsel represented Claimant. (Claimant's revised brief). Employer's counsel responded that he represented Claimant only as a county employee in the regular course of his duties as counsel to the County. (Employer's brief). While this Decision likely makes Claimant's argument of little consequence, there is no evidence that for this claim, Claimant's due process rights were violated or otherwise thwarted from any alleged conflict of interest.

**CONCLUSION OF LAW**

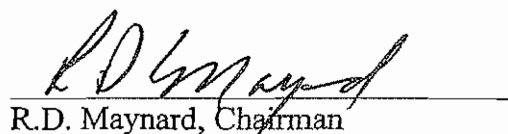
Claimant was discharged, but not for misconduct in connection with the employment.

**ORDER**

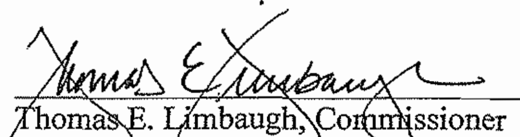
Based on the foregoing analysis, the Decision of the Appeals Examiner is REVERSED. Claimant is eligible for unemployment insurance benefits. This is a final order under Idaho Code § 72-1368(7).

DATED this 04 day of June, 2009.

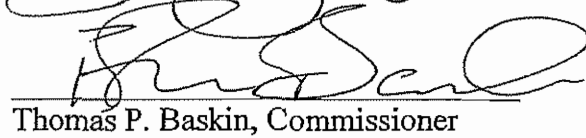
INDUSTRIAL COMMISSION



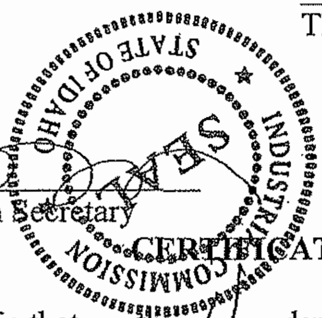
R.D. Maynard, Chairman



Thomas E. Limbaugh, Commissioner



Thomas P. Baskin, Commissioner





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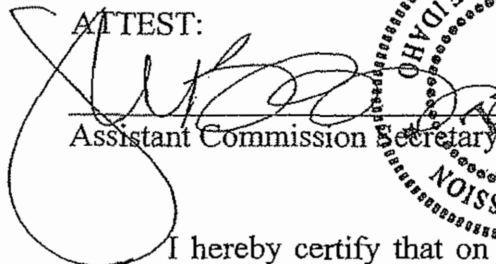

Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4 day of June, 2009 a true and correct copy of **Decision and Order** was served by regular United States mail upon each of the following:

MARK M MUSSMAN
3097 W LUTHERHAVEN
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DARRIN MURPHEY
PROSECUTOR
KOOTENAI COUNTY
PO BOX 9000
COEUR D ALENE ID 83816-9000

DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF LABOR
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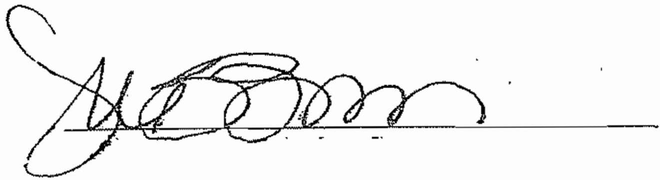

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LEGAL

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

| | |
|---|---|
| MARK W. MUSSMAN,<br>Claimant,<br>vs.<br>KOOTENAI COUNTY<br>Employer,<br>and<br>IDAHO DEPARTMENT OF LABOR. | **IDOL #2300-2009**<br>**ORDER DENYING REQUEST FOR A NEW HEARING AND SETTING BRIEFING SCHEDULE** |

FILED
MAY 06 2009
INDUSTRIAL COMMISSION

Claimant, Mark. W. Mussman, appeals to the Industrial Commission a Decision issued by the Idaho Department of Labor ("IDOL" or "Department") ruling him ineligible for unemployment benefits. In that Decision, the Department's Appeals Examiner concluded Employer discharged Claimant for misconduct. In addition to his appeal to the Commission, Claimant asks for a new hearing before the Commission. Claimant also submitted, separately, a document entitled "Claimant's Brief" with additional documents attached as exhibits that are not part of the record established by the Appeals Examiner. (Claimant's brief, filed April 30, 2009). We address both of these requests more fully below.

**NEW HEARING**

Pursuant to Idaho Code § 72-1368(7), the Commission may, in its sole discretion, "conduct a hearing to receive additional evidence or may remand the matter back to the appeals examiner for an additional hearing and decision." In this case, Claimant asks that the Commission consider additional documents that are not part of the evidentiary record established during the Appeals Examiner's hearing. Before we could evaluate the contents of these

documents Claimant provided as exhibits to his brief, we would have to re-open the evidentiary record and admit them.

Rule 7(B) 5 of the Rules of Appellate Practice and Procedure, under the Idaho Employment Security Law, effective as amended, March 1, 2009, provides that a party requesting a hearing to offer additional evidence shall submit "the reasons why the proposed evidence was not presented before the appeals examiner." Whether a party seeks to present additional evidence or make an oral argument on the basis of the record as it stands, that party must present some justification for that request. Unemployment insurance appeals are adjudicated under the principles and procedures of administrative law. Hearings at this level of review are not a matter of right, as in some other forums.

Claimant participated in the Appeals Examiner's hearing on Employer's protest of the initial Eligibility Determination and was provided an opportunity to explain the circumstances surrounding his separation from his job with Kootenai County. The Appeals Bureau informed Claimant that if he had additional evidence that was not presented during the Appeals Examiner's hearing, he could ask that the Appeals Examiner re-open the hearing. (Exhibit 2, p.2). There is nothing in the record or Claimant's appeal to suggest that he attempted to exercise that option.

The Commission takes the position that conducting a new hearing at this level of review is an extraordinary measure and should be reserved for those cases when due process or other interests of justice demand no less. We find no such circumstances here. By appealing his case to the Commission, Claimant is assured that the Commission will review the evidence and draw its own conclusions as part of its *de novo* review. Accordingly, Claimant's request for a new hearing is DENIED and we will consider only that evidence in the record established during the Appeals Examiner's hearing.

## BRIEFING SCHEDULE

Although Claimant did not file a formal request that the Commission provide him with an opportunity to argue his case in writing, Claimant has submitted a brief. In light of our denial of Claimant's request that we consider any additional evidence or hold an additional hearing, we will give Claimant an opportunity to revise the brief he submitted and opposing parties an opportunity to respond.

The Commission establishes the following briefing schedule:

Claimant may stand on the brief he has already filed or submit a revised brief. Should Claimant desire to file a revised brief, it will be due ten (10) days from the date of this Order.

Should Employer and/or Idaho Department of Labor wish to reply, they may do so within seven (7) days of the receipt of Claimant's revised brief. In the event that Claimant does not file an additional brief, replies will be due seventeen (17) days from the date of this Order.

DATED this 6 day of May 2009.

INDUSTRIAL COMMISSION

Cheri J. Ruch, Referee

ATTEST:

Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of May 2009, a true and correct copy of **Claimants Brief filed April 30, 2009 and Order Denying Request for a New Hearing and Order Setting Briefing Schedule** was served by regular United States mail upon each of the following:

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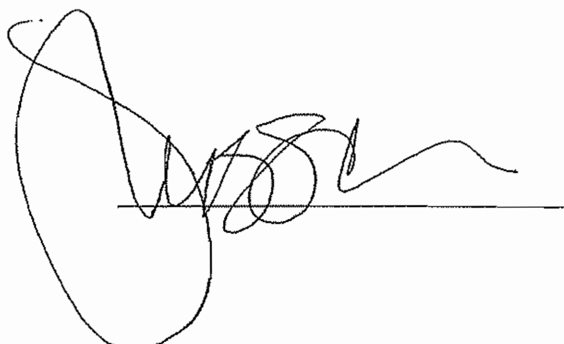

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