IN THE MATTER OF ARBITRATION
BETWEEN

Service Employees International Union 775

and

State of Washington, Department of Social & Health Services
IP's FIT Deduction

FMCS #170417-54535-6

Opinion and Award

Shelly C. Shapiro

Date Issued: January 18, 2017

Representing the Union:
Kristin M. Garcia
Altshuler Berzon, LLP
177 Post Street, Suite 300
San Francisco, California 94108

Representing the Employer:
Andrew L. Logerwell
Attorney General of Washington
Labor & Personnel Division
7141 Cleanwater Drive SW
Olympia, Washington 98504
**WITNESSES** (all called by the Union)

Cary McManus-Davis, Union Collective Bargaining and Employer Relations  
Shaine Truscott, Union Deputy Director of the Member Programs and Participation  
Dennis Elonka, Consultant to Department of Social and Health Services

**EXHIBITS**

J-1  Collective Bargaining Agreement  
J-2  Grievance Letter Dated 2/9/17  
J-3  Response Letter dated March 16, 2017  
J-4  Letter dated March 31, 2017 McManus Davis  
U-5  Form W-4 (2016)  
U-6  Summary of Named Grievants’ IPOne Status Provided by State  
U-7  Union internal email string dated February 8, 2017  
U-8  Email dated March 31, 2017 transmitting J-4  
U-9  Earning statements  
U-10 Earning statements  
U-11 Letter dated January 11, 2017 from PCG to IPs  
U-12 Email dated February 1, 2017 from Elonka to Truscott  
U-13 Email dated February 7, 2017 from Elonka to Truscott, etc. U-11  
U-14 Email string dated September 7, 2017 regarding scheduling of a different matter  
U-15 same  
U-16 same  
U-17 same  
E-18 Email dated March 16, 2017 transmitting J-3  
U-19 Spreadsheet provided by State from IPOne hotline  
U-20 IRS Publication 15 (Circular E) Employer’s Tax Guide  
U-21 IRS Federal-State Reference Guide  
U-22 Union internal email dated February 1, 2017
PROCEEDINGS

Service Employees International Union 775 ("the Union") initiated this grievance pursuant to the terms of the Collective Bargaining Agreement between The State of Washington (the Employer”) and the Union effective July 1, 2015 through June 30, 2017 ("the CBA"). The Union represents approximately 35,000 Individual Providers ("IPs") who provide long-term, in-home care for aging individuals and individuals with disabilities.

The Arbitrator was chosen from a list provided by the Federal Mediation and Conciliation Service pursuant to the CBA. The hearing was held on September 18, 2017 in Tacoma, Washington. The Union was represented by Kristin M. Garcia, Altshuler Berzon, LLP, San Francisco, California. The Employer was represented by Andrew L. Logerwell, Attorney General of Washington, Labor and Personnel Division, Olympia, Washington.

At the hearing, both sides had an opportunity to make opening statements, submit documentary evidence, examine and cross-examine witnesses (who testified under oath) and argue the issues in dispute. The Arbitrator was provided with a transcript of the proceedings. The hearing record was closed on November 30, 2017, when the post-hearing briefs were received by the Arbitrator. At the outset of the hearing, the parties stipulated to the Arbitrator’s retention of jurisdiction following the issuance of this Opinion and Award in order to resolve any disputes regarding compliance with it in the event of a ruling in favor of the Union.

STATEMENT OF THE ISSUE

The parties did not stipulate to the issues. The Arbitrator adopted, in essence, the Employer’s Proposed Issue Statement:

1. Was the grievance filing in compliance with CBA Article 7?
2. Was the grievance advanced to arbitration in compliance with CBA Article 7?
3. Did the Union establish a violation of CBA Article 12.5? If so, what is the remedy?
4. Did the Union establish a violation of CBA Article 2.7(3)? If so, what is the remedy?
FACTS

This grievance concerns the State’s failure to accurately withhold federal income tax ("FIT") from individual IPs consistent with the information provided by IPs in their W-4s.

IPs work with their clients, who are aging and/or individuals with disabilities, assisting with activities such as feeding and dressing, as well as providing other long-term, in-home care that enable the clients to remain in their homes. IPs are compensated by the State of Washington through federal Medicaid funds and state funds. Many of the IPs are family members of their respective clients and possibly live in the same household as the client; other IPs may be providing services to multiple clients. IPs are low-wage workers who earn an average of $12.50 an hour. IPs can earn as much as $15.90 an hour if they have the requisite training and skills to reach that top wage rate. See J-1 at A-4.

IPs’ wages can fluctuate from paycheck to paycheck due to various factors. These factors could include a reduction in their clients’ hours (which would occur if the client is hospitalized), an increase in hours due to additional paid trainings throughout the year, or a wage scale that adjusts with increases every six months as IPs move up in seniority based on accumulated hours worked. IPs complete and submit their own time sheets, and do not necessarily submit their hours on a regular basis. This results in situations where pay statements do not consistently cover the same amount of hours worked each pay period even if there is no fluctuation in hours worked (as opposed to reported) each pay period.

IP Payroll System Prior to March 1, 2016.

In accordance with its CBA obligation, the State had correctly withheld FIT from IPs’ paychecks for years, utilizing a payroll system known as SSPS. During those years, there were no reported problems with IP’s FIT withholdings. The SSPS payroll system maintained IPs’ FIT withholdings from year to year unless the IP filed a new W-4 changing their withholding information; IPs were not required to file a new W-4 for each tax year reiterating their unchanged withholding instructions. This was consistent with federal law: the IRS Employer’s Tax Guide, Publication 15, instructs that a “Form W-4 remains in effect until the employee

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1 Most of the relevant background facts are uncontested. The State did not call any witnesses at the hearing. See Tr. 35:21-24, Tr. 166:6-9. The Union’s brief included a particularly detailed comprehensive fact statement materially supported by the record. Accordingly, this comprehensive fact statement, in most respects, is taken from the Union’s factual statement. Citations to the hearing record are primarily only provided when a material factual statement has been added or revised by the Arbitrator, or to identify the source of a direct quote.
gives [the employer] a new one.” U-20 at 20. In the event an employee fails to turn in any completed Form W-4, the IRS instructs employers to “withhold income tax as if he or she is single, with no withholding allowances,” which is the highest level of withholdings; these same instructions as applicable to all public employees. Id. at 9 “Payments to employees for services in the employ of state and local government employers are generally subject to federal income tax withholding . . . . Id. See U-21(Federal-State Reference Guide) at 1-1 (“Federal tax requirements generally apply to public employers in the same way that they do to private employers.”).

IPOne and Defects with Federal Income Tax Withholding.

In March 2016, the State went live with a new payroll system called IPOne. IPOne was created and is administered by the State’s contractor, Public Partnerships, LLC (“PPL”). Although the “go live” date had been pushed back three months by mutual agreement of the State and the Union, there were no anticipated problems with the new system, and the Union expected that IPs’ FIT withholdings would be converted from the old SSPS system to the new IPOne system. As Shaine Truscott, Union Deputy Director for Member Programs and Participation, testified, “every indication that [the Union] got up until the conversion date was that things were going smoothly and that the plan and the process, that the conversion was going smoothly.” Tr. 74:12-22. There was no evidence that the State directly informed the IPs that the IPOne system would cause any issues or disruptions to their FIT.

Once the IPOne system went live in March 2016, several problems occurred. The system had not been load-tested, and it immediately crashed due to the large volume of IPs attempting to submit their time by the March 17 first deadline with IPOne. As a result, many IPs were paid late, were not paid at all, or were paid the wrong amount. Fifteen percent of IPs received no paycheck at all during the first pay period after the rollout of IPOne. In the first five months of the IPOne system, thousands of IPs submitted claims and hundreds of IPs called the Union’s Member Resource Center ("Union MBC") to report problems.

Among the problems experienced by IPs was the State’s failure to properly withhold FIT. In late January and February 2017, as IPs were receiving their W-2s and beginning to prepare their 2016 tax returns, IPs began reporting to the Union that the State had not properly withheld FIT from their 2016 paychecks. IPs also began posting on Facebook and calling the Union’s MBC about that problem. IPs, including those named by identification numbers only in this grievance as IP #4701 and IP #3801, called the Union MBC in early February 2017 to report
that their FIT had not been properly withheld for the months IPOne had been in effect. Tr. 58:6-25; U-7.

About the same time, both of the IPs attempted to address the problem with their FIT withholdings by calling the State’s IPOne hotline. Hotline records indicate that IP #4701 called to complain about her FIT withholdings on three separate occasions in late January and early February 2017. The first time, she explained that she had not requested to be exempt from FIT withholdings but that the system had marked her as FIT exempt. During subsequent calls, she reported to the IPOne hotline that she owed $4,000 to the IRS as a result of the State’s failure to properly withhold FIT from her paycheck. (“Member is extremely concerned because she has to pay back the IRS over $4000 for FIT”). U-19 at 000018. An IPOne hotline manager subsequently “call[ed] back [to] explain... the situation and apologiz[e] for any inconvenience caused by taxes not being taken out during the year.” Id.

IP #3801 similarly had several calls with the IPOne hotline in which she reported that no FIT withholdings were indicated on the W-2 that she had received for the wages that she had been paid through the new IPOne system. Id. at 000019 (“Member states the W2 from IPOne doesn’t have any FIT withholdings.”). She told the hotline that she was “very worried because she believes she owns [sic] about $5000 for FIT.” Id. The IPOne hotline notes say: “In this case, we do have IP’s W-4 with Single 0 on he[r] file, due to system glitch we default her FITstatus to the exemption.” Id. On February 14, an IPOne representative left a voicemail for IP #3801 to “sincerely apologize about this issue.” Id.

Once the Union heard about these issues, it attempted to investigate the problem. Jennifer Rogers, the director of the Union MBC, called the IPOne hotline, and was told by an IPOne representative that there was a “known system issue that has been identified.” U-22. Rogers was advised that “an unknown number of providers [had received a tax] exempt letter because they were inadvertently switched during payroll processing to an exempt status.” Id. In addition to attempting to get information from the IPOne hotline and by inquiring with the State, the Union attempted to determine the scope of the FIT problem by contacting its members through robocalls near the end of February 2017. Robocalls are imperfect tools especially given their low response rates; as a result, the calls did not provide a complete picture of the FIT problem.

At the hearing, the Union estimated that it filed over 50 grievances since IPOne went live due to the various problems associated with the system. For some of these problems (not

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2 “She” is used for references to IP # 4701 and IP# 3801 as well as other unnamed IPs. This may be incorrect.
those at issue here), the State and Union negotiated a settlement of a group grievance regarding the initial IPOne transition with a claims administration process enabling IPs to claim damages due to inaccurate, incomplete wage payments. Tr.110:20-111:19.

**Letter to IPs Regarding Tax Exempt Status.**

Sometime after mid-January, a Union member informed the Union that she had received a letter from PPL regarding IP tax exempt status. The State did not give prior (or any) notice to the Union about the PPL letter to unit members. The January 11, 2017 letter informed IPs that they had been marked as “exempt” on their 2016 IRS Form W-4, and that, as a result, the Employer would not withhold FIT from their wages. The letter stated that IPs needed to fill out a new Form W-4 in order to have FIT withheld for the 2017 tax year. The letter also said, contradicting the earlier statement, that “[f]ailure to submit a new Form W-4 . . . will result in your income tax being withheld at the highest rate, which assumes a single filing status with 0 allowances.” U-11 (underlining added).

When the Union inquired how many IPs were sent the letter, Dennis Elonka, the former DSHS project manager for IPOne, informed Truscott in a February 1, 2017 email that the letter had been sent to “all providers”. U-12. On February 7, 2017, Elonka sent another email stating that 27,000 IPs received the letter; he acknowledged the failure of PPI to submit the letter to the Union and the State prior to mailing, the poor wording of the letter, and challenges with the IPOne system. U-13. Weeks later, however, in its March 16 SGR, signed by Ann Mitchell of the State’s Office of Financial Management, the State said: “Regarding your assertion that [CBA] Article 2.7E was violated [as a result of] the letter sent on February 1, 2017, 3 I agree that this constitutes a violation of the CBA.” J-3. 4 The State has provided no further information regarding how many IPs were sent the letter.

**The Grievance Filings.**

Within a few days after receiving the FIT related complaints from IPs #4701 and #3801, and learning about the January 11 letter, the Union filed this February 9, 2017 grievance. J-2. It grieved: the State’s failure to properly withhold FIT in violation of CBA Article 12.5; and, the State’s failure to notify the Union of the “tax exempt” mailing or provide an opportunity for “the union to review” it in violation of CBA Article 2.7 E. J-2. The grievance identified three

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3 The letter was dated January 11, 2017 but perhaps it was sent on February 1.
4 As the State Brief notes, CBA §2.7 E applies to “mail communication to the entire individual provider group.” J-1 (italics added).
“named” IPs by identification number, and stated that the grievance “also applies to any and all other similarly impacted providers.” The grievance remedy sought, among other things, “[t]heir investigation of any system errors of or fixes pertaining to tax exempt status of all ... unit members to assess the case and extent of incorrect tax exempt categorization”, “[p]ayment by the state of all taxes due and owing as a result of ... unit members being incorrectly categorized as tax exempt”, and “[i]ncidental and consequential damages, including interest, accountant and attorney’s fees.” *Id.* The Grievance was signed by Cary McManus-Davis, the Union’s collective bargaining and employer relations specialist, with a copy to Truscott and Summer Young (unidentified in the record).

The grievance meeting was held on February 23, 2017. The State sent its grievance response a March 16, 2017 letter signed by Mitchell, J-3 (the State grievance response is referred to herein as “SGR”). The SGR was addressed to McManus-Davis, with a copy to Truscott and Elonka, and was sent attached to an email, sent the same day, by a state Labor Relations Assistant addressed to McManus-Davis with a copy to Mitchell, Truscott and Elonka. E-18.

With respect to IP #4701, the State granted the grievance acknowledging a violation of Article 12.5. *Id.* at 2. It noted that “[f]rom June 16, 2016 through February 2017, FIT was not withheld” and there was “no evidence that the IP requested a FIT change between June 2016 and February 2017. PPL is still analyzing the situation to determine the cause of the change in FIT status between June 16, 2016 and February 2017 with the absence of a new W-4.” *Id.* The State denied the grievance with respect to IP #3801, pointing out that FIT was not withheld from that IP because she had not submitted a W-4 for the 2016 tax year. (The State, however, later had information that #3801’s FIT was erroneous, and that the failure to withhold from IP #3801 was due to an IPhone system error. See U-6. As noted above, the State acknowledged that a violation of Article 2.7 F occurred in the handling of the January 11 letter,

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5 The Union subsequently withdrew its initial claim on behalf of one the named Grievant IPs. See J-3 at 2.
6 The State, in response to the Union’s information request, provided a document summarizing the IPhone FIT history of the three named Grievants, without any date or source identified. For IP #3801, it said that she had submitted a W-4 in 2006 and, on that basis, had FIT withheld for all 2015 wages earned. U-6. The information said that 2006 W-4 should have carried over into IPhone: “[p] via data conversion from SSPS to IPhone the IP’s 2015 tax status indicating FIT withholding should have been applied in IPhone.” *Id.* The State information said that “[t]his did not occur and the IP did not have FIT withheld from IPhone payments from April 2016 through December 2016. This was due to an IPhone system defect.” *Id.* The FIT was corrected for IP #3801 in February 2017. *Id.*
The SGR said the State had already logged a defect ticket with PPL, and PPL “would now conduct an impact analysis looking for the providers who had FIT taken from a payment, and then ceased to be taken, at any point since IPOne go-live.” J-3 at 2. It noted:

If there are others who experienced a defect, IPOne will cross reference that list with the list given to DSHS [the responsible State agency] by the Union. Following our standard process, DSHS will work collaboratively with SEIU to determine the root cause of this defect and develop a correction that will be released to production. DSHS will also communicate with providers appropriately based on the results of the root cause analysis. We will provide the union a status update as new information is discovered.

Id.

In a March 31 meeting McManus-Davis had with Truscott, who is McManus-Davis’ direct supervisor, Truscott inquired whether he had escalated this grievance. He told her that he not received the SGR. Truscott showed him, on her computer, the emailed SGR dated March 16. Truscott testified that McManus-Davis was both “stunned” and “upset”. Tr. 104: 19-21. He searched for, but never found, the State’s email response in his email account. They discussed what to do and, within two hours, McManus-Davis sent an email to Mitchell, escalating the grievance to arbitration and explaining that he had not received the SGR. The cover message from McManus-Davis to Mitchell, with a copy to Truscott, said:

Attached is an Escalation Notice of [the FIT grievance]. Please be aware that the State’s response letter never arrived in my email inbox. We are investigating with our IT department how this email failed to reach me, but in the meantime please send grievance processing email with delivery and read receipts and continue to copy Shaine.

U-8. The attached letter with the same addressees, stated in material part:

Our grievance regarding the mischaracterization of multiple PRs’ tax exempt status filed February 9th, 2017 was not resolved at Step 1 of the Grievance Procedure in the Parties’ [CBA].
This letter serves as official notification that the Union has escalated this grievance to Arbitration.

J-4.

McManus-Davis testified that his not receiving the SGR email was not isolated: there were other instances in which people reported sending him emails that he never received. Tr. 63:20-23. Truscott described another matter where a State email may have failed to reach a non-Union addressee. Id. 105:8-107:24. See U-14 - U-17. The Union had requested that the State use read receipts with their emails, but the State has not done so. Tr. 110:5-13.
The Union’s Further Efforts to Understand the IPOne Problems.

Union efforts to obtain information about the scope and nature of the FIT withholdings problems have been unsuccessful. The Union never received the impact analysis the State described in the SGR. The Union, however, made other efforts to understand the scope and nature of the problems with IPs’ FIT withholdings. Truscott testified, without contradiction, that at some point subsequent to the SGR, Elonka told her that 1,600 individuals experienced the problem that affected IP #4701. In her case, as described in the SGR, the FIT was correct when IPOne went live in March 2016, but due to an IPP system defect was erroneously turned off starting with her July 18 paycheck. The State offered no evidence to dispute that number or information.

The Union asked the State for information regarding the number of people who did not have their FIT withholdings properly converted from SSPS to IPOne in pre-arbitration hearing information requests, but none was provided. (Based on the attorneys’ statements at the hearing, both sides’ responses to pre-hearing information requests were marginal at best). The Union also filed a Motion for Evidence Sanction and Accompanying Exhibits at the hearing; it was denied.7 Other than the SGR, where the State acknowledged that it and IPP needed to determine the scope of the FIT problem in order to judge certain merits of the grievance, and the few Elonka statements to the Union, the State has provided no definitive information regarding the extent of the FIT problem. The State offered no hearing witnesses. The Union called Elonka as a witness. When he was asked if other IPs were impacted by the same defect that caused IP #3801 erroneous FIT, he said he did not know. Tr.163:3-6.

The State has not provided the information which presumably would have been part of the impact analysis referenced in the SGR. Prior to filing their briefs, however, the parties submitted a signed Joint Stipulation dated November 17, 2017, for inclusion in this record. It says:

DSHS is aware that other IPs had FIT turned off by the IPOne system as early as the go-live and beyond. However, DHS has not yet been able to determine the cause of the defect

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7 The Union requested an “evidence sanction in the form of a finding that the IPOne defects are widespread and effect many IPs”; or, in the alternative, “the State be ordered to provide its impact analysis and to respond to the Union’s... February 9 and August 9 information request by no later than October 2, 2017, and that the record of the proceeding be held open for additional evidence and briefing based on that evidence.” On October 11, the Union filed a Motion to Reopen the Record requesting that the hearing record be reopened to permit it to add several exhibits related to one of the named grievant’s (IP #3801) 2016 FIT liability, which she provided to the Union after the hearing. It was denied except for two documents: 2016 W-2s for IP #3801 issued by the State. The denial of both motions was without prejudice to either party’s right to move for production/and/or admission of relevant information and documents needed to determine the scope, and implementation of, any remedy ordered in the event of a ruling in favor of the Union.
or defects that lead to this, how many IPs were affected by each potential defect, or how many IPs had their FIT turned off by the system in total.


**RELEVANT CONTRACT PROVISIONS**

**Article 2 Union Rights**

2.7 Access to Pay Envelopes provides, in part:

E. When feasible, the Employer shall provide the union at least fourteen (14) days advance notice prior to sending a mail communication to the entire individual provider group. In the event fourteen (14) days advance notice is not feasible, the Employer will send the notice to the Union as soon as possible, but at a minimum, at the same time the notice is sent to the entire individual provider group.

**Article 7 Grievance and Dispute Resolution**

7.3 Grievance/Dispute Resolution Procedure

Step 2. Written Grievance

If the grievance is not resolved at Step 1, the home care worker and/or Union representative shall set forth the grievance in writing including a statement of the pertinent facts surrounding the grievance, the date on which the incident occurred, the alleged violations of the Agreement, and the specific remedy requested.

The written grievance shall be submitted to the Employer within thirty (30) calendar days of the occurrence of the alleged violation or within thirty (30) calendar days of when the home care worker or the Union could reasonably have been aware of the incident or occurrence giving rise to the grievance. The written grievance shall be submitted by email to labor.relations@ofm.wa.gov.

The Employer or the Employer’s designee shall meet with the grievant and his or her Union representative within fourteen (14) calendar days of receipt of the written grievance, in order to discuss and resolve the grievance. Subsequent to this meeting, if the grievance remains unresolved, the Employer will provide a written response to the grievance by email within fourteen (14) calendar days from the date the parties met to discuss the grievance. If the response does not resolve the grievance, the Union may, within fourteen (14) calendar days of receipt of the response, proceed to Step 4, Arbitration.

Step 3. (Optional) Mediation

As an alternative prior to final and binding arbitration in Step 4, if the matter is not resolved in Step 2, the parties may choose by mutual agreement to submit the matter to mediation in order to resolve the issue...If the party receiving the request does not agree to mediate the dispute, the Union may, within...14 days calendar days of the email notification of the decision to mediate, proceed to Step 4, Arbitration.

...
If the issue is not successfully resolved through mediation, the Union, within fourteen (14) calendar days of receipt of a written declaration of impasse or rejection of a settlement offer from the party, proceed to Step 4. Arbitration.

**Step 4. Arbitration**

If the grievance is not settled at Step 2 or 3, it may, within the time frames noted above, be referred by the Union to final and binding arbitration. The arbitrator shall be mutually agreed upon by the parties, or upon failure to agree upon an arbitrator, the Union shall within 14 calendar days of the request for arbitration, request a list... from the [AAA].

The award of the arbitrator shall be final and binding upon both parties. The parties shall each pay one half (1/2) the costs of the arbitration, including the fees of the arbitrator and the proceeding itself, but not including the costs of representation, advocacy, or witnesses for either party. The arbitrator shall have no power to add to, subtract from, or change any of the terms or provisions of this Agreement.

**7.4 Time Limitations**

The parties agree that the time limitations provided in this Article are essential to the prompt and orderly resolution of any grievance, and that each will abide by the time limitations. To this end, grievances must be processed within the periods of time specified above. Days are calendar days, and will be counted by excluding the first day and including the last day of timelines. When the last day falls on a Saturday, Sunday or holiday, the last day will be the next day that is not a Saturday, Sunday or holiday. Any grievance not properly presented in writing and within the time limits specified, or any grievance not moved to the next step within the specified time limits shall be considered to have been withdrawn. If the Employer fails to meet the time limitations specified, the Union may move the grievance to the next step. Time limitations may be extended by mutual agreement of the parties.

**Article 12 Payroll, Electronic Deposit and Tax Withholding**

**12.5 Tax Withholding**

The Employer, at its expense, shall withhold from each home care worker’s paycheck the appropriate amount of Federal Income Tax, Social Security, Federal and State Unemployment Insurance, Medicare contributions, and any other taxes or public insurance fees required to be deducted by federal or state law.

**12.6 Changes to Payroll and Payment Systems**

Unless specifically otherwise noted in this Agreement, the Employer shall bear all costs for any changes to payroll or payment systems required to implement this Agreement, including both the costs of any initial programming changes and the ongoing costs of operating payroll and payment systems.
OPINION

**Burden of Proof.** In cases involving contract interpretation, the party asserting a contract violation has the burden of proving the violation by a preponderance of the evidence. *The Common Law of the Workplace* §1.93 (St. Antoine, Editor) (2nd Ed.) See, *e.g.*, *Columbus Bottlers, Inc.* 44 LA 397, 400 (Stouffer, 1965). The State, however, bears the burden of proving the two affirmative defenses it has raised. *See e.g.* *Miami Indus.*, 50 LA 978, 984 (Howlett, 1968) (attached to the Union’s brief). The State claims that the grievance should be dismissed on two different procedural bases: (1), that the grievance was not timely filed; and, (2), even if the grievance was timely filed, the Union’s attempt to escalate the grievance was not timely. These procedural arbitrability issues must be resolved in favor of the Union for this matter to proceed on the merits.

**I. Procedural Arbitrability**

As the Union notes, arbitrators “recognize a presumption in favor of arbitrability”. Elkouri & Elkouri, *How Arbitration Works* (Eighth Ed. 2016) at 5-29 (“Elkouri”). “Accordingly, when contractual timeliness limits are not strictly enforced or unusual circumstances occur, arbitrators tend to allow the grievance to go to arbitration.” *Id.* at 5-29. But that presumption has its limits.

In the vast majority of cases, arbitrators strictly enforce contractual limitations on the time periods within which grievances must be filed, responded to, and carried through the steps of the grievance procedure where the parties have consistently enforced such requirements. Untimely grievances will be refused a hearing. Untimely responses will result in the grievance being automatically sustained. When the agreement does not specify any time limitations on the filing or processing of grievances, objections to timeliness may be overruled.

*Id.* at 5-28 - 5-29 (footnotes omitted). In this case, the CBA states specific time limits and stated consequences for the failure to meet those deadlines.

**A. The State Waived its Objection that the Grievance Filing was Untimely.**

The State argues that the initial filing of the grievance was untimely because the IPs knew or should have known about the State’s improper withholding of their FIT well before the 30 day CBA limit for the filing of a related grievance had lapsed: one named Grievant had their appropriate FIT stop when the IPOne system issued its first wage payment in April 2016; the other IP’s FIT stopped with the mid-July 2016 wage payment. *See e.g.* U-9, U-10. According to the State, the Union failed to file their grievances within 30 days as the CBA requires, and their February 9, 2017 grievance filing was untimely.
The Union asserted several reasons supporting its argument that the grievance filing was timely. These included that the Union filed the grievance within a few days of learning about the FIT problems though member complaints to the Union, and of when a member informed the Union about the PPL FIT letter. Only one aspect of the Union arguments, however, need be considered as it undermines the State’s affirmative defense that the February 9, 2017 grievance was untimely: the State waived the affirmative defense of an untimely grievance filing through its action and inaction.

Timeliness issues are to be raised throughout the grievance processing, not just at the arbitration. Elkouri at 5-42 - 43. “[A] ‘timeliness’ defense is deemed waived where an employer waits until the arbitration hearing to make such an argument.” Seattle School District and IUE, Local 609, 1145. 1150 (Elinski, 2004). See Cleo, Inc. and A-IC& EWIU, Local 5-1766, 121 LA 1707, 1716 (Curry, 2005) (“well settled law” that timeliness issues must be raised prior to arbitration hearing).

The State argues that it cannot be deemed to have waived the untimeliness of the grievance defense by not raising it prior to the hearing day as it needed to have the Grievants available to determine what the Grievants “knew or should have known” about the FIT problem and when. The record indicates that when the State first raised its timeliness argument at the hearing it apparently knew little more about the FIT problem then it knew when it sent its SGR in March 2017. The State’s argument that it did not have sufficient information on which to base any timeliness objection is unpersuasive. The information in the SGR regarding the named Grievants demonstrate that the State already knew that its alleged erroneous FIT withholdings, a CBA 12.5 violation, started during tax year 2016 when IPOne went life — more than 30 days prior to the February 9 grievance filing. Furthermore, the State had no basis for objecting to the timeliness of the grievance claim about the January 11 PPI letter, dated less than 30 days before the grievance was filed. The State’s failure to raise the timeliness defense in the SGR, or at any time prior to the arbitration hearing, was unjustified, and constitutes a waiver of the affirmative defense that the grievance filing was untimely.

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As the State’s brief says: “[T]he change in tax withholding occurred well more than thirty days prior to the February 2017, grievance filing. With IP 3801, the change in her FIT withholding occurred in April 2016, and with IP 4701 the change was in July 2016.” State Brief at 6. The SGR acknowledged that the PPL letter violated CBA 2.7 E, and that the erroneous FIT withholding as to one of the named Grievants violated Article 12.5. The State granted one of the remedies requested, deferred four of the remedies requested (two pending more information from the “impact analysis” the State had requested from IPP, and two based on the absence of the specific consequential and incidental damages claimed by impacted IPs), and denied the requested remedy that the State pay the impacted IPP’s federal income tax based on the Washington State Constitution.
B. The State's Objection to the Union's Untimely Escalation is Sustained

Union counsel acknowledged that it was aware that the State objected to the timeliness of the Union's escalation of the grievance to arbitration prior to the hearing. Tr. 14:9-17:3. Although the State offered no proof of when or how it raised that objection, the Union made no argument that the State had waived its affirmative defense by not raising it earlier.

When deadlines are at issue, dates are important. These dates are relevant here:

- February 9, 2017: grievance filed
- February 23: grievance meeting
- March 9: CBA deadline for grievance response (14 days after grievance meeting)
- March 16: grievance response emailed to McManus-Davis with a copy to Truscott
- March 23: 14 days after the CBA deadline for grievance response
- Match 30: 14 days after grievance response received in Union's server and Truscott inbox
- March 31: Union notice of escalating grievance to arbitration sent to the State

The State argues that the Union’s March 31 notice to the State of escalating the grievance to arbitration (“Escalation Notice”, the term used by the Union) was untimely: in order for the grievance to be arbitrated, the Union had to have advanced the grievance by March 30, 14 days after the SGR was received by the Union. J-1 § 7.3, Step 2; J-1. Here, it is undisputed that the SGR was received by Truscott, who processed all the IPOne related grievances prior to McManus-Davis, and oversees the team that manages and handles the Union’s grievance processing including McManus-Davis. It is immaterial that McManus-Davis testified that he did not see the SGR until March 31. The CBA does not provide that any particular Union representative has to receive the SGR to trigger the time period for advancing the grievance. The Arbitrator has no power to “add to, subtract from or change any of [CBA] terms or provisions...” J-1 § 7.3, Step 4. The CBA requires, and Truscott agreed in her testimony that the parties enforce, strict adherence to its time deadlines. J-1, §7.4.

The Union argues that under §7.3, the Union may “within... 14 calendar days of receipt of the response, proceed to Step 4, Arbitrations.” McManus-Davis, testified that he did not receive the SGR until March 31 and responded within one day: it never came into his inbox and he first saw it when Truscott showed it to him that day. The Union claims Truscott’s receipt of the SGR was immaterial as the Union had informed the State that McManus-Davis handled the grievances, and the State cannot satisfy the CBA’s notice requirement by sending it to any Union official it chooses. Furthermore, even if the Union’s deadline for escalating the grievance did commence on March 16,
two independent reasons indicate the State’s argument that Union failed to escalate is wrong. One, the Union made a good faith attempt to comply with time limits and the State was not prejudiced in any way by the one day delay. Two, it is undisputed that the SGR was one week late, and CBA Article 7.4 says that if the State fails to comply with the response deadline, “the Union may move the grievance to the next step.” This means, as Truscott explained, that if the State does not timely respond to the grievance, “it is automatically escalated to arbitration”, which has been the parties’ past practice. Union Brief at 13.

As noted, in addition to their reliance on the CBA, both parties’ cited the same portion of Truscott’s testimony to support very different points. Both Truscott and McManus-Davis testified on direct that the State does not always provide a response to every grievance or always do so in a timely manner. Tr. 56:24-57:4 (McManus-Davis); 110:12-13 (Truscott). Neither offered any direct testimony about what occurs if the State does not timely respond or respond at all. During her cross examination, Truscott had the following exchange with counsel for the State:

Q: When Counsel was talking to you earlier, you said that there have been cases where the State has failed to timely respond to a grievance.
A: Yes.
Q: And if they don’t follow it -- if they don’t respond in time, then the grievance is elevated per the CBA, correct?
A: The grievance is what? I’m sorry.
Q: Elevated to the next level.
A: Yes.
Q: And in fact, during your tenure, there’s only been about two grievances where the State failed to apply [sic: presume “reply”]; isn’t that also correct?
A: I don’t know the exact number.
Q: Do you think it’s, like, marginally more than two, or are you saying it’s twenty? Do you have any sense, ballpark?
A: Since January, I’ve not been the one following the grievance timelines or responding to the State or communicating with the State about the grievances in a formal manner, so --
Q: But I assume your position would be that if the State didn’t respond to the grievance timely that it would automatically, per the CBA, be elevated?
A: Yes. That’s what it says in the CBA.

Tr. 113: 25-114:24 (bold in the original; underlined supplied).

The State argues that testimony indicates that “if the Employer does not timely respond to the grievance then, under the language of the contract, [Truscott] would consider the matter
elevated *to the next step in the process,*” indicating the parties’ enforcement of CBA deadlines. State Brief at 5. *See Id.* at 8. The Union relied on the same testimony to support several variations of its argument that: “if the State does not timely respond to the grievance, it is automatically escalated to arbitration”; and, the parties “past practice has been to automatically escalate the grievance to arbitration when the State has failed to timely respond in writing to a grievance.” Union Brief at 13. *Id.* at 11-12.

The CBA and the record, and, importantly, the Union’s actions here, undermine the Union’s position that the State’s failure to timely respond *automatically escalated* the grievance to arbitration as opposed to giving the Union the right to exercise its option to move the grievance to the *next step or level in the process:* that is to refer the matter to Step 4, Arbitration within 14 days. *See J-1 at §7.3, Step 2, Step 4; J-1 at §7.4.*

The CBA provides that “when the Employer fails to meet the time limitations specified, the Union *may* move the grievance to the next step.” CBA §7.4 (italics added). The CBA also says that that “any grievance not moved to the next step *within the specified time limits noted above*”, shall be considered to have been withdrawn.” CBA §7.4 (italics added). The “next step” when there is no timely grievance response, other than the optional mediation under Article 7.2, Step 3, is to proceed to Step 4 which says: “If the grievance is not settled at Step 2 or Step 3, it *may, within the time frames noted above,* be referred by the Union to final and binding arbitration.” CBA §7.2, Step 4. A grievance that is not timely resolved at Step 2 is “not settled at Step 2”. Thus it is incumbent on the Union, if it chooses to proceed to arbitration of the grievance, to meet the time limit for proceeding or referring the matter to arbitration. That referral time limit for advancing the matter to arbitration also constitutes the commencement of the time period for the Union to request a list of arbitrators (unless the parties mutually agree to an arbitrator). CBA §7.2, Step 4. The CBA arbitration process assumes there is a specific deadline by which the Union must, if it exercises its option to do so, make its referral to arbitration, and makes no reference to, or provision for, any “automatic” referral.

The Union never acted as if the State’s failure to timely respond to its grievance by March 9, 14 days after the grievance meeting (the CBA deadline for the grievance response), constituted an automatic elevation of the grievance to arbitration. Rather, its actions demonstrate that the Union, although it does now understandably dispute *when* the untimely response was received, assumed it had a contractual obligation to refer the matter to arbitration within 14 days of receiving the one week late SGR. When McManus-Davis and Truscott realized on March 31 that the Union had not
yet escalated the matter, McManus-Davis was ‘‘upset’’ and they immediately ‘‘made a plan…to escalate it’’. Tr.104:22-25. Within hours, McManus-Davis sent Mitchell ‘‘official notice that the Union has escalated this grievance to Arbitration because it had not been resolved at a [lower Step]’’. J-4. The transmittal cover email explained that the State’s March 16 response letter had never arrived in his mailbox. U-8. The Union made no assertion or suggestion that the grievance matter already had been ‘‘automatically’’ or otherwise elevated, advanced or referred to arbitration because the SGR was untimely.

If the agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested. Thus, the practical effect of late filing in many instances is that the merits of the dispute are never decided.

_Elkouri_, 5-32 to 5-33.

The question remains whether the Union ‘‘received’’ the SGR on March 16 when it arrived, according to what the Union’s IT person told Truscott, in the Union’s server and in Truscott’s mailbox _or_ on March 31 when Truscott showed McManus-Davis the email. _See_ Tr. 105: 7-16. If it was received by the Union on March 16, the Escalation Notice was not timely; if it was received on March 30, it was timely.

Truscott and McManus-Davis both testified that McManus-Davis has been in charge of processing Union grievances with the State since January 2017, and that the State was so informed. He prepared and submitted this grievance to the State with a copy to Truscott (and to someone not identified in the record). J-2. The SGR was addressed to McManus-Davis with a copy to Truscott and Elonka. J-3, E-18. In other words, the State knew he was responsible for this matter. The State, like McManus-Davis, however, copied Truscott, during the processing of this grievance.

McManus-Davis testified that he never saw the email because it never arrived in his inbox. The issue of whether the Union received the SGR on March 16 is _not_ a question regarding McManus-Davis’ credibility, which was neither challenged by the State nor doubted by the Arbitrator. It is an issue that turns on the CBA, an unfortunate reality of potential problems with email communications, and the receipt of the SGR by Truscott.

Article 7, Step 2 provides that grievances shall be submitted to the State as a stated email address. For the State’s written response to grievances, it provides that it will be sent to the Union via email. All five references to specific deadlines in the Article are stated as ‘‘within fourteen (14) calendar day of “receipt” of the relevant document; receipt is not, however, defined. The Union argues that the “plain meaning” of the language is that the notice must have been _received by_
McManus-Davis for the response period to commence, and McManus-Davis’ unrefuted testimony that he did not receive it and first saw it on March 31. The “plain meaning” of the language, also says receipt “by the Union.” It does not say “by McManus-Davis” or identify any particular Union representative or positon. At this point, the majority of “notices” in labor relations, as well as business communication in general, is done via email; there are methods that can be utilized for documenting actual receipt by a particular addressee, but this CBA does not utilize them.

This situation raises an admittedly difficult question, but fact is that there was undisputed “receipt” of the SGR “by the Union”: both by email in the Union’s server and in Truscott’s inbox. The Union testimony that McManus-Davis has experienced other instances of getting his email is immaterial other than it suggests that the Union may have (or had) an issue that it impacts the integrity of its grievance processing mechanics. The Union argument that the State could not just send the notice to any Union official is valid. Truscott, however, is not “any Union official”: she was copied on all the grievance process correspondence here; she received the SGR on March 16; she knew the significance of the receipt of the SGR in the process; and, McManus-Davis reported to her.

The Union notes precedent for denying a timeliness objection where the employer had notice of the grievance, was not prejudiced by the delay and the union “‘has made a substantial, good faith attempt’ to comply with the time limits”. Union Brief at 13 quoting Elkouri at 5-30. The weight of that precedent, however, emphasizes the latter: a union’s diligence to meet the time limits. Although the Union acted diligently on March 31, it did not do so on or after March 9, which was the date the SGR was due.

Given the CBA provisions — and particularly the Union’s position that the State’s failure to respond within 14 days of the March 9 grievance meeting automatically elevated the grievance to arbitration — the Union can fairly be expected to have been watching for the SGR as of March 9, and, if it was not timely provided, be prepared to proceed accordingly. If the grievance was “automatically escalated” as of March 9, as the Union’s position here would indicate, the Union could have moved forward with arbitrator selection process within 14 days as required by the CBA. Even if the Union was not relying on an “automatic elevation” to arbitration, the Union could have moved forward with referring the matter to arbitration once the State missed the March 9 deadline: the Union then had 14 days to move the grievance to the next step.

The CBA includes a “forfeiture clause”: that is, the grievance is deemed withdrawn if the Union fails to either timely file a grievance or advance the grievance in compliance with the CBA.
Understandably, the Union believes that it is unfair given the fact the parties do not dispute that the Union could have referred the matter to arbitration on March 30. Arbitral precedent is replete, however, with cases enforcing clear contractual time limits even when those deadlines are missed by a short time. See e.g. *Veolia Transportation Services, Inc.*, 129 LA 1498, 1503 (Daney, 2011) (grievance dismissed for failure to submit arbitrator list within 15 days); *Bahlsten, Inc.*, 99 LA 515 (Nolan, 1992) (requirement of actual notice missed by 3 days not excused by timely verbal notice; *Textile Paper Products, Inc.*, 51 LA 384, 387-89 (Hebert, 1967) (grievance dismissed when time limit missed by 13 days). Human error is understandable but it does not provide an arbitrator with reasonable grounds to excuse a failure to comply with clear contractual mandates. See e.g., *SEIU Local 503 v. Oregon Transportation Dept.*, Case No. UP 11-09, 23 PECBR 939 (2010) (late filing caused by a clerical support person’s mistake did not amount to good cause to excuse late filing); *Bahlsten, supra* (grievance dismissed where “someone just dropped the ball” even though employer had actual notice of intent to arbitrate).

The Union is undoubtedly dismayed that the State has taken advantage of an inadvertent and minor breach of a contractual time limit. So is this Arbitrator. This avoids a ruling on the merits in this very important matter where the State admitted in the SGR and the Joint Submission that it has significant problems with the IPOne system that resulted in breach of the State’s CBA Article 12.5 obligations to the detriment of a number of unit members, in addition to a related violation of CBA Article 2.7 E. Hopefully, the State’s position here was taken despite State’s legitimate intent and willingness to constructively address these issues directly with the Union and provide appropriate remedies for those who have been damaged by the State’s breach. It also may be that some, or all, of these matters have been or will be addressed in other forums including any related arbitrations between the parties.

At the end of the day...if there is a clear breach of a strict rule with no waiver or extenuating circumstances, the arbitrator must follow the agreement, not his or her heart. If the parties’ contract produces harsh results, they can change it; the arbitrator cannot.

*Bahlsten, supra*, at 519.

The grievance is not procedurally arbitrable.
AWARD

After careful consideration of all the oral and written arguments and evidence, and for reasons set forth in the foregoing Opinion, it is the Award of the Arbitrator that:

The Union’s grievance is not procedurally arbitrable.

Dated: January 18, 2018.

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Shelly C. Shapiro, Arbitrator