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EMPLOYMENT SECURITY DEPARTMENT

STATE OF WASHINGTON

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TRANSCRIPT OF PROCEEDINGS

of

HB 1394 TAX SETTLEMENT AUTHORITY AND  
SB 5355 SECTION 4, EQUITY AND GOOD CONSCIENCE  
PUBLIC MEETING

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Date and Location

August 22, 2013	Employment Security Department
Thursday, 1:30 p.m.	GMAP Room
	212 Maple Park
	Olympia, Washington

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BE IT REMEMBERED, that a HB 1394 Tax Settlement Authority and SB 5355 Section 4, Equity and Good Conscience Rules Public Meeting was held on the date and location as set forth above. The Employment Security Department was represented by Larry Sheahan, Legislative and Regulatory Process Manager.

WHEREUPON the following proceedings were held, to wit:

Reported by:  
Cheryl A. Smith, CCR, CVR  
(License #3017)

EXCEL COURT REPORTING  
16022-17th Avenue Court East  
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PROCEEDINGS

Welcome and Introductions

MR. SHEAHAN: Welcome, everyone. I think most of you were here this morning. Except Hina. Hina wasn't here. Welcome, Hina.

This afternoon we are going to do a stakeholder meeting. We have a discussion on implementation of House Bill 1394 which deals with tax settlement authority. And we also decided to do Section 4 of 5355 that deals with a definition of "equity and good conscience." And the WAC that we're doing for the Tax Settlement Authority Bill has to do with defining "equity and good conscience" as well. And so that's the reason that -- you may have wondered why we were doing those at the same time, and that's the reason.

So anyway, no one is on the phone, but I want to remind you that this is being recorded. We need to introduce ourselves again. Please spell your last name because this will be a different record than the other one. And say what your affiliation is. And I'll go ahead and start. My name is Larry Sheahan, S-H-E-A-H-A-N, and I'm the legislative and regulatory process manager for the UI division of ESD.

1           Go ahead, Juanita.

2           MS. MYERS: My name is Juanita Myers, M-Y-E-R-S. I  
3 am the rules manager for the unemployment insurance  
4 division.

5           MR. RUDNICK: My name is William Rudnick,  
6 R-U-D-N-I-C-K. I'm manager of governmental relations for  
7 Equifax Workforce Solutions.

8           MR. PAJA: My name is Alan Paja, A-L-A-N, P-A-J-A,  
9 Pacific Northwest Regional Council of Carpenters.

10          MR. MANTE: My name is George Mante, M-A-N-T-E, UI  
11 legislation and rules.

12          MS. ADAMS: Joy Adams, A-D-A-M-S, UI legislation.

13          MS. ARAI: Hina Arai, legal appeals unit. My last  
14 name is spelled A-R-A-I.

15          MS. WELLS: Robyn Wells, W-E-L-L-S. I'm the manager  
16 of the experience rating and benefit charging unit within  
17 tax and wage administration.

18          MS. JOHNSON: I'm Judy Johnson, J-O-H-N-S-O-N. And  
19 I'm the unemployment insurance legislative coordinator.

20          MR. SHEAHAN: Great. Thank you all. Again, if we  
21 get someone on the phone, then we'll have them introduce  
22 themselves.

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Review HB 1394

MR. SHEAHAN: Let's go ahead and get started on House Bill 1394. Again, we're doing a WAC to deal with this bill. I'll speak briefly to the bill, kind of explain what it's about and answer any questions that you might have.

The bill amends RCW 50.24.020, and it gives the Department the authority to enter into settlement agreements with employers for less than the amount of taxes, penalties or interest due when it would be against equity and good conscience to demand the full amount. And if you look at the RCW as it's been in effect up to the effective date of this law, you'll see that it basically applies the same standard, the same rule to settlement with employers on tax liability as the law has applied in the past to overpayments by claimants. In the past the only way the Agency had the authority to enter into a settlement agreement with the employer is if the employer was facing insolvency. So it basically takes that language out and says that if it's consistent with equity and good conscience, we can go ahead and enter into a settlement agreement with the employer.

So the real emphasis and really the only issue that we will be dealing with in WAC for this particular bill is

1 how are we to define equity and good conscience as it  
2 relates to settlement agreements with employers.

3

4 Review Section 4, SB 5355

5

6 MR. SHEAHAN: And Juanita is going to speak briefly  
7 to the other topic of today's meeting, and that's  
8 Section 4 of Senate Bill 5355. Remember, we spoke this  
9 morning about Section 3 of this same bill. But Section 4  
10 has some language dealing with equity and good conscience  
11 as well, and that's the reason why we are discussing both  
12 of these together this afternoon.

13 And we want to make sure that there's some kind of  
14 consistency in our definition. Clearly there will be some  
15 areas that might be a little different in regard to  
16 claimants versus employers, but as much as possible we  
17 want to make sure that there's some clarity and fairness  
18 and certainty for both claimants and employers in defining  
19 these terms.

20 So I'll pass it over to Juanita right now and she'll  
21 explain this part of 5355.

22 MS. MYERS: Sure. If you still have a copy of 5355,  
23 we're looking at a change on page 10 starting at line 17.  
24 And I'll read it because it's very brief. "When  
25 determining whether the recovery would be against equity

1 and good conscience, the department must consider whether  
2 the employer or employer's agent failed to respond timely  
3 and adequately to a written request of the department for  
4 information relating to the claim or claims without  
5 establishing good cause for the failure pursuant to  
6 RCW 50.29.021(6)." And this is in the statute that allows  
7 the Department to waive overpayments. Waiving is only  
8 allowed if the claim -- waiver, excuse me, is only allowed  
9 if the claimant is without fault in the overpayment. So  
10 it's not allowed in fault cases, fraud, et cetera.

11 We have a very short definition of equity and good  
12 conscience that was established by the Court of Appeals.  
13 If you look at a copy of WAC 192-220-030, paragraph 1 or  
14 (1) -- it's not even a paragraph, one sentence.

15 MR. SHEAHAN: If I can interrupt. That's in the  
16 handouts.

17 MS. MYERS: In the handouts, yes. "'Equity and good  
18 conscience' means fairness as applied to a given set of  
19 circumstances." And that's about as broadly stated as you  
20 possibly could. So what we had to do when we dealt with  
21 benefit overpayments -- remember, as Larry said, we could  
22 only do equity and good conscience for benefit  
23 overpayments at the time. We developed basically two  
24 rules. One, spelling out in that same rule, 220-030, what  
25 we would consider as far as being part of equity and good

1 conscience. The piece that we're looking at today is in  
2 Section 3(g), "Whether the employer contributed to the  
3 overpayment by providing inaccurate information or failing  
4 to respond to the department's request for information  
5 within a reasonable period of time." That particular  
6 element is what has now been moved to statute. But it is  
7 something that we have considered when we are doing --  
8 defining what fell under the heading of equity and good  
9 conscience for quite some time now.

10 The second rule you have here is 192-230-110. And it  
11 says, "May I negotiate with the department to repay less  
12 than the full amount?" Although it doesn't specify  
13 benefits, that fell within the benefits chapter on benefit  
14 overpayments because, again, as Larry stated, we didn't  
15 have the authority to negotiate settlements for equity and  
16 good conscience on tax debts.

17 So what we're looking at here, when you read this  
18 particular rule or if you glance through it, it  
19 specifically talks about what factors we would consider as  
20 far as negotiating settlements for benefits. And one of  
21 the things we're looking at is the criteria we use both  
22 for what does equity and good conscience mean and may we  
23 negotiate to repay less than the full amount are not  
24 necessarily going to be the same for taxes, tax debts and  
25 for benefit overpayments. And so we can look through this



1 list, see what applies or doesn't apply, other things you  
2 think should be applied for tax purposes, et cetera.  
3 We're here to hear what you've got to say.

4

5 Discuss Proposed Rulemaking

6

7 MR. SHEAHAN: And again, as we said today, we haven't  
8 drafted the language of the WAC yet. We're here to get  
9 your input and any ideas that you might have. But there  
10 are certain criteria that are in the WAC, but as Juanita  
11 said, in the past they've only been applied to benefit  
12 overpayments. So the question is: How can we have  
13 consistency in our definition but also make it -- or apply  
14 criteria when appropriate that are a little different on  
15 the claimant's side than on the employer's side?

16 So do you have any ideas or any thoughts on how we  
17 should define that?

18 MR. PAJA: I guess in reviewing the maximum of  
19 equity, it seemed to me that there were two that kind of  
20 came out and just provide general direction. I don't have  
21 any specific wording other than to hearken you to the  
22 principles themselves. But equity aids the vigilant, not  
23 those who slumber on their rights. So I think we want to  
24 look at it's got to be somebody who's brought their  
25 request in a timely manner, they haven't waited and waited

1 and then at the last minute come in. And I'm thinking the  
2 situation where I'm referring particularly to an  
3 employer's situation because I think the -- there's a lot  
4 of statutes already spell out quite a bit about what the  
5 claimant's equity might be. We're talking about employers  
6 who may have an obligation that's been arisen. But if  
7 they've slept on those rights, they've not done things  
8 that could have reduced the amount of interest and  
9 penalties and allowed those to continue to build and then  
10 just claim it's only because it's been this long, I don't  
11 think that should be something that should be considered.

12 And then the other one would be the shoe comes in,  
13 the equity comes with clean hands, and look very carefully  
14 at those employers who have defrauded, have engaged in a  
15 -- it's been an intentional fraudulent action that's led  
16 to their obligation and they're trying to settle that.

17 MR. SHEAHAN: Okay. Are you finished?

18 MR. PAJA: Yes.

19 MR. SHEAHAN: One question. You said the vigilant  
20 employer. Do you think we should wait until an actual  
21 appeal is filed before we enter into a settlement or do  
22 you think it's appropriate to begin settlement discussions  
23 before the employer has filed an appeal?

24 MR. PAJA: What's your process today? In other  
25 words, are you asking before the orders become final?

1 Because if they appeal, then it's not a final order,  
2 right?

3 MR. SHEAHAN: Well, yeah. If they appeal, then it  
4 wouldn't be final until the appeal is heard. But they  
5 could have a determination of the amount that they owe.  
6 And so the question is: Is it appropriate if they come to  
7 us and say, "We owe 'X' amount and we're willing to  
8 discuss a settlement at this point," between, you know,  
9 prior to the time that they appeal, is that appropriate or  
10 should we wait until the actual appeal is filed?

11 MR. PAJA: I would say that generally, the principles  
12 would apply to allow you to do that, but I would caution  
13 you to look at the statute and what -- because when I was  
14 with L&I, we had an informal settlement process and we use  
15 that process to try and resolve obligations before --  
16 before -- well, before a formal appeal. And in one  
17 instance we -- the appeal rights passed before a  
18 resolution was gotten. And the court ruled that the way  
19 the statute operated it, if we hadn't come to a  
20 resolution, then we lost jurisdiction. So in the absence  
21 of that, I would say it's okay. As long as we're within  
22 those time frames and you have jurisdiction, it seems to  
23 be that -- it's -- that would be an equity in principle  
24 itself.

25 MR. SHEAHAN: Thank you.

1 Billy, did you have anything?

2 MR. RUDNICK: Yes. Basically, the way we look at it  
3 is that the statute is fairly sufficient to just simply  
4 work from statute. And if you're going to modify the  
5 relative WAC simply because the language there is more  
6 claimant oriented, although you do have under Subsection  
7 3(g) --

8 MR. SHEAHAN: Just a second. You're speaking of  
9 5355?

10 MR. RUDNICK: I'm talking about statutory authority  
11 under 1394.

12 MR. SHEAHAN: Oh, okay. I'm sorry. Go ahead.

13 MR. RUDNICK: That's what we were discussing, right?

14 MR. SHEAHAN: Well, we're talking about both of them.

15 MR. RUDNICK: Both. Right.

16 So under 3(g) you do have a qualification there where  
17 the employer contributed to the overpayment by providing  
18 inaccurate information or failing to respond to the  
19 Department's request for information within a reasonable  
20 period of time. So that would disqualify the employers  
21 who failed to meet that threshold for waiver, it looks  
22 like. But if you were going to do anything with the WAC  
23 to clarify operation of the statute, you may want to put  
24 something like good-faith errors into the WAC.

25 As far as the timeliness on it, sometimes these

1 particular issues can pop up several quarters after the  
2 initial matter. And we're -- as a third-party  
3 administrator, we see this issue has caused -- where the  
4 statute has caused problems in the past before it was  
5 modified under 1394 would be if there was a  
6 redetermination of a prior tax bill, an amount and  
7 interest became owing, and I think there was -- I can't  
8 remember how many quarters the employer is allowed before  
9 that correction -- you could make the correction, but then  
10 they would be assessed a penalty rate for the following  
11 year. We had one case in particular where an amount came  
12 up to about \$32 plus interest owing, and the employer had  
13 to pay a penalty and interest the following year that  
14 basically on payroll taxes that amounted to several -- a  
15 million dollars or better. And it was just not -- that  
16 was not equitable.

17 And I do recall there was a tip by the Agency to  
18 rectify this issue for WAC, but it was out of conformity.  
19 Now I'm getting a little bit out of my scope of expertise  
20 since this is taxes. So I think that was somewhat the  
21 basis behind 1394.

22 I think if an employer had intentionally tried to not  
23 properly pay their taxes due, the contributions due or any  
24 interest or penalties they had owing and tried to  
25 circumvent the system, then, of course, a waiver shouldn't

1 apply. But in those rare circumstances which you're just  
2 basically going back and doing a reassessment which is a  
3 fairly small portion of the tax bill owing that the  
4 employer is willing to pay, particularly if they were  
5 willing to pay the basic amount owed plus interest, that  
6 certainly the waiver should be applicable as long as they  
7 meet the conditions of the statute.

8 MR. SHEAHAN: So your thought is that we should look  
9 at the impact to their tax rate, that should be part of  
10 the inquiry if the -- like in your example, if the tax  
11 rate was exorbitant or the penalty was very, very high  
12 compared to the amount that was -- you know, the tax that  
13 wasn't paid properly or what have you, that that should be  
14 part of the consideration?

15 MR. RUDNICK: Well, I think the situation that led to  
16 that additional amount being owing. I mean, if it's  
17 simply a clerical error or, again, I'll use that term  
18 "excusable neglect" on the part of the employer, not  
19 intentional, willful, a practice where they're trying to  
20 get away with not paying their taxes or bill due when due,  
21 I believe that's what is basically stated in the statement  
22 of need by -- the Department put out a briefing on  
23 September 6, 2012, is that by having the ability to enter  
24 into settlements that are deemed to be in the Department's  
25 best interest, Employment Security could recoup owed

1 taxes, interest and penalties that may otherwise not be  
2 recoverable doesn't benefit the trust fund and close tax  
3 collection more quickly with less cost to the Department.

4 MR. SHEAHAN: That brings up another question. Do  
5 you think it's -- is it appropriate for us to look at the  
6 impact on the trust fund, do you think, when determining  
7 equity and good conscience? In other words, if we have an  
8 employer that's having financial troubles or an employer  
9 that owes or has other debts maybe to other taxing  
10 agencies, for example, is it appropriate for us to say,  
11 "Well, if we settle for 75 percent of what that person  
12 owes, we will -- the trust fund will most likely benefit,"  
13 versus if we go all the way through the appeals process  
14 and maybe end up with nothing, do you think that's an  
15 appropriate issue to look at in regards to equity and good  
16 conscience?

17 MR. RUDNICK: If you look at Title 7, and I can't  
18 cite the exact title, but if you look at mandatory  
19 arbitration law in the state of Washington and mandatory  
20 arbitration rules that exist in various counties or are  
21 adopted in various counties or the superior courts, the  
22 intent there is to be able to negotiate a settlement under  
23 an agreement without taxing the system through appeals,  
24 trials and whatnot and, again, using up a lot of time and  
25 resources when you can get a negotiated settlement early

1 on that's going to be a so-called win-win for both sides.  
2 And I believe that's the intent of those arbitration  
3 statutes and mandatory arbitration rules is try to avoid  
4 that endless litigation and then if you go from  
5 administrative appeal right into judicial review. I think  
6 that's -- from a public policy standpoint, that's in the  
7 best interest of the Department.

8 MR. SHEAHAN: Okay. Do you think it's appropriate --  
9 when we look at claimants, if you look at 192-230-110,  
10 there's a lot of individual and personal factors that we  
11 look at in regard to claimants. Do you think it's  
12 appropriate to look at some of those? If you look at (2),  
13 is it appropriate to look at some of those when we're  
14 dealing with employers?

15 MR. RUDNICK: I don't think these would be helpful as  
16 far as the employer. I mean, even if you took some type  
17 of comparable comparable there, for example, outside of  
18 the employer facing insolvency which was already in the  
19 statute previously, I mean, outside something disastrous  
20 like that, I don't think you really need to look at their  
21 ability to pay as long as they're staying afloat. If the  
22 bill is due and it was, like I said, an error that  
23 occurred, a recalculation, and it simply would be in the  
24 best interest to go offer a settlement -- compromised  
25 settlement versus penalizing them with a high penalty, a



1 penalty tax rate for a whole year, I believe that was kind  
2 of the intent behind the bill.

3       Again, if the employer can -- as this gentleman said,  
4 if they came forward in good faith and presented that  
5 there is an error or they could show the Department  
6 created an error -- had a hand in creating the error, then  
7 perhaps that should be the extent of defining "equity and  
8 good conscience."

9       MR. PAJA: I would be very cautious -- caution the  
10 Department to take those factors which apply to an  
11 individual and carry them across the street to the  
12 employers for the reason that unless you're dealing with a  
13 sole proprietorship, I don't think those factors should  
14 apply to corporations, even a subchapter S corporation or  
15 a partnership or those types of things. It just muddies  
16 the water, gets too complicated. I've got three partners,  
17 and two of them have dependents. And so I think they  
18 don't cross very well in most instances.

19       MR. SHEAHAN: And I think that's part of the  
20 challenge is to -- we want to make sure that we're being  
21 fair to both the claimant and to the employer and that  
22 we're not applying different standards to different people  
23 but figuring out what specific criteria are the most  
24 appropriate to apply on each side is a little difficult.  
25 And you don't -- you can have maybe a general standard or

1 general definition like fairness under the circumstances  
2 in defining "equity and good conscience," but do you think  
3 it's appropriate then to have some different criteria for  
4 each that seem to apply?

5 MR. PAJA: I think so. Because once a business takes  
6 a corporate status, then they've got some of these --  
7 there's a shield there against some of these things that  
8 an individual wouldn't be shielded from. But I do think  
9 it's appropriate to have different factors for the type of  
10 entity that you're dealing with.

11 MR. RUDNICK: Again, I didn't address what -- as far  
12 as the definitions of equity and good conscience as far as  
13 the other bill here, 1394 -- 5355?

14 MR. SHEAHAN: Uh-huh.

15 MR. RUDNICK: I think that -- I've got the wrong one  
16 in front of me. There we go. I don't see any change that  
17 needs to be made now that the WAC's reference in the  
18 statute by 5355. I mean, that was kind of a compromise  
19 that was agreed on with labor that we would bring that  
20 into the UI integrity bill. And it was already considered  
21 in the WAC in the standards there. Again, a test that's  
22 already been proven to work within the UI system here in  
23 Washington. So I don't see any additional changes or  
24 amendments that need to be made from the claimant's  
25 perspective here.

1           MR. SHEAHAN: Okay. Are there other comments or  
2 questions or other issues you think would be pertinent to  
3 the discussion?

4           MR. PAJA: Not offhand.

5           MR. RUDNICK: I think the Department already stated  
6 its position, again, in its briefing paper from  
7 September 6, 2012, and the examples that are listed in  
8 there under impacts are -- pretty much stand out as to why  
9 it would be best to consider equity and good conscience in  
10 the WAC as far as a compromise for the employer that has a  
11 debt owing to the Department.

12           And I agree. I wouldn't try to muddy the water too  
13 much. I'd keep it as simple as possible so that the  
14 language is that qualifies an employer from waiver.

15           MR. SHEAHAN: Okay. Anyone on the phone? Okay.

16           Are there any other issues or questions? Juanita,  
17 did you have anything that you wanted to bring up?

18           MS. MYERS: No. Not at this time. We'll go back and  
19 look at these comments and so on.

20

21                           Rulemaking Process: What's next

22

23           MR. SHEAHAN: And I think I'll call on Juanita again  
24 to -- I guess both of you were here this morning, but  
25 maybe explain what the process will be on these or the

1 rulemaking process in the next few weeks.

2 MS. MYERS: Sure. What we will do is go back, take  
3 your comments and input and draft some rules that we will  
4 send out both to the participants and to all of those who  
5 indicated an interest in participating in the development  
6 of these rules. At that point we would like you -- if you  
7 could look at the rules carefully, see if they address  
8 your concerns, if you have any questions, suggestions,  
9 et cetera.

10 As Larry said, we don't have any language in mind  
11 right this second. We're going to have to go back and  
12 look at everything. There may be a back-and-forth. You  
13 may come back with some -- or the larger group may come  
14 back with some suggested changes that may require redraft,  
15 and so there may be a length of time before we can get  
16 these finalized. But once we get a set of rules we  
17 believe that meets circumstances and address most of  
18 stakeholder concerns, we can't guarantee we'll be  
19 consistent with everybody's because everybody's opinions  
20 are going to be different, we will file for a public  
21 hearing and you'll have another opportunity to express  
22 your concerns.

23 So there are multiple levels in which you can express  
24 or provide input into the rules. And that can be a  
25 lengthy process, but we're going to try to make these as

1 -- complete them as quickly as possible so that we can get  
2 these implemented quickly. We have a lot of rulemaking  
3 going on this session or this summer because of a large  
4 number of bills that passed this session. And so we'll  
5 just try and fit them all in and get them all drafted as  
6 soon as we can and get them back out to you maybe in a  
7 couple weeks.

8 What do you think, Larry?

9 MR. SHEAHAN: Yeah. I think so.

10 MS. MYERS: A couple weeks we'll get them back out to  
11 you.

12 MR. SHEAHAN: A couple weeks after Labor Day.

13 MS. MYERS: Okay. That's right. You're gone next  
14 week.

15 MR. SHEAHAN: I'm on vacation next week.

16 Any questions for Juanita or any other questions  
17 before we adjourn? Okay.

18 I want to thank you both for coming and thank you to  
19 Cheryl for her work as a court reporter. And if there are  
20 no further discussions, the meeting is adjourned.

21 (Whereupon, proceedings  
22 adjourned at 2:10 p.m.)

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