

**IN ARBITRATION PROCEEDINGS  
PURSUANT TO AGREEMENT BETWEEN THE PARTIES**

In the Matter of a Controversy

between

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 775,

and

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES.

RE: LRS #G17-058 ESD Reporting; FMCS Case No.  
170627-02323

**OPINION AND AWARD**

of

**LUELLA E. NELSON,**  
Arbitrator

May 1, 2018

This Arbitration arises pursuant to Agreement between SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 775 (“Union”), and STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES (“State” or “DSHS”), under which I, LUELLA E. NELSON, was selected to serve as Arbitrator and under which my Award shall be final and binding upon the parties.

Hearing was held on January 10, 2018, in Olympia, Washington. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. A certified shorthand reporter attended the hearing and subsequently prepared a verbatim transcript. Both parties filed post-hearing briefs on or about February 26, 2018.

**APPEARANCES**

On behalf of the Union:

Lauren H. Berkowitz, Attorney at Law, PLLC  
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Seattle, WA 98146

On behalf of the State:

Robert W. Ferguson, Attorney General (on brief)  
Susan Sackett DanPullo, Senior Counsel  
Office of the Attorney General  
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## STIPULATED ISSUE

The parties were unable to agree on a statement of the issue or issues to be decided. The Union would formulate the issue as follows:

Did the State violate the Collective Bargaining Agreement when it continuously refused and refuses to timely report hours worked to the Employment Security Department; and, if so, what is the remedy?

The State would formulate the issues as follows:

1. Is the grievance arbitrable under the Collective Bargaining Agreement 2015-2017?<sup>1</sup>
2. If so, did the State correctly deduct the State Unemployment Insurance from individual providers' pay as required by the Collective Bargaining Agreement, Article 12.5, which the Union presented at the grievance hearing as the article that they were grieving? If not, what, if any, is the remedy available?

The parties stipulated that the Arbitrator would formulate the issue or issues to be decided. Having reviewed the record, the Agreement, and the parties' statements of the issues, I formulate the issues as follows:

1. Is the grievance arbitrable?
2. If the grievance is arbitrable, shall the grievance be sustained or denied; and, if sustained, what is the appropriate remedy?

## RELEVANT SECTIONS OF THE AGREEMENT

### ARTICLE 3 EMPLOYER RIGHTS

...  
3.3 The above enumerations of Employer rights are not inclusive and do not exclude other Employer rights not specified, including but not limited to those duties, obligations or authority provided under RCW 74.39A.250 through RCW 74.39A.280 and to the extent not otherwise expressly limited by this Agreement. The exercise or non-exercise of rights retained by the Employer shall not be construed to mean that any right of the Employer is waived.

3.4 No action taken by the Employer with respect to a management right shall be subject to a grievance or arbitration procedure or collateral action/suit, unless the exercise thereof violates an express written provision of this Agreement.

....

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<sup>1</sup> On brief, the State re-framed its proposed formulation of the issues, as follows:

1. Is this grievance arbitrable when the Union changed the issue at arbitration, and neither the issue raised at arbitration or at arbitration are addressed by the CBA?
2. Even if arbitrable, did the Union meet its burden to prove that the contract was violated? If so, what is the remedy?

ARTICLE 5  
BARGAINING UNIT INFORMATION

...

[NOTE: The following two paragraphs of Article 5.1 will become effective upon implementation of a new payroll system in accordance with Article 12.]

5.1 Information to be Collected and Provided

A. The Employer shall collect and provide information about the bargaining unit and each member of the bargaining unit and shall provide this information to the Union on a regular monthly basis. Such information shall be transmitted electronically in a common, commercially-available electronic format specified by the Union, and shall include:

...

14. Amount paid during the current month of payment,

15. Hours or units and dates of work worked in a month for which payment has been made,

...

The Employer and the Union shall coordinate to reconcile any questions about the bargaining unit information and records.

....

ARTICLE 7  
GRIEVANCE AND DISPUTE RESOLUTION

7.1 Dispute Resolution Philosophy

The Employer and the Union commit to address and resolve issues in a fair and responsible manner at the lowest possible level, and to use mediation and conflict resolution techniques when possible. Our relationship depends on mutual respect and trust based on our ability to recognize and resolve disagreements rather than avoiding them. Prior to filing a grievance, the Union and the Employer will attempt wherever possible to resolve problems informally and not to resort to the formal grievance procedure.

7.2 Grievance Definition

A grievance is defined as a contention of a misapplication or violation concerning the application or interpretation of this Agreement.

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 violation of the Agreement, and the specific remedy requested.

...

Step 4. Arbitration

...

The award of the arbitrator shall be final and binding upon both parties. ... The arbitrator shall have no power to add to, subtract from, or change any of the terms or provisions of this Agreement.

....

ARTICLE 10  
WORKER'S COMPENSATION

...

10.2 Worker's Compensation Premiums

The home care worker premium share for worker's compensation insurance shall be paid by the Employer. ...

10.3 Third Party Administrator

The Employer shall contract with a third party administrator in order to administer the workers' compensation coverage provided to home care workers in the bargaining unit. ...

....

ARTICLE 12  
PAYROLL, ELECTRONIC DEPOSIT AND TAX WITHHOLDING

12.1 Payroll System Implementation

The State will adopt a new payroll system for the purposes of calculating and making payments to individual providers.

The new system will, at a minimum, be capable of collecting and reporting demographic data, including but not limited to information outlined in Article 5, ... adding and editing deductions at variable levels for health care premiums, Taft-Hartley fund contributions, taxes, union deductions, wage garnishments, and other purposes; providing web-based reporting of hours; ....

...

12.3 Timely and Accurate Payment

Home care workers shall be entitled to receive timely and accurate payment for services authorized and rendered. To promote a timely and accurate payroll system, the Employer and the Union shall work together to identify causes and solutions to problems resulting in late, lost or inaccurate paychecks and similar issues. The parties acknowledge the time necessary to correct errors in payments depends on the underlying nature of the error. Once the cause of the error has been identified, payment will be made as soon as possible but no later than ten (10) business days.

...

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.

....

ARTICLE 14  
REFERRAL REGISTRY

14.1 Eligibility for Referral Registry

Any member of the bargaining unit who is seeking new consumers or additional hours, and who has completed the legally required amount of training or other training as may be determined by the Department of Social and Health Services, and who has successfully cleared a criminal background check, shall be eligible for listing on any referral registry operated by the Employer, its agencies, contractors and/or subcontractors. ...

...

14.3 Removal from Referral Registry

Once a worker is listed on the registry, he or she may only be removed from the registry for the following reasons:

- A. Upon his or her request, he or she is removed from the referral registry because he or she is not seeking additional referrals from the registry; or,
- B. Upon his or her request, he or she is temporarily removed from active status on the registry because he or she is not seeking additional referrals or more consumer hours on a temporary basis; or
- C. He or she worked no hours as an individual provider for twelve (12) or more consecutive months;
- D. For just cause, ... or
- E. When he or she does not respond to three (3) consecutive attempts by registry staff following a consumer referral request, he or she will be removed from active status after thirty (30) days. He or she shall be reinstated to active-status upon request.

....

ARTICLE 23  
SAVINGS OR SEPARABILITY CLAUSE

23.1 This Agreement shall be subject to all present and future applicable federal, state and local laws and rules and regulations of governmental authority. Should any provision of this Agreement, or the application of such provision

to any person or circumstance be invalidated or ruled contrary to law by Federal or State court, or duly authorized agency, the remainder of this Agreement or the application of such provision to other persons or circumstances shall not be affected thereby.

....

## RELEVANT STATUTORY PROVISIONS

### RCW 50.04.248

Employment—Third-party payer.

(1) Subject to the other provisions of this title, personal services performed for, or for the benefit of, an employer who utilizes a third-party payer constitutes employment for the employer. The third-party payer is not considered the employer as defined in RCW 50.04.080.

...

### RCW 50.12.070

Employing unit records, reports, and registration—Unified business identifier account number records—Penalty for failure to keep records.

(1)(a) Each employing unit shall keep true and accurate work records, containing such information as the commissioner may prescribe. Such records shall be open to inspection and be subject to being copied by the commissioner or his or her authorized representatives at any reasonable time and as often as may be necessary. The commissioner may require from any employing unit any sworn or unsworn reports with respect to persons employed by it, which he or she deems necessary for the effective administration of this title.

(b) An employer who contracts with another person or entity for work subject to chapter 18.27 or 19.28 RCW shall obtain and preserve a record of the unified business identifier account number for and compensation paid to the person or entity performing the work. In addition to the penalty in subsection (3) of this section, failure to obtain or maintain the record is subject to RCW 39.06.010.

(2)(a) Each employer shall register with the department and obtain an employment security account number. Each employer shall make periodic reports at such intervals as the commissioner may by regulation prescribe, setting forth the remuneration paid for employment to workers in its employ, the full names and social security numbers of all such workers, and the total hours worked by each worker and such other information as the commissioner may by regulation prescribe.

(b) If the employing unit fails or has failed to report the number of hours in a reporting period for which a worker worked, such number will be computed by the commissioner and given the same force and effect as if it had been reported by the employing unit. In computing the number of such hours worked, the total wages for the reporting period, as reported by the employing unit, shall be divided by the dollar amount of the state's minimum wage in effect for such reporting period and the quotient, disregarding any remainder, shall be credited to the worker: **PROVIDED**, That although the computation so made will not be subject to appeal by the employing unit, monetary entitlement may be redetermined upon request if the department is provided with credible evidence of the actual hours worked. Benefits paid using computed hours are not considered an overpayment and are not subject to collections when the correction of computed hours results in an invalid or reduced claim; however:

(i) A contribution paying employer who fails to report the number of hours worked will have its experience rating account charged for all benefits paid that are based on hours computed under this subsection; and

(ii) An employer who reimburses the trust fund for benefits paid to workers and fails to report the number of hours worked shall reimburse the trust fund for all benefits paid that are based on hours computed under this subsection.

(3) Any employer who fails to keep and preserve records required by this section shall be subject to a penalty determined by the commissioner but not to exceed two hundred fifty dollars or two hundred percent of the quarterly tax for each offense, whichever is greater.

### RCW 74.39A.270

Collective bargaining—Circumstances in which individual providers are considered public employees- Exceptions—Individual provider pay—Joint legislative-executive overtime oversight task force.

(1) Solely for the purposes of collective bargaining and as expressly limited under subsections (2) and (3) of this section, the governor is the public employer, as defined in chapter 41.56 RCW, of individual providers, who, solely for the purposes of collective bargaining, are public employees as defined in chapter 41.56 RCW. To accommodate the role of the state as payor for the community-based services provided under this chapter and to ensure coordination with state employee collective bargaining under chapter 41.80 RCW and the coordination necessary to implement RCW 74.39A.300,

the public employer shall be represented for bargaining purposes by the governor or the governor's designee appointed under chapter 41.80 RCW. ...

(2) Chapter 41.56 RCW governs the collective bargaining relationship between the governor and individual providers, except as otherwise expressly provided in this chapter and except as follows:

(a) The only unit appropriate for the purpose of collective bargaining under RCW 41.56.060 is a statewide unit of all individual providers;

...

(3) Individual providers who are public employees solely for the purposes of collective bargaining under subsection (1) of this section are not, for that reason, employees of the state, its political subdivisions, or an area agency on aging for any purpose. Chapter 41.56 RCW applies only to the governance of the collective bargaining relationship between the employer and individual providers as provided in subsections (1) and (2) of this section.

...

(5) Except as expressly limited in this section and RCW 74.39A.300, the wages, hours, and working conditions of individual providers are determined solely through collective bargaining as provided in this chapter. Except as described in subsection (9) of this section, no agency or department of the state may establish policies or rules governing the wages or hours of individual providers. ...

...

(8) Nothing in this section affects the state's responsibility with respect to unemployment insurance for individual providers. However, individual providers are not to be considered, as a result of the state assuming this responsibility, employees of the state.

....

## RELEVANT PROVISIONS OF THE WASHINGTON ADMINISTRATIVE CODE

WAC 192-310-010

What reports are required from an employer?

...

(3) Quarterly tax and wage reports:

...

(b) Report of employees' wages. Each calendar quarter, every employer must file a report of employees' wages with the commissioner. This report must list each employee by full name, Social Security number, and total hours worked and wages paid during that quarter.

...

(d) Due dates. The quarterly tax and wage reports are due by the last day of the month following the end of the calendar quarter being reported. Calendar quarters end on March 31, June 30, September 30 and December 31 of each year. So, reports are due by April 30, July 31, October 31, and January 31, in that order. If these dates fall on a Saturday, Sunday, or a legal holiday, the reports will be due on the next business day. ...

....

## FACTS

This case involves the lack of reports of hours worked by Individual Providers (“IPs” or “caregivers”) for purposes of administration of Unemployment Insurance (“UI”) benefits. IPs perform in-home personal care for elderly or disabled persons (“clients”) – often family members – who are eligible for such services. Clients select their IP. The State is the IPs’ employer for purposes of collective bargaining; for all other purposes, IPs are independent contractors with the State and employees of their clients.

Article 12.5 of the Agreement makes the State responsible for withholding payroll taxes for, inter alia, UI. The State's Senior Labor Negotiator, Ann Mitchell, testified this provision is unique in collective bargaining agreements between the State and its Unions. In researching it, she first found it in the Union's proposals in negotiations for the 2005-2007 Agreement. She testified that only the State pays UI premiums, so no UI premiums are withheld from IPs' pay. The record does not reflect whether employees paid any portion of the UI premiums at the time this language was negotiated.

Employers make quarterly reports of hours and wages to the State Employment Services Division ("ESD"). The ESD uses those reports to determine eligibility and benefits for UI. As discussed below, no reports of IPs' hours were filed with ESD for the last three quarters of 2016, and none had been filed for 2017 by the time the grievance in this matter was filed.

#### THE GRIEVANCE

In a May 1, 2017,<sup>2</sup> letter, the Union filed this grievance as a class action, reading, in pertinent part:

...

On April 28, 2017, the Union was informed that providers' wages and hours worked have not and are not being reported to the Employment Security Department in violation of Article 12, and all other applicable provisions of the Collective Bargaining Agreement.

The remedy sought is:

- Immediately fix (or causing to be fixed) the Employment Security Department reporting issue in this grievance;
- Payment by the state of all taxes, fees and penalties due and owing as a result of bargaining unit members' wages being misreported to the Employment Security Department;
- Incidental and consequential damages, including interest, accountant and attorneys' fees;
- Immediately notify any impacted providers of the error, the steps that will be taken to correct the error, and the timing of those steps;
- Any and all other appropriate remedies.

...

The Union retains the right to modify this Grievance [*italics in original*]

The State responded in a June 13 letter that quoted the Union's statement of the grievance (other than the final italicized portion) and stated as follows:

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<sup>2</sup> Except as otherwise indicated, all dates refer to 2017.

### Grievance Meeting

[Participants] convened a grievance meeting on May 16, 2017. You stated that on April 28, 2017, a report came from the Member Resource Center (MRC) that an Individual Provider tried to file for Unemployment Benefits and was denied. You stated that multiple Individual Providers have experienced the same problem. Individual Providers call the IPOne call center and are told that IPOne is not responsible and are instructed to call the Union.

During the grievance meeting, Dennis Elonka provided some background on this issue. The Employment Security Department (ESD) has significant challenges with their newly implemented unemployment tax system called the Next Generation Tax System (NGTS). Due to these challenges, the NGTS system was unable to accept work hours data from IPOne. In order to allow providers to continue to claim unemployment benefits, DSHS has created a “workaround” so that Individual Providers may still apply for and appropriately receive Unemployment Benefits. The instructions for the “workaround” were shared with the IPOne call center on November 10, 2016. Individual Providers who are filing an unemployment claim and are denied, should call ESD again and ask to have their claim “re-determined.” They should also inform the ESD claim rep that they performed work providing in-home care services through DSHS under a Medicaid program and file their time through Individual Provider One, but that the hours are not in the ESD system.

### Grievance Decision

I do not find a grievance violation. Article 12.5 requires the Employer to “withhold from each home care worker’s paycheck the appropriate amount of Federal Income Tax, Social Security, Federal and State Unemployment Insurance . . . “ DSHS has withheld the appropriate amount of unemployment insurance.

During the grievance meeting we discussed how DSHS or IPOne can notify IPs of the process to file for unemployment. DSHS has agreed to look into other ways to inform providers of the workaround process with ESD to claim unemployment insurance benefits.

Mitchell testified that the grievance, as filed, was unclear and broad to her, so she asked in the grievance meeting what specific provision within Article 12 was at issue; her recollection was that Collective Bargaining and Employer Relations Specialist Cary McManus identified Article 12.5. She testified that McManus did not identify Article 12.3 or 23.1; did not refer to the duty of good faith and fair dealing; did not assert that the State was refusing to make changes so that timely reports could be made to ESD; and did not assert that the State had refused to make timely and accurate ESD reports in the past.

McManus testified he was contacted by several members about problems claiming UI benefits. He did not specifically recall being asked, during the grievance process, to identify a specific contract provision on which the grievance was based, and he does not dispute that he referred to Article 12.5 during the grievance meeting. He testified that being able to access UI benefits based on information from the payroll system is a



“similar issue” to other problems with payment, and is thus addressed in the agreement in Article 12.3 to work together to identify and solve such problems.

## THE PAYROLL AND REPORTING PROCESS

Beginning in March 2016, DSHS contracted with Public Partnership Limited (“PPL”) to manage its IP payroll, including ESD reporting. PPL uses a payroll system called IPOne to track and report hours. It is undisputed that PPL did not report hours worked from the IPOne records to ESD. According to the State, a glitch in ESD’s Next Generation Tax System (“NGTS”) made ESD unable to accept reports from PPL, resulting in the lack of reporting at issue. IPs who became unemployed because their clients died, became ineligible for in-home services, or temporarily did not need in-home services (e.g., because they were hospitalized), were denied UI benefits because NGTS showed no hours reported for them after the first quarter of 2016.

On November 9, 2016, ESD Director Brenda Westfall notified other ESD staff of contacts from DSHS regarding the concern with reported hours, as follows:

I was just on the phone with DSHS. They have several (15-20) in home care providers filing UI claims. Currently, there are no accounts or wages in NGTS for 2/16 or 3/16. Our two agencies are working on the interfaces for these new Medicaid Provider One accounts but the files are still in test.

I advised DSHS that we can get the wages in to NGTS via a redetermination. DSHS will send me a contact name that Tax Audit staff can work with to establish the accounts and obtain the two quarters worth of wages. I’m alerting you all because the [sic] I am instructing DSHS to call the claimants to request an RX. We’ll get these accounts established one at a time until the new interfaces are working.

On the same day, DSHS Project Manager Dennis Elonka had the following e-mail exchange with Westfall regarding the reporting problem:

Brenda

Please add/modify if I missed anything

- Providers who are filing an unemployment claim should call back to ESD and ask to have their claim redetermined. **Correct. They will need to provide the “employer” name as part of the call. The new provider one accounts should be in our system by Monday.**

- They should inform the ESD claim rep that they did work providing in home care services through DSHS under a Medicaid program, but that the hours are not in the ESD system. **Correct.**
- Our call center rep should then collect the name of the individual and provider number and pass it along to my team for a work around solution. We will then work with ESD IT to get the hours in for Q2 and Q3 of 2016 (The exact process for this is TBD) **We will ask you for the hours worked and wages paid by calendar quarter.**
- You will inform your benefits managers that this is happening and that they should be on the lookout for it. **Done.**

The Union was not copied with either of these e-mails or notified at that time of the reporting problem.

DSHS Director of Office Communications Lisa Yanagida testified that, until November 2016, she believed PPL was reporting IPs' hours and earnings to ESD. Once she learned of the problem at issue here, she worked with PPL to make sure they knew the scope of the problem and the IPs who were affected; to find out when the problem would be fixed; and to find workarounds in the meantime. The Union was not included in those discussions. The defects in the ESD reporting process are still being researched.

The initial workaround was for an IP who had unreported hours to call the IPOne call center; the IPOne representative, in turn, was expected to direct the IP to contact ESD and ask to have the UI benefits recalculated. Neither ESD's on-line FAQ's on UI Benefits nor the printed Handbook for Unemployed Workers in evidence mentions this workaround or discusses whether UI applicants can submit their own wage records in support of their UI applications or appeals. Letters in evidence notifying two IPs (identified below) that they were not eligible for UI benefits did not refer them to the workaround. Yanagida testified that, if an IPOne representative told an IP that the issue was between the IP and ESD, that was inconsistent with the directives the IPOne representatives were given. After the May 16 grievance meeting, she went back to IPOne to ensure their representatives were given the right process to follow. She continues to work with IPOne on the process.

McManus testified he has been in multiple meetings with the State to identify the numerous problems with IPOne's handling of payroll. Mitchell testified there were multiple grievances weekly about IPOne, and that she was concerned about the continuing problems. She testified that, after the May 16 grievance meeting, IPOne filed a report for the second quarter of 2016 with ESD, and that it is working on filing additional

quarterly reports. She testified that, if an IP incurred costs such as fees for late rent payments due to the delay in receipt of UI benefits, the State will consider paying those costs.

#### ATTEMPTS TO USE THE WORKAROUND

Two IPs testified to their applications for UI benefits. Both encountered difficulties months after the above exchange of e-mails between DSHS and ESD and development of the workaround.

Dana Loring testified she sought UI benefits in April 2017 because her client was expected to be hospitalized for several months for surgery; ultimately, the client did not have the surgery and was hospitalized for only a few weeks. Loring went to ESD's on-line website in the first week to file for UI, but stopped short of submitting her application when the system showed she had no hours worked. That caused her to miss the one-week waiting period for UI. The next week, she went on-line again in the hope that there had simply been a delay in reporting her hours, but again found that the system showed no hours worked. When she continued with the application process, the system invited her to submit an alternate base year, which she did. Her UI application was denied on April 21; she requested redetermination, which was again denied on April 26. She testified she continued filing weekly UI applications until sometime in May, when she returned to work. A redetermination on May 3 approved UI benefits; a redetermination on October 12 approved an increased benefit, but by this time she had returned to work. Loring testified she called ESD, IPOne, and the Union multiple times to find out why her hours had not been reported, but found the answers confusing. IPOne offered on several occasions to send her copies of her wage statements, but she declined because she understood that ESD would only accept reports from employers. She testified that, at a minimum, she lost one week's UI benefits because the error deterred her from submitting her UI application the first time; she believes she missed three weeks' UI benefits.

According to ESD Intake Claims Office Supervisor Brittaney Dahl, Loring's first week was her waiting week, and she reported additional income in the second week that made her ineligible for UI benefits for that week; she filed no further applications thereafter. ESD therefore had no occasion to determine her eligibility beyond those two weeks. ESD's records show that Loring received no UI benefit payments.

Melissa Kassahn worked 192 hours per month for seven years for her client, who was her mother. She applied for UI benefits a few weeks after her mother's death. She testified she did not realize at first that she was considered unemployed. When she first attempted to apply on May 13, ESD's on-line system showed no hours for her in the past year. The alternate base year showed hours for her only until April 2016; those hours were not enough to qualify for UI. Kassahn testified she did not submit her UI application on May 13 because she did not want to have it denied. May 13 was a Saturday, so there was no one to call.

On Monday, May 15, Kassahn called ESD and IPOne. She testified that ESD's representative told her they had zero hours for her, so there was nothing to do; IPOne's representative told her it was not responsible to report hours but that reporting hours was the State's responsibility. She called ESD back, and was again told there was nothing they could do. She posted her dilemma on the Caregivers Support Group website and learned others had the same problem. Eventually, someone informed the Union of her problem, and the Union contacted her. The Union representative told her to call ESD again and explain that she was an IP, and said ESD would know what to do or, if not, to have them call a supervisor. She did that, and filed her UI claim on May 16. That claim was denied because the system showed zero hours. After several more rounds of communications, her UI claim was approved on July 19. By that time, she had found a job at lower pay. She was able to backdate her application, so she ultimately received UI benefits back to April 30. She testified that being unemployed and denied UI benefits caused her extreme stress and severe weight loss, and also affected her son, who flunked that semester of school in part because he was upset about the economic uncertainty.

Dahl testified that Kassahn's UI application indicated she had been let go, and requested to backdate the application for two weeks. The application does not have a place to indicate that the cause of separation was that the client died. Both the cause of separation and the cause for filing late had to be investigated. The investigation began at the end of May, after proof of her hours and earnings showed she was monetarily eligible. The cause of the separation was approved on June 14, and the backdating was approved on July 8.

## POSITION OF THE UNION

The grievance is inherent in the Agreement and/or expressly contracted for in the Agreement. All of the Union's theories are arbitrable, whether they were initially introduced before or at hearing, because they all arise from the same issue. The State has the obligation under the Agreement to timely and accurately report hours to ESD and to work with the Union if it fails to do so. It breached both obligations. Its breach is the proximate cause of harm to IPs and to the Union. The State should be ordered to immediately fix or cause to be fixed the error that causes untimely reporting to ESD, deemed liable for the failure to make timely reports, and ordered to make the Union and the IPs whole.

Grievances may be held arbitrable even under narrow grievance clauses where the claimed right is inherent in clauses on other subjects. Reporting hours and wages to ESD is inherent in Articles 12.3, 12.5, and 23.1.

The Agreement does not say "DSHS will report all hours worked to ESD in compliance with the law." However, Article 23.1 makes the Agreement subject to laws, rules, and regulations. Article 12.5 requires the State to withhold appropriate UI. Article 12.3 requires timely and accurate payment. To effectuate these provisions when IPs must apply for UI, the State must accurately and timely report hours and wages to ESD. Any decision to the contrary would render Articles 12.3 and 12.5 meaningless and contradictory to Article 23.1. Non-reporting to ESD is arbitrable because it requires interpretation and application of Articles 12 and 23.

The State's obligation to report to ESD is not a management right exempt from dispute resolution under Article 3. The Agreement modifies the State's obligation to report hours to ESD. Article 12.3 requires the State to "work together" with the Union to promote a timely and accurate payroll system. Article 12.5 requires the State to calculate and withhold state UI taxes from IPs' paychecks. Article 23.1 requires the State's interpretation of the law to align with state law and regulations.

The grievance does not rely on RCW 74.39A.250 through RCW 74.39A.280. Article 3.3 only limits Employer rights under those laws "to the extent not otherwise expressly limited by this Agreement." Article 3.4 modifies the exemption, "unless the exercise thereof violates an express written provision of this

Agreement.” The duty to report hours to ESD is not a management right. The State has the right to choose its contractor (PPL) and its payroll system (IPOne). However, compliance with regulations is an obligation, not a right.

Assuming arguendo that the obligation to report hours to ESD is a management right, any such right is expressly limited by Articles 12.3, 12.5, and 23.1. The State did not reserve the right to deprive IPs of benefits enshrined in those Articles. Further, management rights are inherently curtailed by state law and regulations. The alleged right to refrain from timely and accurately reporting hours to ESD is eliminated by statute and regulation. This issue is not exempt under the management rights section.

The grievance is arbitrable because it also alleges the State’s failure to work with the Union to resolve the payroll system issues arising from IPOne. The Union has consistently alleged violations of Article 12 and all other applicable contract provisions. The obligation to work with the Union is expressly delineated in Article 12.3. This obligation is not exempt from arbitrability under Articles 3.3 or 3.4. The failure to work with the Union to resolve issues arising from IPOne remains arbitrable.

The Union did not narrow the grievance to Article 12.5. Mitchell’s self-serving testimony is the only evidence in support of the State’s claim that the Union narrowed the scope of the grievance. That testimony is not credible. Her grievance response quotes the same broad language as the original grievance. The grievance response resulted from information provided in the grievance meeting. Had the Union narrowed the scope of the grievance during the meeting, Mitchell’s response letter would have reflected that narrow scope.

The Union’s representative does not recall limiting the scope of the grievance during the grievance meetings. Mitchell’s notes mention Article 12.5; she admittedly pressed the Union to tell her what specific section of 12.5 was allegedly violated. Her notes and testimony indicate that the State, rather than the Union, was honing in on Article 12.5. Mitchell testified the Union did not have a lot of details at the meeting, decreasing the probability that the Union would have agreed to narrow the scope of the grievance.

Even if the Union first raised Articles 12.3 and 23.1 and/or the covenant of good faith and fair dealing at arbitration, they are properly considered. The Union clearly raised these arguments at hearing. An arbitrator

should not limit the inquiry only to points of argument raised before hearing. As this Arbitrator noted at hearing, the purpose of the grievance procedure is to resolve disputes, and narrowing disputes to create a narrower issue than the Union came in with conflicts with that general purpose. Even an ineptly worded grievance statement, or one which gives an incorrect basis for the claim, does not bind the grievant in arbitration.

The issue has remained unaltered throughout the grievance and arbitration processes: the State is failing to report to ESD and to work with the Union to resolve the issues. Whether the Union accurately listed all potential legal avenues for recourse during the grievance meeting is irrelevant. Narrowing the grievance solely to Article 12.5, rather than holistic consideration of the dispute, would undermine the purpose of the dispute resolution process. The State adopted the Union's broad language when its response used the same language. If the Union misstated any legal or contractual basis prior to arbitration, the issue was corrected when the Union properly raised the arguments at hearing. Any other conclusion would elevate form over substance, eviscerate the policy favoring arbitrability of disputes, and deprive grievants and the Union of justice. All theories raised by the Union are properly before the Arbitrator.

Article 12.5 requires the State to timely and accurately report hours to ESD. That interpretation is the only one that gives meaning to the language. Undeniably, Article 12.5 does not expressly require the State to timely report hours worked to ESD. However, under Article 23.1, any application of Article 12.5 to the malfunctioning IPOne payroll system must be in accordance with state law and regulations. State regulations clearly delineate timelines to remit hours worked to ESD. The State asserts that it is required to withhold any necessary UI contributions (in this case, \$0) from IPs' paychecks, but not to report the hours on which contributions are based. This cannot reflect the parties' intent in negotiating this provision. To conclude otherwise would require inclusion of all ministerial steps the employer must take to fulfill its promises. The State's interpretation of Article 12.5 violates state regulations and must be invalidated under Article 23.1.

Article 12.5 requires the State to withhold all necessary UI contributions from paychecks and remit hours worked to ESD. Submission of hours worked is the legal requirement and prerequisite to determining and withholding UI contributions, so it is inherently included in Article 12.5's requirements.

The parties' intent is manifest in the covenant of good faith and fair dealing. This covenant requires management discretion to be exercised reasonably. The Union seeks only what is just, fair, and reasonable: a contract interpretation that gives meaning to the language and requires the State to timely and accurately report hours worked to ESD, not merely monetary contributions. The State violated the Union's reasonable interpretation of Article 12.5.

The plain language of Article 12.3 expressly requires the State to work with the Union on this issue, not merely with PPL. IPOne is a payroll system within the meaning of the Agreement. Article 12.3 expressly requires the State to work with the Union to address issues arising from IPOne. The State has not worked with the Union, other than to deny the Union's grievance. The failure to work with the Union, not solely with PPL, to address the failing IPOne payroll system violates Article 12.3.

The State undisputedly has not timely and accurately reported all hours worked by IPs to ESD since March 2016, in violation of Articles 12.3 and 12.5. The State is responsible for the reporting obligations under the Agreement. The State has not timely reported hours to ESD. The second quarter 2016 hours should have been reported on July 31, 2016. The grievance meeting occurred on May 16, 2017. The second quarter of 2016 was reported to ESD after the grievance meeting, at least 10 months late. The issue is not resolved, and DSHS still refuses to report hours timely and accurately to ESD.

DSHS also fails to work with the Union to resolve the reporting issue. DSHS continues to work with PPL to make sure the workaround is working and make sure PPL is continuing to try to fix the issue. However, there is no evidence that the State is working with the Union.

The Agreement establishes the State's duty to report hours and work with the Union to address the reporting failure. The Union has consistently described the grievance as broader than Article 12.5. The grievance response proves that Mitchell did not perceive the Union to have narrowed its grievance. The State failed to report hours timely and accurately to ESD and failed to work with the Union to resolve the issue. The State's interpretation of the Agreement violates Article 23.1. The issue is not exempt under Article 3 because it is enshrined in state regulation and law. The State failed to report Loring's and Kassahn's hours upon



implementation of IPOne, and continued to fail to report hours worked. The State failed to take advantage of its own FAQ's pamphlet to include directions for caregivers to access UI benefits.

The State Legislature has not repealed or amended any part of the UI statute. The Legislature is not a party to this grievance or arbitration proceeding. The State acknowledges that it is responsible for management obligations under the Agreement. The State failed to meet those obligations. It is irrelevant that issues not contemplated under the Agreement may or may not relate to the State as the employer of IPs, because the Union does not allege any grievances other than violations of items addressed by the Agreement.

The State admits its failure to timely and accurately report hours worked to ESD. Dahl's notes acknowledge that ESD did not timely and accurately receive hours worked, and that this lag in reporting was the proximate cause of Kassahn's delayed UI benefits. The Union always objected to the State's proposed workaround, indicating the workaround does not represent working together with the Union. There is no indication the Union narrowed the grievance to Article 12.5 alone.

The workaround is ineffective and does not meet the needs of the Union or the bargaining unit. Both IP witnesses called both ESD and PPL/IPOne and were not directed how to correct the issue. Instead of triggering the alleged workaround, their alerts to ESD and PPL resulted in endless phone calls to IPOne, ESD, the Union, and anyone who might help, with both IPOne and ESD denying responsibility or ability to help. By the time Loring's issue was resolved, she had already returned to work and abandoned the application process. Even if the Union were amenable to the workaround, it is not actually occurring.

The failure to report hours to ESD is the proximate cause of the employees' harm. It delayed benefits to otherwise-qualified individuals such as grievants. Dahl testified to the harm caused by missed or late paychecks. The two IP witnesses testified to the financial, medical, and emotional harm they experienced.

The State raises matters that are irrelevant to the issue of whether its failure to timely and accurately report hours worked to ESD, and to work with the Union to correct the issue, constitutes a violation of the Agreement. The State's own witnesses acknowledged it was late in reporting hours; that the lag delayed UI

benefits and any necessary adjudication of job separation reasons; and that the delay in UI benefits is harmful. Suggestions to the contrary are attempts to obscure the proximate cause of the harm.

The appropriate remedy is to direct the State to timely and accurately report all hours worked to ESD, to work with the Union, and to make the Union and its members whole. Much of the harm from the breach can be determined, quantified and alleviated without additional evidence. To the extent that making timely and accurate reports takes time to implement, the Order should direct the State to work with the Union to create a workaround that addresses the Union's and its members' concerns. The Arbitrator should direct the State to immediately notify all IPs of its error, the steps to correct the error, and the timing of the corrections. The Union also requests an award of attorneys' fees.

Individual caregivers should also be made whole. Due to the nature of the harm, the complete scope of harm is yet to be determined. The difficulty of determining damages is not a reason to deny the grievance or damages. In difficult cases, an arbitrator may determine a lump sum settlement if the parties can agree to one, or may use good sense and judgment. Arbitrators typically order that employees be made whole and leave it to the parties to determine the amount.

The State admits it has the ability to pay, and in the past has paid damages incurred by individuals as a result of late paychecks. Mitchell testified the State has paid for things like late rent fees, not provided for under the Agreement, because of grievances resulting from the IPOne roll-out related to timely and accurate payment. The requested remedy here is no different. The State is able to calculate and pay damages, together with interest, incurred by IPs as a result of the failure to timely and accurately remit hours worked to ESD.

To address the harm to individual IPs, including but not limited to the named grievants, the Order should declare DSHS liable for any lost UI benefits, including lost waiting weeks, incurred by any IP as a result of the State's error, together with interest. The Order should also deem the State responsible for any liability or future liability of taxes, fees, or penalties due or owing as a result of wages being incorrectly reported.

The State should also be liable for any and all other appropriate remedies.

## POSITION OF THE STATE

The Agreement is silent regarding reports to ESD. It was negotiated by experienced parties. The Union proposed Article 12.5, which has remained unchanged since 2005. When the principal purpose of a provision can be ascertained, it is to be given great weight in interpreting the provision. Interpreting a provision to be in tune with its purpose is favored. Specific language, rather than general language, is more likely to express the parties' intent. Arbitrators must look at the entire Agreement. Arbitrators may not change express terms to achieve what they believe is a more equitable result.

Article 12 and 12.5 only require the State to withhold state and federal taxes. The principal purpose can be readily ascertained. Nothing in Article 12 or any other provision of the Agreement requires the State to report IPs' hours and wages to ESD. This is even clearer since DSHS is not their employer.

The parties' intent in Article 12 becomes clearer in contrasting its language with Article 10. Article 10 not only requires the State to provide Workers Compensation coverage, but directs it to pay the workers' share of premiums and hire a third-party administrator to administer claims. Workers Compensation requires "employers" to file reports of hours worked by "employees," but that reporting is required only by statute, not by the Agreement. That is true of all requirements relating to reporting hours and wages of IPs. By statute, the State pays employer premiums and is required to file reports of hours and wages to ESD. If the parties wanted to cover UI more fully than they did in Article 12, they knew how to do so.

Article 5 of the Agreement requires reports to the Union of, inter alia, "amount of pay during the current month" and "hours or units and dates of work worked in a month for which payment has been made." It does not say anything about providing information to the Union about reports made to ESD. The parties knew how to craft reporting requirements. The Agreement is very specific, down to who is responsible for producing copies of the Agreement. Had the parties intended to agree about reporting to ESD, they could have bargained for it, but they did not. Arbitration is not a forum to litigate provisions that do not exist into the Agreement. The Arbitrator should not add "employer" reporting requirements to the Agreement.

This case is not appropriate for gap filling. That is appropriate only when evidence shows that the parties would have covered a particular subject matter if they had thought about it. The party asserting that a “gap” exists and should be filled has the burden of proof. Arbitrators may refuse to fill gaps if that would constitute “contract making” rather than contract interpretation. Gap filling should not add to, subtract from, or modify the Agreement.

The only provision in the Agreement that addresses UI is Article 12.5, “Tax Withholding,” which covers what state and federal taxes must be withheld. This provision is required because the State is not the IPs’ employer and would not normally withhold taxes from their pay. The parties bargained for withholding of taxes for state and federal UI, along with other federal income tax deductions. Nothing in it can be interpreted to require the State to report wages and hours worked to ESD, as such reporting has nothing to do with withholding taxes from IPs’ pay. Nothing in Article 12 or 12.3 supports inclusion of a requirement to report IPs’ hours and wages to ESD.

Article 12 addresses all things related to IPs’ pay and taxes. Article 12.3 refers to timely and accurate payments. It requires the parties to “work together to identify causes and solutions to problems resulting in late, lost, or inaccurate paychecks and similar issues.” It would be a tortured interpretation to interpret that to include reports to ESD, especially since the State has no legal obligation to make reports to ESD and no provision in the Agreement requires such reports. The State, as party to the Agreement, is not charged with making UI benefit payments; only ESD can do so. An application for UI benefits means the IP no longer has a contract with the State to work for a DSHS client.

No witness testified to the covenant of good faith and fair dealing or the failure to abide by all laws. Even if there had been testimony, the Union cannot meet its burden of proof on this issue. The principles of good faith and fair dealing come into play in determining what is contained in the Agreement. The implied covenant does not inject new obligations or duties. It governs only conduct in areas controlled by the Agreement and does not impose a duty to act in good faith in matters outside the Agreement.

The Union misstates the purpose of Article 23.1. Article 23.1 is the Savings or Separability Clause. It does not add a requirement to comply with all laws. It makes the Agreement subject to all present and future laws, and states that, if any provision is invalidated or ruled contrary to law, the remainder of the Agreement is not affected. Even if the State was required to report IPs' wages and hours to ESD, that would not be covered by Article 23.1. Interpreting this provision in the way the Union urges would lead to absurd results, sweeping in alleged violations never contemplated by the parties.

The grievance is not arbitrable as it is expressly precluded by Article 3.3, the Employer Rights Article. The parties never agreed to a provision regarding ESD reporting. Without such an express limitation, the Employer retains its management rights in this regard. Actions taken by the State are not subject to a grievance or arbitration unless its exercise violates an express written provision of the Agreement. Any management right is not grievable; by extension, it is not arbitrable.

No express written provision in the Agreement addresses the State's reporting of IPs' hours and wages to ESD. Even the reference in Article 3.3 to statutory obligations under RCW 74.39A.270(8) does not specifically address reporting to ESD; it merely requires the State to pay UI premiums. In doing so, the State is not the employer. The client is the employer. Clients are not parties to the Agreement. Nothing in the Agreement addresses the obligation of the client or the State to report to ESD.

Read together, the provisions of Article 3 clearly demonstrate that the issue in this case is not arbitrable. Because the State is not the employer, it has no legal requirement to report IPs' wages and hours to ESD. Any reporting obligation would be the client's. Although DSHS has undertaken some aspects of the employer relationship on behalf of clients by contracts, it has not undertaken all such responsibilities. It carefully crafted language limiting its responsibilities to those explicitly enunciated in the Agreement. Reporting to ESD is not covered in the Agreement, and therefore is not arbitrable.

Even if Article 12.5 applied, the Union has not shown that the Agreement was violated. It put forward no evidence that Article 12.5 or other provisions require the State to report IPs' hours and wages to ESD. It

presented no bargaining notes or testimony from bargainiers, or testimony of a shared understanding of the language. It put forward no evidence that the language means what the Union says it means.

Even if the Agreement covers the State's reporting of IPs' wages and hours, the State has met this requirement through a workaround with ESD. The State continues to work on getting quarterly reports filed with ESD, and has filed at least one quarterly report through IPOne. The Union therefore has not shown a violation of the Agreement.

The State continues to address problems with IPOne. Even if the Arbitrator ordered the State to immediately fix the ESD reporting, the State would be unable to comply. The State does not control the interaction between the new ESD system and IPOne's payment system. The workaround permits IPs to apply for UI benefits and ESD to obtain IPs' hours and earnings. Since the workaround was implemented and discussed with the Union, there is no evidence that IPs are being denied UI benefits or that such denials are based on the reporting issue. The State continues to work in good faith with the Union to make sure IPs receive UI benefits when they are entitled to them.

The Union has no right or authority to seek the remedy of taxes, fees and penalties due to the ESD reporting problem. The law provides no private right of action to enforce employers' filing obligations. Actions to enforce those obligations, including penalties, rest solely with ESD. Neither the Union nor an individual IP may file suit to force an employer to file quarterly reports or seek penalties for failure to do so.

Even if the Union proved a violation, the Agreement does not provide for "damages" as sought in the grievance. There is no proof of damages. There was no evidence of late fees, bank overdraft charges, attorneys' fees, or other compensable damages. It is easy to be sympathetic to the IPs, but no appropriate remedy was suggested or proven at arbitration. The Union and the IPs were informed of the workaround to obtain UI benefits. The Union and IPOne customer service representatives were informed of the workaround. ESD intake claims personnel were told to direct IPs to redetermination. The State worked with ESD to inform IPs and the people they would contact of the problem and of how to get the information needed by ESD. There were no other suggested remedies.

## OPINION

### ARBITRABILITY

The burden of proof on arbitrability is on the party arguing a grievance is not arbitrable. A challenge to substantive arbitrability must be approached in much the same manner as a trial judge who is asked to dismiss a complaint for failure to state a cause of action. The question is not whether a particular contract section has been violated, but rather whether a case has been stated such that it is appropriate to determine whether or not the contract has been violated. Thus, a grievance may be arbitrable because its subject matter falls within the contractual definition of a grievance, yet ultimately fail on the merits. Arbitrators do not lightly find matters non-arbitrable, and will not read into a contract barriers to grievances that are not plain in the language.

Article 7.2 defines a grievance as a “contention of a misapplication or violation concerning the application or interpretation of this Agreement.” It does not require that the contention be correct; the correctness of the contention is determined through the grievance and arbitration process. The grievance here contends that the State violated Article 12 and “all other applicable provisions.” The question of whether the State violated Article 12 goes to the merits, not to arbitrability.

The State also objects to filing this grievance as a class grievance. On this record, multiple IPs were affected by the failure to report hours and earnings to ESD. It is undisputed that PPL did not report hours for any IP from the outset. Thus, any IP who temporarily or permanently lost a client or had other qualifying events after March 2016 was affected, so long as s/he would have qualified for UI benefits but for the lack of reports to ESD. Two IPs testified to obstacles in claiming UI benefits in 2017; the November 9, 2016, e-mail exchange between Elonka and Westfall states that 15-20 IPs were encountering the same difficulty months before these two IPs applied. I therefore conclude that this grievance was properly filed as a class grievance on behalf of IPs whose hours and earnings were not timely reported to ESD.

The Agreement requires that grievances include “a statement of the pertinent facts surrounding the grievance, the date on which the incident occurred, the alleged violation of the Agreement, and the specific remedy requested.” Unlike some contracts, it does not expressly waive alleged violations that are not articulated

in the grievance. A grieving party cannot infinitely expand its theories at arbitration; the grievance must give fair notice of the nature of the grievance. However, absent a tightly-written grievance provision, a poorly articulated or fleshed out grievance does not preclude advancing theories that arise logically from the claim stated. Grievances are often prepared by persons who are not attorneys, and who are not otherwise trained or expected to file pleadings that would comply with formal court requirements. Further, even a formal court pleading may be amended to conform to the evidence “when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.” Superior Court CR 15(b).

In this case, the grievance stated that the Union was informed of the lack of reports to ESD on April 28, and briefly described its concern. It cited violations of Article 12 “and all other applicable provisions” of the Agreement. These allegations gave fair notice of the more refined arguments presented at hearing by counsel. I therefore conclude that allegations and arguments presented at hearing are appropriately before me.

The Union need not prove specific monetary or other harm from an alleged contract violation at this phase of the case. If the alleged contract violation is proven, the existence and extent of any resulting harm is appropriately the subject of further inquiry in the remedy phase upon remand.

## THE MERITS

The Union bears the burden of persuasion in this contract interpretation case. The intent of any particular contract provision must be gleaned in context, from a reading of the contract as a whole, not by interpreting individual words in isolation. Because parties are deemed to have intended that all the contract language they adopt be given meaning and effect, contract language should be interpreted in a manner that harmonizes with other provisions, not in a way that contradicts or nullifies other terms. Arbitrators seek to balance the legitimate rights and obligations of the parties, avoid harsh and nonsensical results, and provide both sides with the benefit of their bargain. Where the Agreement does not specifically address the issue raised in a grievance, arbitrators must attempt to discern the parties' intent. However, an arbitrator may not legislate in the guise of interpretation. Arbitrators must apply principles reasonably drawn from other provisions of the Agreement.



The State argues that applying for UI benefits means the IP no longer has a contract with the State to work for a DSHS client. However, Article 14 of the Agreement calls for the State to maintain a registry of IPs seeking referral to clients. The listed reasons for removal from the registry that are specified in Article 14.3 do not include death of a client, nor loss of employment with a specific client, nor an application for UI benefits. Indeed, an application for UI benefits does not necessarily mean that the IP has lost a client. For example, Loring's client was temporarily hospitalized. Loring filed for UI benefits with the expectation that she would resume providing services upon the client's discharge from the hospital, as she did. I therefore conclude that an application for UI benefits does not terminate the contract with the State to work for a DSHS client.

By November 2016, the State was aware that 15-20 IPs had applied for UI benefits but were at least initially denied benefits because they had no reported hours. The economic effect of a delay in receiving UI benefits is very similar to that of a late, lost or inaccurate paycheck, within the meaning of Article 12.3. The State therefore was contractually obligated to work with the Union to "identify causes and solutions" to the ESD reporting problem. As early as November 2016, the State worked with PPL and ESD, but not with the Union, on causes and solutions to the ESD reporting problem of which the State had become aware. The State thereby violated Article 12.3 of the Agreement.

Turning to Article 12.5, that provision calls for the State to withhold taxes, premiums, and fees that are ordinarily withheld by employers. It does not explicitly say that the State is to transmit any of those withheld sums to the appropriate authorities, nor does it explicitly say that the State is to inform those authorities of the related payroll information. Article 10 explicitly says that Worker's Compensation premiums "shall be paid" by the State; however, like Article 12.5, Article 10 does not explicitly say whether the State must report the underlying payroll information. This does not suggest that the State had discretion regarding whether to report employment information to the appropriate authorities. Such reports are an ordinary part of administering any payroll, and governed by long-established statutory and regulatory requirements that exist outside the Agreement. It would defeat the purpose of Article 12.5 (and, for that matter of Article 10) to hold that the State has no obligation to follow through with the steps that are integrally related to payroll deductions - i.e., to

transmit the funds to the appropriate authorities and inform those authorities of the employment information underlying their transmission.

It is true that clients are legally the IPs' "employers" for most purposes, and that "employers" ordinarily are responsible for making payroll deductions, transmitting the withheld sums to the appropriate authorities, and submitting the corresponding reports. However, the relationship between a client and an IP is no ordinary employment relationship. Clients select IPs, but have no role in paying wages or withholding payroll deductions. As the only entity that pays wages to IPs and makes payroll deductions, only the State is in a position to make corresponding reports required of employers. Article 12.5 contains no language suggesting that the parties bargained away the ministerial responsibilities that are integral to administering a payroll. I therefore conclude that the State violated Article 12.5 of the Agreement when it failed to report hours and wages for IPs.

In so concluding, I recognize that no payroll deductions for UI premiums are withheld because the State pays the entire UI premium. The fact remains that only the State has the necessary information to report IPs' hours and wages to ESD. I also recognize that the failure to make timely ESD reports is the result of a glitch in communications between ESD's and PPL's computer systems, and that the cause and solution to this glitch remain elusive. The State selected PPL to administer its payroll. It only partly met its payroll obligations when it implemented a workaround that was not announced to IPs, was sometimes not observed in practice, was time-consuming to pursue, and was delay-inducing.

#### THE REMEDY

The record establishes that, despite its efforts in conjunction with PPL and ESD, the State is not currently able to make timely ESD reports. There is no point in ordering an act that cannot be carried out at the moment. The State shall continue pursuing a process that will enable it to make timely ESD reports, including reports retroactively to April 2016. The State shall also work with the Union to develop a mutually-acceptable workaround until the inability to make timely ESD reports is resolved.

Meanwhile, because of the lag in working with the Union, the Union is hampered in identifying affected IPs and any harm they may have suffered. Assuming that the State fully complied with the reporting provisions

of Article 5, the Union could use the monthly lists of employees and hours to reconstruct when bargaining unit members joined and left the lists. More information would be required to determine whether any particular IP left the monthly lists because of an event that triggered eligibility for UI benefits. The State, on the other hand, has records of clients who have died or become ineligible for in-home services after March 2016, and thus has a greater ability to identify which IPs became potentially eligible to claim UI benefits, but for the glitch in reporting their hours. In view of the disparity in available information, the State shall work with the Union to identify IPs who became potentially eligible to claim UI benefits in or after April 2016.

The workaround that the State developed with ESD and PPL placed the burden on claimants to provide information to establish their eligibility. Until a more effective workaround is developed, the State shall notify all IPs whose hours and earnings have not been reported to ESD of the lack of a report and the workaround, and provide them with documentation of their hours and earnings since April 2016. This will permit any IP who is in the UI application process (including redetermination or appeals), who was deterred from completing the UI application process by the lack of reported hours, or who enters that process while the parties are still formulating a mutually-acceptable workaround, to use that information to pursue the workaround that has been in effect. If the failure to make timely ESD reports delayed or deterred an IP from filing for UI benefits, the State shall provide a statement in support of a request to backdate the application because of the State's failure to report to ESD.

The matter is remanded to the parties for implementation of the Remedy, including calculation of losses, if any, suffered by individual IPs as a result of the lack of timely ESD reports.

Finally, the Union has requested interest and attorneys' fees. Arbitrators are not of one mind regarding whether it is appropriate to award interest, attorneys' fees, or other equitable remedies in labor arbitration. In my view, absent specific contract language granting authority to include equitable remedies, such a remedy is warranted only in rare cases - e.g., where a party acts without justification, in bad faith, vexatiously, wantonly, or for oppressive reasons. This is not such a case. Attorneys fees therefore are not part of the Remedy. As to the request for interest, the record does not reflect whether interest is normally payable when UI benefits

are delayed. Nothing in this Opinion and Award should be read to preclude payment of any interest that would ordinarily be due on such delayed benefits.

As agreed by the parties, I will retain jurisdiction over the Remedy portion of the Award and any disputes arising therefrom.

## AWARD

1. The grievance is arbitrable
2. The grievance is sustained.
3. As a remedy, the State shall:
  - a. continue pursuing a process that will enable it to make timely ESD reports, including reports retroactively to April 2016;
  - b. work with the Union to develop a mutually-acceptable workaround until the inability to make timely ESD reports is resolved;
  - c. work with the Union to identify IPs who became potentially eligible to claim UI benefits in or after April 2016;
  - d. until a more effective workaround is developed, notify all IPs whose hours and earnings have not been reported to ESD of the lack of a report and the workaround process, and provide them with documentation of their hours and earnings since April 2016;
  - e. if the failure to make timely ESD reports delayed or deterred an IP from filing for UI benefits, provide a statement in support of a request to backdate the application because of the State's failure to report to ESD; and
  - f. make affected IPs whole for losses, if any, from the failure to make timely reports to ESD.
4. The matter is remanded to the parties for implementation of the Remedy portion of this Award, including calculation of losses, if any, suffered by individual IPs as a result of the lack of timely ESD reports.
5. The Arbitrator retains jurisdiction over the Remedy portion of the Award and any disputes arising therefrom.



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LUELLA E. NELSON - Arbitrator