060508c1.txt

Public Meeting on Unemployment Tax Rules, 6/5/08

1 EMPLOYMENT SECURITY DEPARTMENT
2 STATE OF WASHINGTON
3
4

__________________________________________________________
5 TRANSCRIPT OF PROCEEDINGS
6 of
7 UNEMPLOYMENT INSURANCE RULES MEETING
8 EQUITY AND GOOD CONSCIENCE RULES
9

__________________________________________________________
10 Date and Location
11 June 5, 2008 Employment Security Department
12 Tuesday, 9:00 a.m. Maple Leaf Conference Room
13 212 Maple Park
14 Olympia, Washington
15

__________________________________________________________
16 BE IT REMEMBERED, that a rules meeting was held on
17 the date and location as set forth above. The Employment
Security Department was represented by Juanita Myers,
Public Meeting on Unemployment Tax Rules, 6/5/08

INDEX

June 5, 2008 - Olympia Page No.

Welcome and Introductions 3

Background and Issues 4
<table>
<thead>
<tr>
<th></th>
<th>Discussion on Rules</th>
<th>9</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>What's Next</td>
<td>37</td>
</tr>
<tr>
<td>9</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Welcome and Introductions

MS. MYERS: Let's go ahead and get started. My name is Juanita Myers. I am the rules coordinator for the unemployment insurance division of the Employment Security Department. The first meeting this morning is to talk about rules related to overpayment waivers and settlements and how the term "equity and good conscience" should be applied to accepting applications or denying applications for waiver or settlement of the overpayment amount owed by somebody who's been receiving unemployment benefits.

This is Cheryl. And she's our court reporter. The meeting is recorded and the transcript of this meeting will be available online as soon as we receive it.

I'm going to ask people, if you wouldn't mind, just
introduce yourselves saying who you're with.

MS. MARSHALL: I am Linda Marshall. I'm with the benefit payment control unit.

MS. AMES: Pamela Ames with our contract and rules office of the agency.

MR. STEVENS: Larry Stevens, the lobbyist for the Mechanical Contractors Association and the National Electrical Contractors Association.

MS. SWANSON: Christine Swanson with the Associated General Contractors.

MR. BUELOW: Matt Buelow. I'm with the UI policy unit.

MS. MYERS: Matt's new to our staff so he's still in learning mode. He gets to accompany different staff to different meetings just to see how things operate.
Background and Issues

MS. MYERS: Just to give you a little background of why we're here, the unemployment insurance statute for many years has contained the provisions that allow for waiver of an overpayment when the claimant is not at fault -- so there's no fraud, nondisclosure or misrepresentation, or otherwise the claimant is otherwise at fault -- if collection of the debt would be against equity and good conscience. Similarly, there's also another statute that says that an individual can make an offer in compromise to the Department if, again, requiring them to pay the full amount of the overpayment would be against equity and good conscience.

The Department, back in the mid-1980s, adopted rules defining what we meant by "equity and good conscience." And it was primarily focused on what are the financial
circumstances of the individual, but we did have language saying other circumstances that would make collection -- or deprive them of the income that they needed to live to maintain their family.

In 2005, the Court of Appeals issued a published decision in the case of Delagrave vs. Employment Security. And Mr. Delagrave had originally applied for L&I benefits, workers' comp benefits, and was turned down. And he appealed that. But while it was under appeal, he applied for and received unemployment insurance benefits. And after a passage of time, he won his case for workers' comp during appeal and was awarded back payments back to the beginning of his application which meant that he got workers' comp to cover this period and unemployment benefits to cover the same period. Our state law prohibits someone from collecting both. So we wrote an overpayment for the entire amount of unemployment benefits he received.
What had happened, though, is when he got his award of workers' compensation benefits, his attorney took 30 percent to cover his cost -- it was a contingent case -- which meant that the amount that he actually received in workers' comp benefits was less than his overpayment for unemployment benefits. We denied his benefits and assessed an overpayment. He appealed to the Court of Appeals with an argument that had he not gone forward with his workers' comp appeal, he would have been entitled to those unemployment benefits and so he actually advantaged the Department.

So rather than him suffering -- because, you know, we recovered all that money. And what he wanted us to do originally was to deduct his attorney's fees -- pay his attorney's fees so that he would not be at a net loss, the
attorney's fees of his workers' comp. And the court ruled that there's no provision in unemployment law to pay somebody's attorney's fees.

However, they said that the Department's rules, which focus on somebody's financial condition in determining whether we can do a waiver, were too narrow, that the term "equity and good conscience" means what is fair in the totality of that individual's circumstances. It has to be decided on on an individual basis. And in some description they said that even though he hadn't technically applied for a waiver, his request made it clear that he was asking for a waiver for some part of his overpayment. So they ordered the Department to use the guidelines of fairness in determining whether a waiver should be granted and remanded it to the Department to determine whether Mr. Delagrave was entitled to a partial waiver of his unemployment benefits.
So that changed a number of things we've been doing in the past. We had to come up with some way of deciding what is fair. It's difficult. You can't just go out and tell staff, "Do what's fair in the circumstances," because everybody's definition of what is fair is different.

Now, thankfully, this is not going to be all our adjudicators. Waivers are done in a unit upstairs so it's, what, five or six staff. And we also have in our law -- the court didn't reference it but our legal opinion was when they define "equity and good conscience," it has to fall under both areas, not just the waivers but the offers in compromise.

The collection staff unit Linda's with which collects the overpayments, an individual, as I mentioned, can make what the statute calls an offer in compromise. We haven't waived the debt so we've determined that the person owes it. But at some point, can a person offer to settle it for less than the full amount?

And we're supposed to also look at that under equity
and good conscience. So we had to look at both. What factors do we consider when deciding whether waiver or settlement for less than the full amount meets the guidelines of equity and good conscience or fairness. And again, it's not fair to the claimants, it's not fair to us, it's not fair to the employers to just say,

"Everybody on your own decide what's fair." We tried to come up with some guidelines or some factors to be considered in deciding whether a waiver should be granted or an offer in compromise accepted.

MS. SWANSON: So you say you have this unit that deals with waivers. But, I guess, what is the number of waivers that you guys -- I mean pre '05? So I'm assuming since the court decision, you guys have been operating under --
MS. MYERS: Trying to but without the guidelines in
place, yes.

MS. SWANSON: Have the numbers significantly
increased? I mean, where are they at? I guess I'm just
trying to get a sense.

MS. MYERS: I can look that up, what's the number of
waiver requests we get. But we get a lot of them.

MS. SWANSON: How many do you grant? That would be
more -- how many do you get and how many do you actually
allow? And then has that significantly gone up?

MS. MYERS: I just saw some statistics on that
yesterday, I think. But I'll have to get that to you. We
have two staff who basically, their job is to process
waiver requests all day.

MS. SWANSON: I mean, because you can see where I'm
going at, to try to see how frequently this occurs. And
then, how much has this decision really expanded?

MS. MYERS: It hasn't yet because there's no rules so it hasn't really been publicized. But I can look for those stats. They shouldn't be hard to get.

So the intent behind this, as I said, was to try to rewrite our rules in a way that complies with the court decision but still gives guidance to our staff and is this as fair as we can possibly be to both the claimant and the employer involved.

Discussion on Rules

MS. MYERS: So what I'm going to do is just walk through these changes quickly. And if you have any questions on each section as we go through, please feel free to interject and raise your questions.

MR. STEVENS: I just want to bring my recollections back. Didn't we discuss this around this same table a year or so ago?

MS. MYERS: Yes, we did. What we did then is we
didn't have the drafts yet. I asked what kind of factors should we consider when we write our rules. It was more the preliminary prior to the drafting stage. It was more when we're considering equity and good conscience, what kind of factors should be looked at. And we particularly discussed it because we did pass rules on claimant fraud. And at that point I asked you -- because they can't get a waiver if they committed fraud, but they could make an offer in compromise. Because the law does not prohibit it. So the question I had asked in that meeting I think you're thinking of is, we're working on these other rules, what type of factors, under what circumstances should we allow offers in compromise when somebody has committed fraud. And they were pretty narrow. And the results of that conversation is in the rules.
MR. STEVENS: Maybe I can ask another question and maybe it's for you to restate what you said just a few minutes ago. This court -- I guess where I'm going is courts are supposed to be the ones who make decisions on what's fair. Because it is not an easy thing to write down as to what's fair. And so that's why we have courts to make the decisions in equity. But it sounded like you said that this court kicked it back to the Department to make that decision as to what's fair. Is that the way --

MS. MYERS: Yes, they did. They remanded it back to the Department to consider Mr. Delagrave's request for waiver using the standard of fairness to see if he was ineligible. Not to use financial considerations only, but to use the standard of fairness in determining whether he was eligible for waiver.
MR. STEVENS: Is that word "fairness" in the statute or in the rules?

MS. MYERS: It's in the rules here. It's not in the statute. What they did is they said -- "equity and good conscience" means fairness is what they said in their decision.

MR. STEVENS: Because the Legislature said, "Equity and good conscience."

MS. MYERS: Absolutely.

MR. STEVENS: And the court said, "We don't want to try to determine what's equity and good conscience. We want the Department to write rules on what's fairness."

That's nuts.

MS. SWANSON: I know it is.

MS. MYERS: What they said was the equity and good conscience statute does not list the circumstances under which the Commissioner may find that a waiver is warranted. I'm just reading from the court decision. that was on page 7. But they did talk at some length about -- in the middle of page 8, what they say is, "Equity is defined as '{f}airness; impartiality;"
evenhanded dealing... The body of principles constituting what is fair and right.' Conscience means 'the moral sense of right or wrong... In law, the moral rules that requires justice and honest dealings between people.'"

Excel Court Reporting (253) 536-5824

Public Meeting on Unemployment Tax Rules, 6/5/08

1 The statute, "Instructs the commissioner to determine whether, as a matter of fairness, ESD ought to waive repayment. The commissioner must so determine that under these facts on remand."

5 MR. STEVENS: So is the suggestion there that the word "fairness" is in the statute?

5 MS. MYERS: Well, what they're saying is that "equity and good conscience" means fairness. They are defining for their purposes what "equity and good conscience" means.

11 MR. STEVENS: If you go back up one paragraph where
it says the "term is undefined," "the term" being --

MS. MYERS: Right. "Equity and good conscience" is not defined in statute so it's given ordinary meaning. And they found that the ordinary meaning of "equity and good conscience" is fairness.

MR. STEVENS: But they were not willing to decide what was fair and what was not.

MS. MYERS: No. They remanded it to the Department. And here we are.

MR. STEVENS: You've got a difficult job.

MS. MYERS: That's why we went through seven drafts of these rules.

So anyway, again, I'm just going to walk through these rules. If you have any questions, just go ahead and stop me.
The first one is just a cleanup of the language a little bit. 192-220-010, we just reworded that one a little bit and we added -- it has nothing to do in particular with this decision. It's just while we were doing the overpayment rules, we fix this one too. We get a lot of requests on Subsection (2). For example, if the person actually received in their hand $500 but that was because we diverted $250 to their child support and another $20 to income tax, so we assess the overpayment for the full $770 because that money is considered paid to them when it's paid for their child support. It just clarifies in there. If we deducted it for income tax or child support, it's considered paid to you and it's part of your overpayment. You may be aware that we're required by federal law to withhold from unemployment benefits when people owe child support. And because their benefits are taxable, they can ask to have the tax withheld, but they don't have to.

The next section, a new section, 220-015: Am I required to repay the overpayment? And then we talk about, yes, you have to repay it even if you're not at
potentially eligible for a waiver of an overpayment when it would be against equity and good conscience for the Department to require you to repay the full amount. You're not eligible for a waiver when you're at fault, the overpayment is the result of a discharge for misconduct, it's a result of a conditional payment of benefits, it was issued by another state or is for disaster unemployment assistance benefits. Under the federal law, those benefits cannot be waived and an offer in compromise can't be accepted.

Do you have any questions on that one, Larry?

MR. STEVENS: No.
MS. MYERS: The next rule: When does the Department consider an individual to be at fault for an overpayment? And that's an existing rule. And we primarily just cleaned up the language a little bit. The Department has to decide if they're at fault. Because remember, to be eligible for a waiver, you have to be not at fault for the overpayment. You can't have fault for the overpayment. So the two reasons when we consider you at fault, again, it's when the overpayment is the result of fraud, misrepresentation or willful nondisclosure; or they were paid benefits in an amount greater than they were entitled to receive and they kept the benefits and they provided incorrect information; didn't disclose information which they should have provided; or they caused another person to fail to disclose information; or in another
circumstance, they noticed that the information should have been reported based on information that was provided to them. They get a lot of material mailed to them or provided to them when they file claims. They get spoken information and written information.

And then Subsection (2), they can be considered at fault even though they provided the Department with all relevant information if they should reasonably have known that the payment was wrong. And we give some examples of that. And these aren't change. They reported earnings to the Department but got the full amount in their checks with no deductions. They should have known that that was an error. And there's a variety of other instances that we list there as to when somebody should have known that the payment they received was incorrect.

Subsection (3), when deciding if someone is at fault, we'll consider their education, mental abilities, emotional state, experience with claiming unemployment benefits and other personal factors which affect their ability to report relevant information to the Department.

And then finally, Subsection (4), the claimant is not
not reasonably have known that the payment they received was improper. Again, we give some examples. We removed a payment stop in error which resulted in payment to them. They got a retroactive pension that was backdated by the pension source, not at the person's request. Because a lot of pensions have to be deducted from somebody's benefit amounts. When they're filing a claim, we improperly filed a combined wage claim against Washington rather than against another state. We paid extended benefits when they would have been eligible for a new claim. A lower level decision was reversed by the Office of Administrative Hearings, the commissioner or in court or -- and just the catchall other circumstances where we
find that you did not know the payment was improper. So that's the rule defining whether they're at fault or not. And then it goes on. When they're not at fault, they can apply for a waiver. So then we talk about what does "equity and good conscience" mean. And you'll see most of that existing rule is stricken. And instead, what we say is, "'Equity and good conscience' means fairness as applied to a given set of circumstances." And that's basically lifted from the court's decision. It is against equity and good conscience to deny waiver when repayment of the overpayment would deprive the person of income required to provide for basic necessities including food, shelter, medicine, utilities and related expenses. And then we go on to say, "Unless there are unusual circumstances which would argue against waiver,
the department will presume repayment would leave you unable to provide (for these) basic necessities if your total household resources in relation to household size do not exceed seventy percent of the Lower Living Standard Income Level," which I provided a table for you. I gave you a chart. So we would look at that, say, "They're a family of five. Here's their income. 70 percent of that is 'this' amount." So unless there are unusual circumstances which would say we should not waive, if their income is below that level, we would determine if they did not have sufficient income to provide for their basic living expenses. But then because the court said that it's not just money, we have to look at other factors.

MR. STEVENS: Let me to see if I'm getting this conceptually right. The first paragraph says, "'Equity and good conscience' means fairness." Are you going on then to try to define "fairness"? Is that what you're doing in paragraph (2)?

MS. MYERS: Yes. The factors we would consider in determining whether -- yeah. The first one is basically
waive the overpayment if you don't make at least 70 percent of this lower living standard income level.

MR. STEVENS: "The department will presume repayment would leave you unable to provide basic necessities if your total household resources in relation to household size (does) not exceed seventy percent..." -- that's over here on this chart -- "and circumstances are not expected to change within the next ninety days."

MS. MYERS: And then the next page, about halfway down the page after everything that's stricken out, we say, "The department may also consider... the following factors in determining whether waiver should be granted for reasons of equity and good conscience." And then we list a host of factors we would also consider. For
example, somebody who is at 75 percent of lower income
don't get the automatic -- don't get that presumption, but
they still argue that waiver is appropriate. And the
court says you can't just look at financial, so look at
some other factors. So we'll look at what's their general
health, their education level, whether they're currently
employed and their history of unemployment, their first
future earnings potential based on their occupation,
skills and the local labor market, their marital status
and number of dependents including whether other household
members are employed, whether an error by the Department

contributed to the overpayment, whether the employer
contributed to the overpayment by providing inaccurate
information or failing to respond to the Department's
request for information, whether they were refused or
ineligible for other government benefits because they were receiving unemployment benefits, and then other factors indicating that repayment of the full amount would cause the claimant undue economic, physical or mental hardship. And it has to be generic.

But what we were trying to do here is give some guidelines for staff to consider. I mean, there can always be something else in there. You can't come out with a hard-and-fast definition of what's fair. Because it's dependent on circumstances. But we're trying to come up with some general guidelines that the staff would look at.

And then we say, "The decision to grant or deny waiver will be based on the totality of circumstances rather than the presence of a single factor... in subsection (3)." So if they say, "Okay, I meet 'C,'" but they don't meet any of the others and their income is high enough, that's not necessarily dispositive of what we would do. Because the one thing to bear in mind is in the court's case that they remanded to us, Mr. Delagrave,
there was never any argument that he made that he was unable to afford to repay the overpayment. That wasn't even a consideration for him. His argument was solely on the basis of what's fair as far as he pursued his appeal, got this back award of workers' comp. And had he not done so, the Department would have just owed him all this money. So he shouldn't be penalized by having proceeded through this appeal period. And the court appeared to agree with him. So he didn't make an argument based on the money, his financial condition. He made an argument solely based on it wasn't fair to require him to pay this back.

Next section: How do I obtain a waiver? That's just basically giving them instructions. Whenever we issue a decision that assesses an overpayment, we send the
individual an application if they're potentially eligible. If we determine up front that they're at fault for the overpayment, they aren't given the opportunity to apply for a waiver.

We ask about their financial condition and other circumstances which will include these different factors here that help the Department decide if the overpayment should be waived. And we ask basically for three months of information on their finances. And then we ask them to turn it in within ten days. And if they don't provide us the information within ten days, we will decide their eligibility based on information we have at hand, which is probably "no" if they don't respond to the request for information. A waiver can't exceed the total amount of benefits.
So we aren't going to waive an amount -- if their total claim that they're eligible for benefits is $8,000 and somehow they receive $9,000, we can't waive $9,000 because we aren't going to waive the total amount in excess of what they're eligible to receive.

And then, of course, at the end, if a waiver is approved based on information that's later found to be false or misleading, the amount that is waived will be restored to their overpayment balance.

The next WAC I'm not going to spend a lot of time on. It's just when somebody has an overpayment, we can offset it. For example, they have an overpayment of $5,000 that they got on a previous claim. They reapply for benefits. And we can offset at 50 percent unless it's a fraud. We'll offset 100 percent. So if they're eligible for a weekly benefit amount of $300, we'll keep $150 and apply it to their overpayment and send them the other $150. But if it's fraud, we'll keep the whole $300 and apply it to their overpayment. So instead of it being mailed to them, it goes back into the trust fund and it's credited to
their overpayment.

And on page 6, the WAC there on the bottom, 110, I was talking earlier about an offer in compromise. What we refer to those as, because it's an easier term for people to understand, is a settlement. You can negotiate a settlement amount. So the question here is: Can I negotiate with the Department to repay less than the full amount? And remember, these were people that were denied waiver or they didn't apply for waiver.

State law permits the Department to accept an offer in compromise for less than the full amount. And then we say, "For purposes of this chapter, an offer in compromise is referred to as a negotiated settlement." Either our staff can offer them or the claimant themselves can offer them.

The Department will consider a settlement offer when
it's against equity and good conscience to require them to pay the full amount. And then we'll look at the following factors. They are not quite the same as the ones for waivers. We left off is the Department at fault or is the employer at fault because at this point, we've already decided they're not eligible for waiver. Here, this is more of a collection tool. We're deciding can they repay this amount that we've already decided that they owe. So there we just look at health, education, employment and employment prospects, the size of their family and so on. What's their income level, basically. And in (b), there it says, "In considering settlement offers, the emphasis will be on what is financially advantageous to the department." Again, these are people who we've already determined owe this money. They were
either at fault for the overpayment or they didn't apply for or were not granted a waiver.

We will look at the cost of collection compared to the amount of the overpayment. We can consider such factors as the age and the amount of the overpayment, the number of prior contacts, whether the individual previously made good-faith efforts to pay the debt, the tools available to us to enforce collection and other relevant information -- information relevant to their ability to repay. For example, if somebody has owed an overpayment of $10,000 and we've been chasing them around for five years, and after five years have succeeded in collecting only $2,000, so they still owe $8,000 -- well, probably back up to $10,000 again with interest. But we track them down. And it's involved a lot of effort from our staff to get that $2,000, garnishments and all kinds of things. And the person, whenever we find them, moves on to another job or closes their bank account. If we can reach them and, for example, we may negotiate something
Public Meeting on Unemployment Tax Rules, 6/5/08

1 and say, "Why don't we settle for $6,000? If you'll pay
2 that now, we'll just basically waive" -- not waive because
3 it's not the exact -- but we'll settle for $6,000 instead
4 of trying to go after the full $8,000, $9,000, $10,000,
5 whatever is it now with interest. Because it's kind of
6 the bird-in-the-hand philosophy. If we can get the person
7 to agree to settle that, it's better to get that in one
8 payment rather than try to continue to chase that person
9 down for the next seven or eight years or however long it
10 takes to try to collect. It's taken us five years to
11 collect $2,000. Isn't it not more cost-effective to
12 settle the amount for $5,000 or $6,000 rather than
13 continue to try to chase them around?
14 At this point, this is our collection staff. It's
15 like collection agencies where they're trying to collect a
16 debt and they may agree to settle it based on a variety of
17 circumstances. But again, what we put here is the
emphasis is on what's advantageous to us as the
Department.

MR. STEVENS: You do put that on the first sentence.
Why do you even put in at the end "depending on your
ability to repay"? You kind of reopen the question of
equity and fairness.

MS. MYERS: Oh, take out "the other information
relevant"? I can look at that.

If they previously applied for a waiver and were
denied and their circumstances have significantly changed
such as catastrophic illness or loss of income, they can
make a negotiated settlement offer. That doesn't mean
we're going to accept it.

It will not be considered when they were discharged
for misconduct. And that's in the misconduct statute. We
cannot waive, we cannot take a negotiated settlement. The
overpayment was issued by a state other than Washington or
the overpayment was for disaster unemployment assistance
benefits. And, again, that's federal law. We have to go
after the full amount on those.

Our decision is final but they can make another offer
at a later date if circumstances change.

The next rule is one we talked about at the other
meeting. Will a settlement offer be accepted if my
overpayment is the result of fraud, misrepresentation or
willful nondisclosure? Because the law does not prohibit
those individuals from making an offer in compromise or
requesting a negotiated settlement, so it leaves the door
open. So we have to decide when could they get that
because they are in a different circumstance than other
claimants if they committed fraud.

So we say, "Except in unusual circumstances, a
settlement offer will not be accepted when (the)
overpayment is the result of fraud, misrepresentation, or willful nondisclosure." And then, "Unusual circumstances that may warrant a negotiated settlement of the overpayment and associated penalties include, but are not limited to, long-term or terminal illness, severe permanent disability, or other circumstances that seriously impair (their) long-term ability to generate income."

MR. STEVENS: And I guess I've got to ask, this is when the overpayment was the result of fraud, misrepresentation or willful nondisclosure?

MS. MYERS: Yes.

MR. STEVENS: Do you have legislative authority to go ahead and do that anyway?

MS. MYERS: The statute does not prohibit people from fraud for asking for a request -- making a settlement offer. It leaves it open. So when we say we're not taking this on, we normally would not. I think if it was
our choice, we probably wouldn't accept -- settle an
amount when it was due to fraud or misrepresentation. But
because the statute permits it, then we get back to since
they committed fraud, looking at equity and good
conscience or fairness, in what circumstances should they
get to be eligible to apply to make an offer in
compromise. And when we talked to stakeholders at the

Excel Court Reporting (253) 536-5824

Public Meeting on Unemployment Tax Rules, 6/5/08

previous meetings, they said really limited circumstances.
The person's got a terminal illness, they're permanently
disabled, some other extraordinary circumstances where
even if they committed fraud, it would be against equity
and good conscience to require them to pay the full
amount.

MR. STEVENS: So just to get this straight in my
mind, I'm looking back at the section before that,
overpayment. Settlement will not be considered if the 
overpayment is a result of the discharge for misconduct or 
gross misconduct. That's in statute. But there's nothing 
in statute that says -- 

MS. MYERS: Absolutely. I don't know if it's a 
loophole or what. When they added the new -- well, you're 
familiar. Back in 2003 when they rewrote the UI statute 
and the drafters wrote a new misconduct statute, they 
added this to the new misconduct statute. But the 
overpayment statute was not changed, nor was the 
offer-in-compromise statute. So those weren't touched. 
So they put in the misconduct statute that the person is 
liable for this overpayment regardless of the two statutes 
that allow waiver or offer in compromise. So regardless 
of those two, they have to repay this. 

But they didn't touch the fraud statute -- or the 
waiver or the offer-in-compromise statute which said --
the waiver says they can't be at fault. So that would
eliminate fraud. But the offer-in-compromise statute just
says that anybody can make an offer in compromise. That
statute itself doesn't eliminate the people who committed
misconduct. That's in the misconduct statute. This
statute itself just says, "We can compromise any amount
owed by an individual because of benefit overpayments
where collection of the full amount of benefit
overpayments made to an individual would be against equity
and good conscience." So it's open there. So it doesn't
exclude fraud.
And there's no other statute that excludes the fraud.
The three that we did exclude out, because the misconduct
is in the misconduct statute. Overpayment decision issued
by a state other than Washington, that's part of our
reciprocal agreement. We can't go compromising other
states' overpayments or what would they do to ours that
they're collecting? And then federal law prohibits the
waiver of disaster unemployment benefits.
And then the last rule is: How do I make a settlement offer? And that's just a technical. They need to contact the Department, make an offer to settle the debt for less than the full amount owing, specify the amount they're offering to repay, be prepared to provide financial and other information in support of their offer.

And the Department may request a credit report to verify the information they provide. And then the Department will notify them of our decision to accept or decline their offer.

MR. STEVENS: Can I go back to page 4, the bottom of Section 030, the new language? All those things that you list there, I guess I made little tick marks by a couple as you went by them, (f) and (g), maybe (h). These things, "Whether an error by the department staff"
contributed to the overpayment." I don't know all the rules. I figured that was probably determined way before you get to this point. The same thing with whether the employer contributed to the overpayment. Because we're talking about -- what are we talking about here?

MS. MYERS: This is at the point we're writing the decision. So not always. We don't make many errors. But we may, at some point, determine when they apply for a waiver that they provided the information that they thought they were supposed to provide based on some inaccurate instructions that they received from somebody in the Department. So we've still denied their benefits and we've still written an overpayment, but whether they should be eligible for waiving part or all of the overpayment, one of the factors we could look at is does it appear likely that they actually received this
incorrect information and relied upon it when making --
because we've already determined they're not at fault for
the overpayment. Otherwise, it wouldn't be in the waiver
process. So when we decide whether to waive the
overpayment, was it our fault? Unfortunately, we're human
and people do make errors. Not many, but we do make some.

MS. AMES: Because even if we're at fault, they still
end up with an overpayment. We don't have the process
ahead of time.

MS. MYERS: We will write a decision denying them
benefits even if we were at fault. Because it happens.
We wrote them that they're eligible for benefits. And
then their supervisor goes, "Why did you do that? That
should have been a denial." And so we write it as a
denial. So then they've already collected for a few weeks
and they've got an overpayment. They provided all the
relevant information, so it's not their fault. They told
us all the facts. We're not talking about a case where
they hid some information.

But at that point, when they apply for a waiver, one
of the factors we should consider, again, is not a single factor. It's not just positive of what we will do. But one of the things we will keep in mind when making the decision about the waiver is who made the mistake. And if it was us, that goes -- you know, you kind of like wait

Whether they should get a waiver or not. And that goes on the claimant side. Same with the employers. When the employer provides inaccurate information or --

MR. STEVENS: Does the IRS go that way when I make a mistake?

MS. MYERS: Unfortunately, I don't think there's anything in federal law authorizing the IRS to waive our underpaid taxes for equity and good conscience. Or did the employer fail to respond to the request for information. Say the claimant says they quit work for
these reasons and they didn't. Well, that may not --

MR. STEVENS: But you'd be able to make that kind of
decision, I would guess, whether it was a significant
error or an insignificant error.

MS. AMES: And whether they should have known or not
known.

MR. STEVENS: Somehow, you would be able to make
those kinds of determinations or whatever the employer did
that contributed to the overpayment. You could -- the
whole process is crazy trying to determine what's fair and
put it down in writing.

MS. MYERS: It was a challenge.

MR. STEVENS: I salute you for what you've done. I
still think it's ridiculous that the court tosses it back
to you to define what they can't define. That's why they
get paid the big bucks.

MS. MYERS: And then the (h) is whether they refused or were ineligible for other government benefits because they were receiving unemployment benefits. For example, say they applied for housing assistance and food stamps and they were ruled ineligible because the person -- the other agency said, "No. We can't give you these because you're getting -- unemployment benefits boosts you above the level where you could receive these." And then we go back and say, "Now all that's overpaid, pay that back to us." And had they not been getting unemployment benefits, they could have, during that time, gotten rental assistance or food stamps to help them with their food costs. So that's one of the factors we could consider.

But the thing to bear in mind with the waiver is these are cases where we've determined the claimant is not at fault for the overpayment. Circumstances or someone else...

MR. STEVENS: If they are at fault --

MS. MYERS: Then they don't get a waiver. They can go on to negotiate a statement.
MR. STEVENS: That's their only option.

MS. MYERS: Yes. That's their only option.

MR. STEVENS: I had another question. Because at the beginning of this, you incorporated this chart. Where was that?

MS. MYERS: That is at the bottom of page 3.

MR. STEVENS: And was the decision -- yeah, there it is. It was just a decision that the Department made to recommend that 70 percent be --

MS. MYERS: Well, actually, what we did is we looked at other states, what they do to see if they look at equity and good conscience or what they do. And several other states used 70 percent of the LLSIL. And when I called -- no. I was e-mailing back and forth to one of them, their initial question was, why don't you use 100
percent? And they said, "No. Because it's 100 percent, they are self-sufficient." You've determined that they are completely self-sufficient. And that's not the standard of which we say should they be required to pay it back. I mean, when they can do everything else, then they can pay us back. No. We should be included in that mix of things.

And it's not to say that somebody who's 71 to 100 percent couldn't get a waiver. But they don't get it on this. They would have to establish other factors like Mr. Delagrave, whether it was fair or not. But we just looked at what other states are doing.

MR. STEVENS: So what do we look at on this?

MS. MYERS: That chart, it's a little bit complicated to read, but what it does is it tells us what region we
are. And we would be west. It would be primarily --

MR. STEVENS: This is Western United States.

MS. MYERS: Western United States. And then they have two numbers. The 70 percent of the LLSIL, if you're in a metro area, it's $23,910 a year for a family of four.

MR. STEVENS: Lower living standard income level.

MS. MYERS: Next page gives you actually some specific cities. It does include Seattle/Tacoma/Bremerton. It's a little higher for those areas. So for Seattle/Tacoma/Bremerton, it would be a little bit higher. 70 percent would be $25,450. Because that goes on a family of four. You go over to this chart here on the third page -- so, for example, on our $25,000 -- for Seattle/Tacoma, it would be $25,450 for a family of four. So that would be $25,450. That's partway down the chart under the family-of-four column. About two-thirds of the way down you see $25,450. And so then you go across from that so you can look at what it would be for a family of one, a family of two, a family of three up to a family of six so that you could then say -- when somebody says, "I have a family of six," then you would use this
amount, $35,130 a year for a family of six living in the Seattle/Tacoma metro area. Then they could get a waiver based on that. We would say, "Now you can't provide for your basic living expenses. Above that, yes you can."

So we go on to look at the other additional factors: age, income level, potential earning power, that type of thing. And it's not quite the same but it's close to the federal poverty guidelines. But we didn't use that because actually, it's easier here because it breaks it out by metro, nonmetro and so on. Which it's not fair to generally apply fair -- there's that famous word again -- to apply the same income level to somebody in Seattle versus somebody in Shelton because the cost of living is so different. But it's pretty close to the federal poverty guidelines.
MR. STEVENS: This may be a crazy question but I always try to put myself into the situation to try to evaluate which is just kind of the way I work. And when I do that with this, of course, I think about my family. What if I had a family member who was living at home who was working, was an adult? Does that come into play at all?

MS. MYERS: Absolutely. If you look on page 4, it says, "(c) (sic) Your marital status and number of dependents, including whether other household members are employed."

MR. STEVENS: I'm sorry. Page 4 of the draft?

MS. MYERS: Yes. 4 of the draft towards the bottom where we have those new factors.

MR. STEVENS: Oh, marital status, number of
dependents. I see two (c)'s. Why do I see (a), (b), (c),
(d), (c)?

MS. MYERS: That's an (e). Sorry. My copy is not
good. That's an (e). "Your marital status and number of
dependents, including whether other household members are
employed." We look at the family -- the household income.

We look at household income.

MR. STEVENS: You guys are thorough.

There was something you said when we started talking
about this. You referenced other states. So have other
states dealt with having to define "equity and good
conscience" also?

MS. MYERS: California has. Actually, California has
the Supreme Court --

MR. STEVENS: That's why this court decided --

MS. MYERS: California has. I think it's one of
their Supreme Court decisions. And it goes on for pages
and pages and pages talking about what "equity and good
conscience" means, all the factors that they should
consider, etc. I can get you a copy of it if you want it.

MR. STEVENS: This court wasn't willing to read that
and decide.

MS. MYERS: No, they didn't. They didn't really give us any guidelines beyond remanding it to us to do what's fair.

MR. STEVENS: I didn't know you gave us Webster's.

MS. MYERS: Actually, that is an old Sullivan case. This is an excerpt from an old commissioner's decision that talked about what equity and good conscience should include. And we kind of looked at this when we were deciding what factors we'd include in our rule.

MR. STEVENS: That old judge did his work then -- his or her work.

MS. MYERS: Any additional questions or comments? Did you have any more questions, Larry?

MR. STEVENS: No. But we may at the -- this is not
the hearing.

MS. MYERS: No. This is not the final hearing. This is just an opportunity to provide input.

What's next

MS. MYERS: A couple of people have told me they're going to submit written comments. So we'll be taking those comments into consideration and hope to propose a final rule this summer, get this off our table.

That being all, I'm going to go ahead and conclude this meeting. And I thank you for attending and thank you for your comments and questions. We are adjourned at 10:08.

(Whereupon, proceedings adjourned at 10:08 a.m.)
C E R T I F I C A T E

STATE OF WASHINGTON )
                      ) ss.
County of Pierce     )

I, Cheryl A. Smith, a Certified Court Reporter in and for the State of Washington, do hereby certify:

That the foregoing transcript of proceedings was taken before me and transcribed under my direction; that the transcript is an accurate transcript of the proceedings insofar as proceedings were audible, clear and intelligible; that the proceedings and resultant foregoing transcript were done and completed to the best of my abilities for the conditions present at the time of the proceedings;

That I am not a relative, employee, attorney or counsel of any party in this matter, and that I am not financially interested in said matter or the outcome thereof;
IN WITNESS WHEREOF, I have hereunto set my hand on this 23rd day of June, 2008, at Auburn, Washington.

____________________________
Cheryl A. Smith, CCR, CVR
Excel Court Reporting
16022-17th Avenue Court East
Tacoma, WA  98445

(CCR License #3017)