Service Employees International Union 775,	**)**	**FMCS CASE NO:**
Grievant,	**)**	**190814-10037**
	)	
and		
	)	**Arbitrator:**
State of Washington Department of Social	**)**	**Betty Rankin Widgeon**
And Health Services,	**)**	
Respondent	**)**	

Appearances

For the Union	**For the Respondent**
Lauren H. Berkowitz, ESQ, PLLC WSBA # 49620	ROBERT W. FERGUSON
4823 46th Avenue Southwest	Attorney General
Seattle, WA 98116	Janelle Peterson
Attorney for Service Employees International	WSBA No. 35533
Union Local 775	Assistant Attorney General

Date of Hearing:	JUNE 25, 2020
Location of Hearing:	Via Zoom Video Platform
Date Post Hearing Briefs Received:	September 11, 2020
Date Decision Due:	November 11, 2020
Date Decision Submitted:	November 11, 2020

ISSUE

Does the Employer's practice of reporting only the Department of Social and Health Services-paid hours to the EDS violate the parties' CBA? If so, what shall the remedy be?

Decision Summary

After having considered all the evidence in the case file, including exhibits entered by both sides at the hearing, and all the testimony presented by both sides, the Arbitrator finds that the Union carried its burden of proving by a preponderance of the evidence that Respondent's failure to report to the Employment Security Department all hours worked by Independent Providers constituted a violation of the parties' CBA. Therefore, the grievance is **SUSTAINED.** A brief background and analysis begin on page 2.

Background

The parties to this dispute are the Service Employees International Union 775 ("The Union," "the SEIU"), and the State of Washington Department of Social and Health Services ("DSHS," "The State," "The Employer"). The Union represents approximately 38,000 home care Independent Providers ("IPs"). IPs perform personal care services for disabled Clients who qualify for Medicaid funds. The State ensures that IPs meet certain qualifications so that the State can pay them using Federal Medicaid dollars.

IPs are employees of the State for collective bargaining. At this time, the Employer does not report all hours worked by all IPs to the Employment Security Department ("the EDS"). The Union brought this class action grievance on behalf of its membership, alleging that this practice constituted a violation of Articles 12.1, 12.3, 12.5, and 23.1 of the parties' CBA.

The Federal Mediation and Conciliation Service appointed the undersigned Arbitrator to this case on February 26, 2020. The Arbitrator and Counsel held several case management discussions regarding when and where to hold the hearing. In early March 2020, we agreed to hold a one-day hearing on June 1, 2020, at the Tacoma Attorney General's Office located at 1250 Pacific Avenue, Tacoma, WA. However, as our nation found itself in the throes of a pandemic, we reconsidered our options and decided to hold the arbitration by video on June 25, 2020, using the ZOOM platform.

Before the arbitration hearing began, the Advocates confirmed that the matter was properly before the Arbitrator. Each side had the opportunity to give opening statements, examine witnesses, cross-examine the other side's witnesses, and submit exhibits and post-hearing briefs. The parties received the hearing transcript for the matter on or about July 10,

2020. The Arbitrator received the parties' post-hearing submission on September 11, 2020. The matter is now ready for Decision and Award.

Position of the Parties

The Union

The Union argues that the State has a duty under state law, the CBA, and the May 1, 2018 award by Arbitrator Nelson, to report all hours worked by IPs to the ESD and to work with the Union on any issues that arise. It alleges that the State has breached both duties. The Union asserts that the State has failed to perform its duty by failing to report a portion of the IPs hours to ESD. It argues that this case's issues and facts are on point with the 2018 Nelson award and Opinion. The Union argues that, consequently, the Arbitrator should sustain the grievance without further examination under the principle of *res judicata.* It also urges that, if *res judicata* does not entirely bar the State's defense, most of the issues central to the State's argument are precluded from re-examination by *collateral estoppel.*

Alternatively, the Union takes the position that, even without deference to the prior arbitration award, the State is obligated to report hours it arbitrarily designates "consumer/Client Participation" hours and that the State has breached its obligations under the CBA by declining to do so. The Union's position is that the State's failure to report all IP hours to the ESD is the proximate cause of the Union's harm and that, therefore, the appropriate remedy to this grievance is an Arbitration Order directing the State to timely and accurately report all hours worked to the ESD and to make the Union and its membership whole for the State's prior failure to report all hours.

The State of Washington

The State argues that it is not in violation of its requirements to report IPs hours to the ESD. It states that the IPs are contracted through the State and are assigned to assist Clients in their homes to facilitate the Client's ability to remain in their homes rather than reside in nursing homes. The State asserts that only in cases where it pays the full wage of the IP, it is responsible for reporting all IP wages and hours to ESD.

The State asserts it has about 4,400 Clients (of 47,000) who have a copay requirement for their care. The State says it has reported IP hours proportionate to the amount it paid the IP. It asserts that it is responsible for reporting the hours proportional to the amount the State actually paid the IP but is not responsible for reporting the hours proportionate to the client's copay amount.

The Arbitrator's Analysis

The Union first argues that the Arbitrator should sustain the grievance without additional analysis according to the principle of *res judicata* based on Arbitrator Nelson's 2018 opinion. *Res judicata* bars the relitigation of a matter that is (1) regarding the same issue, (2) between the same parties, (3) at the same location, (4) involving essentially the same facts, and (5) involving the same controlling contract provisions. The Arbitrator finds that *res judicata* is not correctly applied in the instant case. In the 2018 case, the State was not reporting any hours worked by IPs to the ESD, and the question of which hours were included in this requirement was not litigated or decided.

The Union argues in the alternative that the principle of *collateral estoppel* precludes the reexamination of several issues of this case. Application of the doctrine of *collateral estoppel* is appropriate where (1) the issue at stake is identical to the one involved in the prior litigation; (2)

the issue has been actually litigated in the earlier suit, (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in that action, and (4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the previous proceeding. The Arbitrator agrees that, given the similarities between the 2018 arbitration before Arbitrator Nelson and the instant arbitration, *collateral estoppel* does, in fact, operate to preclude the reexamination of the following issues: (1) the appropriateness of a class action designation in a case of this type, (2) the existence of damages, and (3) the fact that Article 15.3 requires the State to report the hours worked by IPs to the ESD. The outstanding issue for this Arbitrator's consideration is whether the CBA's requirement that the State report IP hours worked to the ESD means all hours worked (or whether there is an exception for hours that are not paid by DSHS).

The State's position is that whoever pays for the hours worked should report them to the ESD and that the Clients pay for the hours that the State does not report. However, the relationship between Clients and IPs is very different than the relationship between the State and IPs. Clients may have the right to determine the number and manner of hours worked, but they do not have the ability to promote, transfer, hire, or fire IPs. More importantly, they do not pay hourly wages; instead, they pay contributions which, like copays, remain static regardless of the number of hours worked. The State's argument that the party paying the wages should report the hours fails to persuade in this regard.

This Arbitrator agrees with Arbitrator Nelson's analysis that "the fact remains that only the State has the necessary information to report IPs' hours and wages to the ESD." The State claims that Clients need simply obtain wage information for the IPs to report the hours worked and wages to the ESD. However, the fact remains that the Clients do not pay wages to the IPs

and that the State is the party in possession of this information in the first place. With this information, the State currently calculates the number of hours it deems appropriate to report to the ESD. Given these facts, the State's argument that it requires Clients to agree in writing to report *contribution payments* for IPs to "state and federal taxing agencies" does not demonstrate that the Client is in a superior — or even equal— position to report *hours worked* to the ESD.

Decision

By the same line of reasoning that Arbitrator Nelson used to find that the Employer's obligations under the relevant contract provisions created a duty of the Employer to report hours, the Arbitrator finds that it is the duty of the Employer to report *all* hours. Therefore, the grievance is SUSTAINED. As a remedy, the Arbitrator orders the State to do the following:

1. Timely and accurately report all IP hours to the ESD to immediately correct (or cause to be corrected) the Employment Security Department reporting issue in this grievance; and
2. Immediately notify any impacted providers of the error, the steps the State will take to correct the error, and the timing of those steps.

The Arbitrator retains jurisdiction for 120 days for the sole purpose of clarifying questions respecting the remedy herein.

Betty Rankin Widgeon

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November 11, 2020