Public Meeting on Overpayments, 5/25/06

EMPLOYMENT SECURITY DEPARTMENT

STATE OF WASHINGTON

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TRANSCRIPT OF PROCEEDINGS

of

UNEMPLOYMENT INSURANCE RULES MEETING

OVERPAYMENTS AND EQUITY AND GOOD CONSCIENCE

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Date and Location

May 25, 2006
Thursday, 1:30 p.m.

DSHS Region 4 Office
400 Mercer Street
Seattle, Washington

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BE IT REMEMBERED, that a meeting was held on
overpayments and equity and good conscience on the date
and location as set forth above. The Employment Security
Department was represented by Juanita Myers, Rules
Coordinator.

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Reported by:
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Excel Court Reporting (253)536-5824
Welcome and Introductions

MS. MYERS: Most of you know me, but my name is Juanita Myers. And I am the rules coordinator for the Unemployment Insurance Division. We are here today to talk about amending our rules concerning the collection of overpayments and specifically the term "equity and good conscience" as it applies to requests for waivers of overpayments or offers in compromise.

I would like to introduce the staff from the agency that came with me today. In the red is Nancy Noble who is the manager of the benefit payment control unit. Next to her is Linda Marshall who is the supervisor of the collection's unit.

And if I could have you introduce yourselves for the record. And when you say your name and where you're from, spell your name so that Cheryl Smith -- who I forgot to introduce, our court reporter -- can get your name down and spelled correctly for the transcript.

Ray, can we start with you?

MR. GONZALEZ: Ray Gonzalez, the Boeing Company.

G-O-N-Z-A-L-E-Z.

MS. GREINER: Lynn Greiner. I'm the director of the...
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1 Unemployment Law Project. G-R-E-I-N-E-R.

2 MS. BOWLIN: Christina Bowlin. I'm a volunteer at
3 the Unemployment Law Project. Last name is spelled
4 B-O-W-L-I-N.

5 MS. DANIELS: Vicky Daniels. I'm a summer intern at
6 the Unemployment Law Project. D-A-N-I-E-L-S.

7 MS. MYERS: Thank you very much.

8 Just a little housekeeping. If you haven't been here
9 before, the restrooms are outside in the hallway. The
10 pass code is 143 which you will need to use to enter the
11 rooms.

12

13 Background and Current Processes

14

15 MS. MYERS: The meeting is set in the agenda to go
16 until 4:00. I don't think we'll go that long particularly
17 with a smaller group here. But what I'd like to do is
18 start out by going through some of the background as to
19 why we are amending the rules and how we got where we are
20 today and then go into discussion of what we would like to
21 get from you today.

22 The initial rule making is caused by a decision of
23 the Court of Appeals -- a published decision of the Court
24 of Appeals which essentially stated that the Department's
25 rules on the waiver of overpayments were stricter than the
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1 statute required.

2 As a little bit of background, clear back in 1958 the policy at that time, based on the commissioner's decision, was that all overpayments were waived whenever it was decided that there was no fraud and the claimant was not at fault. That decision was overturned in 1962. And I have an excerpt from the decision -- the Sullivan decision that overturned it, the first real detailed discussion that we had in one of our cases about equity and good conscience. And the discussion is actually pretty good.

3 The commissioner at the time held that first, of course, the claimant has to be without fault and there can't be fraud. But we have to consider equity and good conscience first in deciding on whether to waive the overpayment. Even in cases where the claimant is not at fault, there are cases where it would not violate equity and good conscience to require them to repay the debt. And that decision held for a long time.

4 But gradually over the years our collection processes tightened up further and further and further until in 1985 the Department entered into negotiations with, what at the time was Evergreen Legal Services. They had surveyed the Department's decisions and found that in the most recent quarter prior to the date they wrote to us, out of 4,000 overpayments the Department had only waived 70. And at
that time it was through negotiations with Evergreen Legal Services that the Department adopted the rules that we have today which essentially state that an overpayment can be waived when repayment of the overpayment would deprive the claimant or his or her family of money that was necessary for living expenses. So that's essentially the rule we operate under today.

Under the current processes for waivers, again, the claimant can't have committed fraud, the claimant must be without fault in the overpayment. And under the 2003 law, they can't have been discharged from work due to misconduct.

We primarily, as I said, look at the financial considerations. And I have supplied for your reference a copy of a lot of the documents that we use. They fill out a statement of their financial condition and send it into the Department where our nonmonetary review unit evaluates their waiver request and decides whether to waive it or not to waive it. Also the WAC does provide for unusual circumstances where not to waive would be unconscionable. So there are cases where even if the person has the money to repay, there are other unusual circumstances where they might waive.

Right now, when I checked yesterday, the waiver requests are running at about 60 percent denied, about 40
percent allowed. So roughly a ratio of 60/40 on the
request for waivers.

To have an offer in compromise approved, the only
limitation on that is the claimant can't have been
discharged from work for misconduct. An individual who
has committed fraud or who is at fault for the overpayment
could be considered to be approved for an offer in
compromise.

We generally refer to our offers in compromise
process as "negotiated settlements" where we work with the
claimant to come up with an amount that they can
reasonably pay based on their financial circumstances,
their other circumstances: is there illness, disability,
death in the family, etc. We apply a number of different
factors to decide whether the individual can pay or in
some cases whether the cost for us to collect it would be
prohibitive or exceed the value of the debt that we are
collecting.

Currently in our process or prior to the Delagrave
decision, we did not permit partial waivers of an
overpayment. A 1972 decision from the commissioner's
office said that the waiver is in whole or not at all. So
we approved the waiver as granted, yes or no. No partial
waivers.

The Delagrave decision is mandating some changes to
the way we operate. And it said a number of things that
the Department is looking at when we look at adopting
rules that comply with this decision.

First off, they said because the Act requires liberal
construction, the Department should not narrowly interpret
provisions to a worker's disadvantage when the statute
doesn't require that narrow interpretation. So the court
said that although the claimant in this particular case,
Mr. Delagrave's case, Mr. Delagrave did not expressly
identify the overpayment waiver statute as the basis for
his request for reduction. He adequately identified the
nature of his request by his argument that collection of
the full amount was unfair based on his circumstances. He
was in essence asking for a waiver or a partial waiver of
the overpayment even though he hadn't gone through the
formal process.

They also said that the equity and good conscience
statute doesn't limit the circumstances under which the
commissioner can decide that a waiver is warranted other
than it can't be fraud or the claimant can't be at fault.
They said that to the extent that we have ruled that a
waiver for equity and good conscience is limited to the
circumstances that we spelled out in our rule, that is an
error in law. We have to go broader than what we have
spelled out in our existing rules. They essentially said
that limiting the circumstances when a waiver would be
allowed when there is no limit in the statute exceeds our
rule-making authority. They said equity needs to be
considered in its broadest term as that which is fair or
right, and "conscience" means the moral sense of right or
wrong. Basically, they said that equity and good
conscience boils down to what is fair, its fairness under
the circumstances.

They also remanded the case to the Department for
consideration of a partial waiver. So the court is saying
the Department can approve partial waivers.

So what I want to get input, and we'll go through
them one at a time, is basically three issues here. First
off -- well, I put "equity and good conscience" on the
agenda. But basically, the court has already said what
they mean by that. The problem we come up with is that
while these decisions -- the decision to waive or the
decision to accept an offer in compromise aren't made by
all the adjudicators in the telecenters. So we're not
dealing with that large of a population. But we are
dealing with about five staff in the nonmonetary review
unit who have to decide what is fair as far as a waiver --
and more staff than that, what, 20 staff in the
collections section who would have to decide whether
accepting a negotiated settlement or an offer in
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compromise under the circumstances is appropriate or would be fair.

And the problem we have is the definition of what is fair in a set of circumstances depends largely on a person's perspective -- on the perspective of the individual making the decision. I don't think for consistency's sake we want 25 different people deciding on their own without any guidance whatsoever, deciding what they think would be fair.

So what we're looking at is -- again, we don't intend to violate the court's ruling by saying, "Only in these circumstances," but what type of circumstances or what kind of factors should we consider when we decide whether granting a waiver would be fair in this condition.

Second, if we decide to grant a waiver, how much of that overpayment should be waived, what factors do we look at in deciding, "Okay, you have a $5,000 overpayment. We think you can pay $2,000 of it. So we're going to waive $3,000." But what type of factors do we look at in making that decision.

And third, of course, what factors do we want to consider in deciding whether it would be fair to accept an offer in compromise. And they may not all be the same particularly as we move into this process once we get the rules adopted. People, they apply first generally for a
waiver if they are at all eligible. And that decision as
to whether it is fair or not fair to waive it or waive
part of it would have been made by the time they get to --
the time when they may be making an offer in compromise or
negotiating a settlement with the collection staff. But
circumstances may have changed or there could be a variety
of things happen that would require them to look again as
to whether it would be fair to accept something less.

Discussion of Issues

MS. MYERS: So what I would like to do is go through
these one at a time and look at waivers first and what
type of factors do you think the Department should
discover when somebody applies for a waiver, what kind of
questions should we ask them and what type of factors
should we consider in deciding whether -- in applying to a
decision as to whether a waiver of the overpayment would
be fair in the circumstances.

MR. GONZALEZ: Has the Department decided not to
appeal this or has a decision been made?

MS. MYERS: Just a reminder, also, it you could say
your name for the record.

But this decision is final. It was decided last
year.
MR. GONZALEZ: Okay. Last year.

MS. MYERS: The Department asked that it be appealed.

It was the decision of the office of the Attorney General not to appeal it.

MR. GONZALEZ: The reason I ask that is because I would think that it would be out of conformity to use unemployment funds to pay for attorney fees and costs associated with an appeal. So is it or is it not in conformity with the Department of Labor to use unemployment funds to pay for attorney fees?

MS. MYERS: We could not use unemployment funds to pay for attorney's fees and the court didn't order us to do that. It's a little bit different.

MR. GONZALEZ: Okay. Because I thought I read that this way here, the decision, it says -- I'm looking -- it says "attorney fees" and I'm reading it right -- because it says, "Because we reversed the commissioner's ruling, we direct that Mr. Delagrave's attorney fees and costs be awarded and payable out of the unemployment compensation fund."

MS. MYERS: Let me clarify. I'm sorry, I misunderstood your question. He had originally asked that the Department reimburse him for his attorney who went -- who appealed his workers' compensation claim. And the court said we can't do that. But paying his attorney's
fees to appeal his decision from us, his denial decision, that is not out of conformity. In fact, we've done it for years and years.

MR. GONZALEZ: So unemployment funds are used?

MS. MYERS: Yes.

MS. GREINER: It's part of the statute. I don't know it offhand.

MR. GONZALEZ: So DOL doesn't have any problem with that?

MS. MYERS: Correct. If somebody appeals a decision to the courts that the Department made and they prevail in court, then yes, we can and are usually required to pay their attorney fees if they prevail. We don't pay them at the administrative level, for example, if they appeal. If they hire an attorney to appeal at the office of administrative level or the petition for review level, we don't pay for the attorneys there. But if they prevail in court, we do.

MR. GONZALEZ: Now, the attorney's fees here, if I read it correctly, is based on the appeal against the Department of Labor & Industries; is that correct?

MS. MYERS: Well, there's two sets of attorney's fees here.

Let me just go into a little background. The individual had applied for unemployment insurance benefits
and we were paying him at the same time he was appealing
his denial of workers' compensation benefits through L&I.
He subsequently got a back-pay award back to the
beginning. But his attorney took 30 percent of that which
meant that he had to pay us back. And he actually
suffered a net loss because the amount -- after his
attorney's fees were deducted, the amount he ended up with
was less than the amount he had to pay back to the
Department. So he argued, "The Department should have to
pay my attorney's fees."

MR. GONZALEZ: And when he said that, the Department
of Labor & Industries.

MS. MYERS: No. He said, "Employment Security should
have to pay."

MR. GONZALEZ: If that was the case against the
Department of Labor & Industries, why is he asking the
Department of Employment Security?

MS. MYERS: Because it is us he has to pay the
benefits to.

MS. GREINER: And ESD benefited because now he has
the money to pay it back because of the L&I.

MR. GONZALEZ: They have the money, that's true.
That's pretty clear. But the question is, he won a
decision against the Department of Labor & Industries.
But how come this is against ES as you mentioned and not
against them because he won against the Department of Labor & Industries. So you would think that there is where the connection would be.

MS. MYERS: Well, the fact that he won his case against the Department of Labor & Industries meant that his unemployment benefits were overpaid.

MR. GONZALEZ: I understand that. But I'm saying that the cost to win the Labor & Industries case -- the attorney's fees and costs were with that case, not with the Department, is what I am saying. So you would think that that is where the --

MS. MYERS: Well, he didn't. He argued that his case -- he shouldn't have to pay the full amount back to the Department because he didn't get -- he ended up suffering a net loss. He had to pay back more to the Department than he actually netted from his workers' compensation claim.

Now, the court said there is no provision in the statute for reimbursing him for those costs. However, when you consider the whole circumstances of the case and look at equity and good conscience, they remanded it to the Department to say, "In this case, is it fair to collect the full amount from him?" And they ordered the Department to consider whether he was eligible for a partial waiver of that overpayment based on the standard
of fairness, not specifically reimbursing him dollar for
dollar for his attorney's fees but looking at the overall
picture, is this fair.

Now, this is not going to be the only type of case
where this comes up. There are other cases where people
may not be at fault for another type of overpayment. It
happens all the time. People who are new to UI don't
understand. Sometimes you get people reporting -- even
though there's a lot of information they get, people may
report net earnings instead of gross earnings during a
week. That is fairly common. And so they end up with an
overpayment. And if they don't understand, we say, "You
are not at fault for it."

Or there are other cases where we can make a mistake
and we send them a payment and we go back and change our
decision. Or they give us -- what happens a lot is they
give us all the facts related to a separation and the
employer gives us all the facts and we just rule, "You
quit with good cause." The employer appeals it and says,
"No. You didn't quit with" -- we say, "You don't have
good cause to quit so your benefits are denied."

Now, the claimant didn't lie to us. He gave us all
the facts. The employer didn't lie. They gave us all the
facts. We just made a decision with which OAH disagreed.
Now, that all became an overpayment for that individual.
He is not at fault for the overpayment. He didn't misrepresent anything. But right now -- so he or she could ask the Department for a waiver of that overpayment. And what kind of factors, other than just financial considerations, should the Department look at in deciding whether or not to approve his waiver request? Because waiver would be fair.

MR. GONZALEZ: Now, in this case was he just reimbursed for the cost or the share he was requesting; do you know?

MS. MYERS: I can't disclose the results of his overpayment waiver request. It was remanded to the Department for consideration of waiver. But I can't disclose that because it is about his particular case.

MS. GREINER: So on to factors. Have you all come up with a list of potential factors?

MS. MYERS: Well, we had a little brainstorming around that. A lot of it ties back to finances. Obviously, if a person has a disability, then their earning power may be reduced.

There may be other factors. I don't know. But we want to be as broad as we can but still giving some guidance to our staff to use. And that's why we thought the best place to go is to go out to the public and say, "What type of factors do you suggest we use?"
MS. GREINER: Well, a good start is this list that's in the decision, I would think. At the bottom they list a number of factors: physical, mental, social, hardship, age of the claimant, marital and dependency status, educational background as it applies to potential of re-employment, general economic conditions affecting the claimant's customary occupation, size of the overpayment.

MS. MYERS: Do you have any other factors? I know you see a lot of claimants with overpayments.

MS. GREINER: Family -- well, I guess marital and dependency status; number of people -- dependents, number of dependents people are supporting. Let me think what else. Probably the amount, I think, is a factor. The bigger the amount and their income capacity.

MR. GONZALEZ: Would there be a time or in this case where the claimant could receive more -- let's just say they're receiving unemployment and some income from some other source, maybe L&I -- where they would receive more than what their unemployment would be for that one week, for example? I mean, would that be a situation where the Department would waive the overpayment and allow them to keep their unemployment or a portion of it for maybe a certain number of weeks and at the same time they would say, "You can also keep your funds from whatever other source." Or would that exclude --
MS. MYERS: Almost anything they bring in is deductible from benefits. The only thing I can think of is if they're getting Social Security, maybe a military -- well, no, even military disability is partially --

MR. GONZALEZ: So it would not happen.

MS. MYERS: Anything else they claim pretty much is going to be deducted at least partially. You know, pensions.

MS. GREINER: We just saw a case -- in fact, we had three of them recently, veterans benefits. A person got unemployment and we told him, "No. You can't do that."

So that's unemployment overpayment.

MR. GONZALEZ: So if a claimant says, "Here is my financial situation" and it is very poor, but they receive more than their share of unemployment or whatever from L&I or something -- no.

MS. MYERS: Not if the claimant gets it directly.

Now, when we decide whether to waive, we look at the household income -- because obviously, a claimant isn't reporting a spouse's income -- and whether they are eligible for benefits or not. The decision of whether you're eligible for benefits is based on your earnings and your base-year wages and what you have coming in. If your spouse or somebody in the household is earning, we don't consider that as far as your eligibility for unemployment
benefits. But it is factored into a request for a waiver.

We look at the household income.

MR. GONZALEZ: But if a person, let's just say, has a small unemployment weekly benefit amount and they had filed a Labor & Industries claim as well and they have both, and the Department says -- well, similar situation to this Delagrave case. Even though their need might be great, but because it involves getting both L&I and UI, that would preclude them from receiving both.

MS. MYERS: Right. State law says they can't receive both at the same time.

MS. GREINER: That is another factor, though, I think, is the size of the weekly benefit amount.

MS. MYERS: From $112 as opposed to $496?

MS. GREINER: Exactly.

MR. GONZALEZ: Do you consider number of dependents now or not? I'm just curious.

MS. MYERS: I would have to look at the form.

MR. GONZALEZ: Because some states pay additional benefits.

MS. MYERS: No. We don't pay those. Let me look at the financial work sheet. Yes. It says -- well, it's optional, but we can consider the number of dependents. But basically, it looks at how much money they are bringing in and how much money they are spending. And
currently if there is a balance, even if it's only a
little more, say if they ended up after all of their
expenses are met and they net $5, we won't waive the
overpayment.

MS. GREINER: So maybe that is another one, which is
agency cost. And you probably have some formula that
allows you -- you know how much you all spend on one of
these. So is it financially worthwhile.

MR. GONZALEZ: Are you saying, like, collect the
amount if the claimant refuses to pay it back? Is that
what you are saying?

MS. GREINER: Well, I'm saying if the overpayment is
$5 and it cost the agency $250 -- just I'm sure that there
is some --

MR. GONZALEZ: Oh, I see. To do the paperwork.

MS. MYERS: But there is also, for example, somebody
-- even if the overpayment is $500, but if the person's
weekly benefit amount is $112 and they've got six kids,
one of the things to look at is what is the likelihood
that we would ever be able to collect that. Would it be
cost prohibitive? How much would the Department spend to
go after that $500 or whatever it is for someone who, at
most, we would be able to get $5 or $10 a month out of?
Would it cost us more to keep sending those notices out
every month and our staff time as opposed to waiving it or
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1 doing a partial waiver? Because actually, from my
2 personal perspective, it might be easier for the claimants
3 to get waivers if we go to partial waivers as opposed to
4 where we said, "All or none."
5       MR. GONZALEZ: That seems reasonable to me to do
6 that.
7       MS. MYERS: If we could say, "We can't waive if all,
8 but we can waive some of it based on these circumstances."
9 And I think that the likelihood that they get at least a
10 partial waiver is higher, I think, then the Department
11 would be able to waive an entire amount. So which begs
12 the next question is, if we do approve a waiver, how do we
13 decide how much to waive? What kind of factors do we look
14 at? Remember, we have to base this all on fairness. We
15 said, "Okay. It would be fair to give you some type of
16 waiver based on all of these factors we looked at." So
17 what kind of factors would we look at to say, "Okay. Out
18 of that $5,000 overpayment, you pay us $1,000, $2,000,
19 $3,000"? That is going be a difficult call.
20       But we want to be able to give some kind of
21 guidelines to staff. Because the claimant should not have
22 to depend on who they happen to reach, who opens their
23 mail or who they get on the phone. Recognizing that with
24 all of our decisions that we make, there is some judgment
25 involved, obviously.
But we have guidelines for staff to use in separation decisions or availability decisions, etc. And we would like to be able to give them some similar type of guidance as far as whether to waive, and if you do waive, how much of that amount to waive.

MR. GONZALEZ: I am just thinking. You might have a similar thing that you do when you have an earnings disregard, something like that. I'm not suggesting the same formula, but something similar to that. I don't know how much that would mean. But something like that.

MS. MYERS: So look at also how much -- after we evaluate this, how much they could pay a month. And if they have a $10,000 overpayment and they could only pay $50 a month, I mean, that's higher than some can give us. But if they can pay $50 a month on $10,000, that is a very long time.

MR. GONZALEZ: Or let's say you do both: how much is coming in and how much debt they have or expenses. Let's just say they end up with having a net amount of, let's say, $100 and then you can apply that formula. Okay. you've got $100. Then you disregard from that after you do that last calculation. That is just another way of doing it.

MS. MYERS: Because one of the things we look at is discretionary spending. For example, if they owe us an
1 amount and they also have, say, Visa cards, they could
2 make a decision to pay us instead of their Visa card.
3 That is discretionary spending money. So that is why it
4 is not included in the list of necessary expenses
5 currently on the work sheet. Because we are a bill.
6 Their overpayment is a bill like any other bill that they
7 have. So we are on par with them. We are not second to
8 their Visa bill.
9       MR. GONZALEZ: Well, that makes sense that you do
10 that because some employees could have a very nice job and
11 then they have these big purchases like a boat or a car or
12 whatever. And I can see that you wouldn't want to
13 consider all of that.
14       MS. GREINER: Have you looked at what Labor &
15 Industries does in terms of factors?
16       MS. MYERS: No, I have not. I know they take -- they
17 do take payments and they will negotiate on the amount.
18       But I did talk briefly to one person. And basically
19 what he said is their position is, like, what is there
20 that you could not pay back any amount no matter how
21 small. What would prevent you from paying $10 a month?
22 That type of thing. And their statute doesn't -- I don't
23 think it references "equity and good conscience."
24       MS. GREINER: I can't remember.
25       MS. MYERS: I think it just talks about they can
enter into payment arrangements or negotiate on the amount. But it doesn't have -- I don't believe it has the equity and good conscience language which is what is driving this particular rule making is that we don't just consider what they're financially able to pay, but what is fair for them to pay.

MS. GREINER I do a lot of Social Security work. That system has both factors, equity and good conscience and hardship. And so I would be happy to take a look at that. And you might be able to look at that too and see what they use. It is a two-pronged test which is what you have now.

MS. MYERS: In this particular case there was really no assertion that Mr. Delagrave could not pay the overpayment. The decision revolved around whether it was fair to require him to pay. So we have to branch beyond financial considerations.

MS. GREINER: Well, I think what the Delagrave case was saying is because ESD benefits from the lawyer's work, because now you are getting reimbursed most of the money that you shelled out, you should have to fork over something for that. So I don't know how you word that factor, though. But is there some benefit to ESD?

MS. MYERS: Back-pay awards. Those happen. We will get back-pay awards. It is budgeting against what they
received as unemployment and it can net an overpayment.

It frequently does.

MR. GONZALEZ: Would the Department issue a decision where they would not attempt to collect the amount and simply expect him to pay when he returns to work?

MS. MYERS: Well, we never write that into a decision. We say, "Here is the amount you owe." The billing statements will start immediately.

MR. GONZALEZ: Because I would think that that might be an option to offer too. Because unless that person is retiring or something, but they are eventually going to return to work. At that time they could enter into an agreement where when they return to work, then there is that contract that they will pay a percentage back to the Department.

MS. MYERS: Well, that gets more into the collection side of it. But there's more than just when that person gets to work because there is also, is there spousal income coming into that household. Maybe that person wasn't even the primary-wage earner for that family. I mean, there is a whole host of things that go in. Correct me if I'm wrong, but usually they try to get an agreement to pay at least something every month or they might delay it a couple of months, set up a payment agreement saying, "Okay. You can't pay right now. August 1st you'll start
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1 paying 'X' amount per month."

2 MR. GONZALEZ: You just brought up another

3 possibility. For example, let's just say somebody is

4 employed now and say, well, to begin paying it back let's

5 just say six months from now. And then if they are still

6 unemployed at that time, they could come back to the

7 Department and maybe get an extension of three months

8 until they actually return to work. I'm just looking at

9 different ways of giving the individual as much time as

10 they need until they are actually employed rather than

11 starting to collect maybe only $10 a week when they're not

12 working. Every little bit for them when they are

13 unemployed could be a lot.

14 MS. MYERS: And again, I don't know. When the

15 collector is trying to come up with a payment arrangement

16 with the individual, they consider a number of factors.

17 They set up payment arrangements all of the time with

18 claimants because it is not often that a claimant can say,

19 "Oh, sure. Here is my $5,000. I'll just pay it to you."

20 MS. GREINER: They are not working.

21 MS. MYERS: Remember, a lot of these people have gone

22 back to work by the time their overpayment comes up. So

23 they are back working anyway. But they still have

24 expenses to meet. Usually, it would depend. I mean, I

25 have seen them where you've delayed collection for a

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certain amount or set a very low payment amount to begin
and then it will go up after a certain period of time.
And then if it doesn't, they can renegotiate. I mean,
I've seen all kinds of things that the collectors will
work out. I don't think it's their intent or our intent
or anybody's intent to drive the person into desperation
because we are insisting on getting every last dime that
they have.

But they also -- I mean, this isn't our money. This
is trust fund money and it's an amount the claimant has
been determined to have been overpaid. And it is our
obligation and our responsibility to try to get it back
whenever we can. If the claimant has the ability to pay,
even if it is a small amount initially, we will do what we
can to collect it. I mean, we are trying to be
responsible trustees of the fund.

MS. GREINER: On the other hand, you don't want to
get into lots and lots of negotiations with people over
$10 for agency-resource reasons. Is it going to be worth
it and what is realistic here?

MS. MYERS: Yeah. But I don't think we want to put
in our rules something like that, you know, "If you're not
working, we're going to wait. You don't have to pay us
back for six months," or anything like that. There are
factors.
I mean, individual collectors make these kinds of decisions every day when they talk to the claimant about what they can pay reasonably. The claimant will say, "I expect I am going to be back to work on the 1st of July." And they'll say, "Okay."

MR. GONZALEZ: So they have lots of flexibility.

MS. MYERS: They have a lot of flexibility in how they go about collecting it. It is most commonly when the person does not respond to the notices or they don't make any attempts to repay that they end up with garnishments and things like that where we have to -- where we go out and look for any wages or bank accounts or so on. Usually or very commonly if the claimant can enter into a payment arrangement with the Department, we will accommodate. We have many, many payment arrangements.

MR. GONZALEZ: The Department doesn't have a minimum, like, you must pay 25 percent or whatever of your weekly benefit amount?

MS. MYERS: I don't believe so. Nancy?

MS. NOBLE: There's a formula of how the payment schedule is set up as soon as the overpayment is established once it comes out of appeals status. What is the formula that the computer sets up?

MS. MARSHALL: One-third of the weekly benefit amount if it's not fraud overpayment or 3 percent of the
remaining balance. If it's fraud overpayment, it would be
the full weekly benefit amount or the monthly payment.

MS. NOBLE: But from that point forward all the
documents that they receive say, you know, "If you need
arrangements, to contact our office." So they do.

MS. MYERS: Yeah. They'll set up a standard payment
amount but they can negotiate on it and frequently do all
the time. We get e-mails all the time, "I can't make this
amount. Can I negotiate a different payment amount?" We
just send them over to their unit and tell them to talk to
somebody there and they will do it if it's reasonable.
Again, we look at everything. We don't just like, "I
wanted to go on vacation this summer so can I please not
pay you."

The staff tries to be reasonable as far as, you know,
what's realistic to get from that claimant in that -- you
know, based on their individual circumstances. But that
is more of how they pay back, not how much -- you know,
the decision is how much they're going to pay back first
comes out of waivers.

Now, they also get into the offers in compromise
statute which basically says, "Remember, that could be
fraud, that could be the claimant at fault."

The only thing we can't do on either of them is if
they were discharged for misconduct. No waivers, no
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1 offers in compromise. They're liable for the full amount.

2 What we call "negotiated settlements," when a collector is
3 on the phone or talking -- or the claimant even writes in
4 or applies or calls in and says, "You know, I owe this
5 amount of money." I'm going to use your example, Nancy.

6 The claimant owed us, say, $5,000 and he is low income and
7 he has gone from job to job. And after, what, a couple of
8 years we have been able to collect $1,000 of it. He still
9 owes us $4,000. We have him on the phone. He says, "I
10 can borrow $3,000 from my dad." Now, at that point,
11 looking at that, that would leave an additional $1,000.
12 But would -- looking at it, it has already taken us a year
13 to collect another $1,000. Would it be reasonable to
14 settle with that person to say, "Okay. We will accept
15 $3,000 as an offer in compromise of the entire debt," or
16 do we really want to spend another year trying to get that
17 other $1,000?

18 At a certain point it becomes cost prohibitive for
19 the Department to try to collect a debt. You know, if we
20 can reach a settlement with the individual as to whether
21 they can pay a reasonable amount, then it is in our best
22 interest to do so and it is in the interest of the
23 claimant to do so. But again, the law says we can accept
24 an offer in compromise when collecting the full amount
25 would be against equity and good conscience.
So again, there's other factors. The factors may be different by the time we get to the offer in compromise. Because remember that they will have gone through the process already -- most of them will have already gone through the process where they applied for waiver and said -- we already said, "Well, it is fair for you to collect 'this' amount." So now they've been in collections for a while and they want to make an offer in compromise or they want to negotiate a settlement of the amount due.

So the factors might be different. They might be the same if circumstances have just changed, but they might be different too. At what point do we say, "Okay." And that is probably where you get more into is it cost effective to continue collecting it or collecting above a certain amount.

But are there other factors that you think we should look at when we decide whether to accept an offer in compromise? Are they different than what we considered when they applied for a waiver? Remembering again, that the offer in compromise could include people who have committed fraud and it could include people who are at fault for the overpayment.

MS. GREINER: It strikes me it would probably be the same list. But you need to -- but it's a different point in time. So you might come up with some different
You know, I would be happy to take this back to my staff. We do a lot of overpayment cases these days. So I bet I could get some other factors for your list, the collective thinking of my office.

MS. MYERS: That would be helpful.

Any other thoughts of what types of things you think the Department should be looking at?

MR. GONZALEZ: The things I mentioned already.

That's all I had in mind at this point.

MS. MYERS: And the other thing to remember -- I know it doesn't affect you, Ray -- but whatever criteria we come up with, it doesn't matter whether their employer is a taxable employer or a reimbursable employer. And whatever we waive, just because of the way it is set up, it has a more immediate impact on the reimbursable employer because the reimbursable employer pays dollar for dollar for benefits and he's only ever reimbursed if we collected from the individual. So if we waive repayment or if we accept an offer in compromise, the reimbursable employer is not going to get the money back for those. And that's why you will see in your packet we have copies of letters that we send to the reimbursable employer letting them know when we have accepted a waiver or that we have accepted an offer in compromise.
MS. GREINER: So will these letters change then depending on what you do?

MS. MYERS: Yeah. I was just showing you what--
because basically, what our legal advisor is telling us is that we are going to have to explain in our decision letters--rather than being standard letters, we are going to have to explain the factors we considered in deciding whether to approve a request for a waiver or approve a request for an offer in compromise when the claimant makes a formal application to us. We're going to have to look at it and say, you know, "Here is--we considered these facts and here is why we say 'yes' and here is why we say 'no.'" Because the reimbursable employer can appeal. You can appeal a waiver.

Can he appeal the offer in compromise acceptance, do you know?

MS. NOBLE: I don't know off the top of my head.

MS. MYERS: I don't know that we have ever had it done. But they do appeal the waiver allowances. So you could get back to the court, you know, and obviously you could get back to the process where the OAH would look at the factors or even different factors and say, "We disagree with what is fair or not."

And that is why it is helpful not just for our staff but for the appeals folks up the chain to say, "Here are
the guidelines we want to look at in deciding whether waiving overpayment or granting a partial waiver of an overpayment would be fair under the circumstances."

MS. GREINER: The other thing is DSHS. Because I have run into public assistance overpayments and I'm pretty sure they have a two-pronged test too. And those Office of Administrative Hearing judges would be familiar with that system. So you might want to see what they look at.

MS. MYERS: DSHS?

MS. GREINER: Right.

MS. MYERS: Do you know if they look at equity and good conscience?

MS. GREINER: They definitely do.

So processwise, Juanita, there would be time for us to do some research and send you a letter?

MS. MYERS: Oh, certainly, absolutely.

We are having a second meeting in Olympia on the 31st. But we are just right now looking at what kind of factors to take a look at. Because you're right, we just came across the Sullivan decision, what, two days ago and we were looking at it.

But I agree with you. I thought it had a pretty good discussion in here about equity and good conscience and some of the factors to look at. So I thought I would
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1 bring it along here and throw it out here for discussion
2 because there could have been some in here that people did
3 not agree with. But I thought they had a pretty good
4 discussion.

5 But we are really at the entry point of these rules
6 just to -- we need something in place because the
7 Delagrave decision is in effect. The Office of
8 Administrative Hearings is using it now to make their
9 decisions. And we don't have anything -- processes set up
10 right now for partial waivers or anything. But we are
11 getting OAH remanding for partial waivers or they are
12 waiving parts of an overpayment.

13 Right now all we can do is waive -- when we talk
14 about partials, we can't waive conditional payments but we
15 can waive above that. And so that is the only partial
16 waiver we have right now. So we are talking about
17 computer programming and everything. Yes, we are at the
18 very initial point.

19 So it looks like we are going to get out of here
20 early today, which is good. But I appreciate your input
21 because we can rack our brains all we want about what we
22 think are good factors to consider, but it is important to
23 hear from the employers and from those representing
24 claimants. And I'm hoping we will get at least one person
25 representing reimbursable employers at the meeting too.
just because it is important to have all perspectives.

MR. GONZALEZ: I think having -- that would be a little more -- especially maybe with the reimbursables when you say, "Well, this claimant has three dependents and the Department is allowing for each one," rather than saying -- deciding on how much money they have coming in and how much expenses they have got.

MS. MYERS: Yes. And remember too that sometimes the overpayment is the fault of the Department because we did something wrong, we keyed something wrong. I mean, we are human; we make mistakes and the claimant is totally without fault and may have gone for a period of time collecting unemployment benefits. And I think that's to a certain extent also how I'm reading the Delagrave decision to say, regardless of whether they could pay it back, is it fair in the totality of the circumstances to require them to pay it all back.

MR. GONZALEZ: Well, I can see, for example, if the Department took a long time to decide whether he was being paid when he shouldn't have been, for example, and allowed that to go on for a while, then I would say "no."

MS. MYERS: Sometimes it comes down to something as simple as a keying error. They meant to key "deny" and they hit "allowed" instead. It's not that common, but it happens. Sometimes we just, you know, being human and
having, what, 150 to 200 staff out there, mistakes can happen. Claimants can be left holding onto it.

The other factor that occurred to me, and I guess I want to get your input before we leave, is what about cases where we may allow benefits and the employer hasn't responded. So we base our allowance benefits based on what the claimant told us and then the employer's appeal goes to hearing and presents new facts? So it is not the claimant's fault. There are no facts in here that they lied. We simply did not have evidence to deny them. If in that case should one of the factors be whether -- deciding whether to waive, should it be whether the employer provided us with the information that we needed for the decision?

MR. GONZALEZ: Well, that's a problem because sometimes employers don't receive those notices. Because it costs employers more to have to go to a hearing.

And that is one of the things that the employer community has a problem with is the Department of Labor has a mandate that states, "Charge employers for overpayments."

And the employer says, "We don't have them," or "They don't allow enough time to collect the information." So the State will decide based on the information they got. And it may be just the claimant's information.
So it seems at least in many instances where that would be unfair to the employer to assume that the employer chose not to provide that information at that time and they could have but they chose not to -- to assume that that's what occurred. Because you are making a decision that you don't -- you know, you don't have it, but you are making a decision that the employer chose not to provide that information.

MS. MYERS: And I'm not saying we would consider it. I'm saying that one of the circumstances -- a possibility, is that one of the factors that we should look at and say -- you know, "The claimant gave us all the information they had. We based our decision on that." Would it be fair to require them to pay the full overpayment back when the decision we made was because we did not receive the information? Not why they didn't send it, but we did not receive information from the employer.

MS. GREINER: And I know what the employers say. But in the claimant's community we see a lot of that where employers say they did not get it. I even heard the Office of Administrative Hearings talk about how many -- it is a huge percentage of their cases where they have to do hearings because employers say they didn't get the notice and now want to weigh in.

MR. GONZALEZ: Well, as it is now, their notices are
sent where the claimant states they worked; is that correct?

MS. MYERS: It was until just very recently. Now it's pulling the address out of our tax system.

MS. GREINER: The other situation is -- and we see this -- is where ESD grants benefits, the hearing's office grants benefits and then the commissioner reverses, right? And so you've had three steps, two went your way. And so then there is an overpayment because the commissioner reversed it.

MS. MYERS: And by that point they've been drawing benefits three or four months.

MR. GONZALEZ: That is just the process.

MS. MYERS: I know that. But again, does that factor into the overall decision as to whether to waive or partially waive? Because there is a lot of -- when we have to -- because again, what is fair? And it is beyond finances; it is beyond any one factor. In the totality of the circumstances, is waiver fair? And so when we look at the totality of the circumstance, what do we include in that package of things we would look at?

MS. GREINER: We will submit something in writing.

What is the timeline?

MS. MYERS: If you could have them to me by, say, June 15th. Is that unreasonable?
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1       MS. GREINER: That's great.
2       MS. MYERS: If you come across any of your fellow
3   employers who want to weigh in and who can't make the
4   meeting next week --
5
6                    Summary of What's Next
7
8       MS. MYERS: We are going to end up with another round
9   of meetings. What we would do is come out next time with
10  some draft rules. But if you can get comments to me by
11  June 15th, if you are going to submit some, that would be
12  great.
13       We will, again, probably later this summer, it might
14  be early fall, but hopefully later this summer, come back
15  out with some draft rules for you to take a look at and
16  provide input on. It is usually easier to provide input
17  when you've got something to say, "We agree or disagree
18  with that." But right now, I don't think we have a firm
19  idea of what type of factors we wanted to look at or
20  should be looking at.
21       MS. GREINER: I know the Department of Labor &
22  Industries has case law on both prongs. Because I
23  actually litigated a couple of cases under it. But I will
24  have some people in my office do some research on it too.
25       MS. MYERS: Okay. If there is nothing else, I want
to thank you for attending. And I look forward to seeing you again.

(Whereupon, proceedings adjourned at 2:45 p.m.)
CERTIFICATE

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 1st day of June, 2006, at Auburn, Washington.

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