102150-0

(COA NO. 83893-8)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL WEISMAN,

Petitioner,

v.

STATE OF WASHINGTON,
Department of Employment Security, et al.,

Respondent.

PETITION FOR REVIEW

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INTRODUCTION

This case raises an issue that potentially impacts tens of thousands of Washingtonians currently facing claims by the Department of Employment Security ("ESD") that they were overpaid unemployment benefits in connection with stimulus measures taken during the COVID-19 pandemic.[1] It involves a little-known, extraordinary power: the power to summarily take a person's federal income tax refund without any judicial involvement or authorization. That power arises from and is governed by federal law, 26 U.S.C. § 6402; 31 C.F.R. § 285.8.

ESD claims federal law allows it to take property this way whenever it issues a letter asserting that a person was overpaid benefits and the person doesn't seek administrative review, whatever the reason for the alleged overpayment.

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[1] *See Thousands of WA workers remain trapped in unemployment overpayments,* Seattle Times, June 2, 2023, page 1; *Thousands of WA Workers May Have to Repay Millions of Dollars in Pandemic Benefits*, Seattle Times March 2, 2023 (copies attached as Appendix E).

However, federal law grants this extraordinary power only if an overpayment was the result of "fraud or failure to report earnings." 26 U.S.C. § 6402(f). It also requires agencies seeking to collect money this way to provide fair notice and consider evidence submitted in response before doing so. *Id.*; 31 C.F.R. § 285.8(c) .

The trial court held that ESD's noncompliance with these federal law requirements violated Petitioner Weisman's statutory and constitutional rights, and it ordered ESD to return his tax refund. The Court of Appeals granted interlocutory review and reversed, upholding ESD's position that a person "fail[s] to report earnings" whenever they are overpaid benefits, regardless of the reason for the overpayment. In doing so it ignored authorities ranging from BLACK'S LAW DICTIONARY to the Supreme Court of the United States which hold that "failure" means "fault, negligence, or refusal."

The Court of Appeals also declared *sua sponte* that ESD actually "considered" Mr. Weisman's objection to the seizure—

although ESD conceded, and the trial court held, that it did not. And the appeals panel also found that ESD's decision to take Mr. Weisman's property was not only properly reached but also substantively correct—although the trial court hadn't ruled on that issue and ESD didn't seek review of it. The panel thus held that ESD did not violate Mr. Weisman's rights under either the governing federal statutes or the Fourteenth Amendment.

This decision warrants review and correction by this Court's for several reasons. RAP 13.4(b)(1), (3), and (4). The most important is the public interest. Although the decision is unpublished, ESD has made it clear it intends to use it to justify its position and the manner in which it exercises this unusual power to take property without court involvement. That gives it a powerful—and we submit unfair and legally unauthorized—advantage over the thousands of people to whom it claims it overpaid benefits during COVID. That includes people who may have been overpaid through no fault of their own or due to ESD's own errors, or who were not really overpaid at all.

IDENTITY OF PETITIONER

Petitioner Michael Weisman was the plaintiff below and the respondent in the Court of Appeals. In 2020 he was employed by the State Department of Health and received unemployment payments as part of a "SharedWork" program in which he was enrolled because of disruptions caused by the COVID-19 pandemic.

COURT OF APPEALS DECISION

The decision of the Court of Appeals was first issued on April 10, 2023, *Weisman v. ESD*, CoA No. 83893-8-I, Appendix A. It reversed the trial court's order, which had declared that the manner in which ESD seized Mr. Weisman's income tax refund violated federal law and had ordered the refund returned. Petitioner's Motion for Reconsideration was denied on May 10, 2023. Appendix B. On June 5, 2023, the Court of Appeals denied ESD's Motion to Publish, withdrew the April opinion, and substituted a new one that reached the same result with one minor change. *See* Appendix C & D.

ISSUES PRESENTED

1. Does the word "failure" in 26 U.S.C. § 6402(f) connote fault, negligence or refusal by the person alleged to have failed to do something?
2. On review of an order that granted partial summary judgment to one party, can an appeals court grant partial summary judgment to an opposing party who did not properly seek that relief in the trial court or in include it in its Notice of Discretionary Review?

STATEMENT OF THE CASE

a. Factual and Procedural Background

In 2020, Petitioner Michael Weisman was an employee of the Washington State Department of Health (DOH). CP 1-3, 66-67. In June that year, during the COVID-19 epidemic, he was placed on a "ShareWork" plan with ESD. Under the plan, ESD provided unemployment benefits to DOH employees who were subject to furlough due to the pandemic, even though they remained employed. *Id.*; RP 34:24–35.

In September and October 2020, ESD sent letters to Mr. Weisman in which it claimed it had overpaid him and he owed it money ("overpayment letters"). CP 113–115, 296-299, 301-304, 306-309. The letters said he had 30 days to appeal, but Mr. Weisman did not do so—in reliance, he says, on assurances from ESD and DOH officials that he didn't need to do that and they would address any discrepancies. CP 2-4, 120-121, 130-134, 185-186, 404-406.

Then on November 28, 2020, ESD sent Mr. Weisman a "Notice of Intent to Intercept Federal (IRS) Tax Refund," informing him that ESD intended to his intercept his federal income tax refund for the previous year. The notice cited 31 C.F.R. § 285.8, which says that such Notices

> … must give the debtor at least 60 days to present evidence, in accordance with procedures established by the State, that all or part of the debt is not past due or not legally enforceable, *or, in the case of a covered unemployment compensation debt, the debt is not due to fraud or the debtor's failure to report earnings*…

31 C.F.R. §285.8(c)(3)(i) (emphasis added); see RP 27:6-22.

The federal regulation also says:

> The State *must*, in accordance with procedures established by the State, *consider* any evidence presented by a debtor in response to the notice described in paragraph (c)(3)(i) of this section *and determine* whether an amount of such debt is past due and legally enforceable *and, in the case of a covered unemployment compensation debt, the debt is due to fraud or the debtor's failure to report earnings.*

31 C.F.R. § 285.8(c)(3)(ii) (emphasis added); *accord* 26 U.S.C. § 6402 (authorizing statute); RP 27:6-22.

The Notice sent to Mr. Weisman said if he "believe[d] all or a part of the debt is not past due or legally enforceable under the Treasury Offset Program[2] because it is not based on fraud or on your failure to report earnings, you must send evidence to support your position" to a specified email address. CP 117-118; RP 27:23-28:9. It didn't say what it meant by "evidence."

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[2] The tax refund intercept is also referred to in some sources as the "Treasury Offset Program," or "TOP."

On January 15, 2021—within the 60-day time limit set by 31 C.F.R. § 285.8 —Mr. Weisman sent an email to that address. RP 28:3-25; CP 120-121, 234-236. In this email, Mr. Weisman tried to explain what had occurred and specifically denied he had "committed any fraud or any intentional misrepresentation;" he said he "did as we were directed" and that ESD's "web site is difficult to navigate and this process was impenetrable…." CP 120-121; RP 25:9-17.[3]

That same day, a computer autoresponder at ESD sent Mr. Weisman a boilerplate message which assured him that he had *not* been accused of fraud. CP 122 ("You do not owe us any money as a result of a fraudulent claim."); RP 28:19-25. A few days later—still within the 60-day period—ESD's collections office sent a second email to Mr. Weisman telling him his only recourse was to appeal through the Office of

[3] *See also* CP 120-122 (Weisman email to Collections), 189-192 and 277-282 (ESD hours reporting forms), 264 – 273 (ESD weekly claim forms).

Administrative Hearings (OAH). CP 123, 234-236; RP 29:1-7; RP 29:8-14. Neither email explained ESD's decision or identified any deficiency in his submission.

On January 29, 2021—the 61st day after the notice—ESD's computer systems automatically referred Mr. Weisman's alleged debt to the U.S. Department of the Treasury for intercept of his federal tax refund. CP 229. ESD's computer programs then automatically intercepted a portion of Mr. Weisman's federal tax refund in the amount of $1,043.66. *Id.*; CP 130-133. ESD did this although Mr. Weisman had filed an administrative appeal as ESD had suggested.

Mr. Weisman's administrative appeal was dismissed. The administrative law judge held the appeal was untimely and there was no administrative appeal jurisdiction over challenges to a tax refund intercept. ESD's Commissioner affirmed, saying that federal law required only an "opportunity to correspond" with the Collections Unit before a tax intercept, and Mr. Weisman had been given that opportunity. CP 29.

Mr. Weisman sought judicial review under the WAPA and also filed suit in King County Superior Court alleging violations of the governing federal law and of his Fourteenth Amendment right not to have his property taken without due process. The lawsuit sought a declaration that the seizure of his tax refund violated his rights and, *inter alia,* an injunction requiring ESD to return it. CP 1-9.

Early discovery in the lawsuit revealed that ESD has an internal Policy Manual which says the "evidence" supporting a recipient's objection to a tax refund intercept must be "documentation such as an ESC billing that reflects the TOP DTMs[4] are paid in full." CP 140; RP 31:21-32:6. Those unpublished requirements are nowhere in the governing statute and regulations—or in the Notice ESD sent Mr. Weisman, or in either of its responses to his submission. ESD's internal Manual also says intercepts can be initiated not only for "Fraud

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[4] ESD's Policy Manual doesn't define "DTM," but deposition testimony below indicated it means "determination."

DTMs," but also "Non-Fraud DTMs with back pay, earnings, holiday pay, separation pay, sick pay, vacation pay, plant closure pay, NSF fees," and "Active accounts." CP 142.

Mr. Weisman moved for partial summary judgment seeking (1) a declaratory judgment that ESD's failure to consider his challenge to the intercept violated federal law and denied him Due Process, and (2) an injunction requiring ESD to return his seized money. CP 75-150. ESD opposed the Motion; but in argument its counsel acknowledged it had never even considered Mr. Weisman's email challenge to the intercept because, under its unpublished standards and rules, it was not "evidence" and could not have made a difference. RP 12:13–13:5, 13:7-15, 34:9-14, 33:8-18.

The trial court granted Mr. Weisman's motion for partial summary judgment, made findings and conclusions from the bench and ordered ESD to return his tax refund. CP 318; RP 32:7-33:18, 36:20-21. ESD then filed a "Motion for Entry of Final Judgment," arguing that no issues remained in the case.

CP 321. Mr. Weisman opposed this, pointing to additional, unresolved claims in his Complaint (CP 347) and the trial court denied ESD's motion. CP 387. ESD then sought review "of the Superior Court's Order Granting Plaintiff's Motion for Partial Summary Judgement." CP 341. Its Discretionary Review Notice didn't mention its untimely request for judgment in its favor or the "Motion for Entry of Final Judgment." *Id.*

The case then proceeded and the parties began conducting discovery on Mr. Weisman's remaining claims regarding the legality of the process that led up to the overpayment notices. This discovery revealed, among other things, that ESD instructs its collections staff to check a box on the computer screen indicating that the overpayment was the recipient's "fault," regardless of the reasons the overpayment actually occurred. See CP 423. Mr. Weisman accordingly filed a motion to amend his complaint to include that fact and new claims based on information revealed after the partial summary judgment ruling. CP 401.

That Motion to Amend was pending when the Court of Appeals granted ESD's Motion for Discretionary Review (CP 432) and stayed further trial court proceedings.

b. The Court of Appeals' Decision

The Court of Appeals panel reversed the partial summary judgment order. Its Opinion upheld ESD's claim that it can intercept federal income tax refunds whenever it finds that a recipient has been overpaid and has not timely appealed from its overpayment determination. App. D at 10-11. It held "[t]here is *no requirement that the debtor engaged in misconduct* when failing to report earnings or intentionally did so." *Id*. at 11 (emphasis added). In saying that it did not cite or even acknowledge authority that Mr. Weisman submitted to it and to the trial court[5] which the statement directly contravenes.

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[5] The Opinion says Mr. Weisman raised this argument "[f]or the first time on appeal." App. C 10. That is incorrect. Weisman's appellate brief repeated almost verbatim his trial court briefing on this issue (see CP 311), which the trial court's ruling was largely based on. See RP 25, 33. Weisman's reconsideration motion pointed this out, but to no avail.

That authority holds that "fail" "connotes some omission, fault, or negligence on the part of the person who has failed to do something." *Williams v. Taylor,* 529 U.S. 420, 431,130 S.Ct. 1479 (2000); *accord* BLACK'S LAW DICTIONARY 594 (6th ed.1990) ("[f]ault, negligence, or refusal"); Resp. Br. 22-23.

Based on its contrary interpretation of the word "fail," the Court of Appeals' Opinion held that ESD had not violated Mr. Weisman's rights under the federal statute or the Due Process Clause by refusing to consider his emailed objections.

> This is because, contrary to the trial court's oral findings, Weisman did not clearly assert in his January 15 email that the debt was not based on failure to report earnings.
>
> Instead, he stated that he did not commit fraud or any "intentional misrepresentation," but admitted that the ESD web-based program was not suited to the SharedWork claims and it was possible he may have checked a wrong box. It is evident from the January 15 email that Weisman indicated the overpayment may have resulted by mistakenly underreporting his earnings because of a confusing reporting system. But *questioning why he may have underreported his earnings is not equivalent to submitting evidence that the debt was not based on his failure to report earnings*. Thus, we agree with ESD that it did not consider any evidence because there was no evidence to consider.

App. D 14 (emphasis added). This description of the email is incomplete[6] and takes a cramped view of what constitutes "evidence" outside of the judicial process.[7] But as the passage makes clear, that ultimately made no difference to the Court of Appeals' decision. It says explicitly that the reason the panel

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[6] For example, the email also said, "we did as we were directed" and ESD's "web site is difficult to navigate and this process was impenetrable." CP 120-121. As the trial court summarized, its message was obviously that he was not at fault for any overpayment because "the forms and the website that that he was asked to complete and provide information through didn't make sense given the nature of the shared work program." RP 25:9-17.

[7] See CP 314; *DeGeorge v. U.S. District Court*, 219 F.3d 930, 937-8 (9th Cir. 2000) ("The ordinary definition of evidence is broad"); RCW 34.05.452 (administrative proceedings allow "the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs."); 20 C.F.R. § 416.913(a) ("evidence is anything you or anyone else submits to us or that we obtain that relates to your claim," for purposes of Supplemental Social Security Income benefits review)

"agree[d]" that Mr. Weisman's email presented ESD with "no evidence to consider" was its holding that persons who do not report earnings thereby "fail" to report earnings under this law. It followed directly from this premise that "why he may have underreported his earnings" was irrelevant and "no evidence."[8]

Seemingly inconsistently, the Opinion also said ESD "did consider the email." App. D 14. This directly contradicted the trial court's finding that ESD "didn't consider the evidence that he had submitted" (RP 33) which was based on the full record and a concession in oral argument from ESD's counsel. See page 11, above. The Opinion did not say by what standard the appeals panel had reviewed that factual finding, but explained its decision to reverse it as follows:

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[8]The Opinion also said "[t]he fact that the intercept notice did not define what type of 'evidence' is acceptable, is to Weisman's benefit, not detriment." App. D 13. It didn't explain that statement or cite authority for it, but presumably it means the appeals panel didn't rely on ESD's argument that it could disregard Weisman's email because it did not comply with some formal rules of evidence, or ESD's unpublished ones.

> This consideration is evident by ESD resending Weisman the overpayment determination letters in response to his January 15 email. The overpayment determination letters explicitly told Weisman that the reason for the ESD action was because "[y]ou didn't report your gross earnings when you submitted your weekly claim." The letters also explicitly laid out the benefits that ESD paid him, the amount to which he was entitled, and the amount he was overpaid. This suggests that Collections did consider the email, researched its own records, and confirmed the debt was based on Weisman's failure to report earnings.

App. D 13-14.

We would respectfully take issue with every aspect of this passage. A "suggestion" cannot be sufficient to overturn a trial court's factual finding. Simply referring to copies of a challenged decision cannot, alone, make it "evident" that its merits have been independently "considered."[9] An appeals

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[9] *See Brownlee v. Haley*, 306 F.3d 1043, 1076 (11th Cir. 2002). BLACK'S LAW DICTIONARY 277 (5th ed. 1979) ("consider" means "to fix the mind on, with a view to careful examination; to examine; to inspect. To deliberate about and ponder over. To entertain or give heed to."); WEBSTER'S THIRD NEW INT'L DICTIONARY, 483 (1986) ("to reflect on: think about with a degree of care or caution").

court cannot properly overturn a trial court based on speculation that a party may have done independent research before acting when there is no evidence whatever that the party ever did so.

But again, none of these things ultimately mattered. The reversal of the trial court's finding about "consideration" followed from the Court of Appeals' overriding premise that "failed to" is the same as "did not." The above-quoted passage is explicit about this: it says the letters told Mr. Weisman "the reason for the ESD action" was "'[y]ou *didn't report* your gross earnings.'" (Emphasis added.)

Finally, the Court of Appeals ruled as a matter of law that ESD had *not* violated Mr. Weisman's Due Process rights. App. D 18. It did so even though ESD did not properly file a motion for partial summary judgment in its favor in the trial court, and its Notice of Discretionary Review did not reference any such motion or a ruling on it. The Court of Appeals nonetheless determined *sua sponte* that ESD's position that Mr. Weisman "failed" to report earnings was correct. See App. D 14-15. The

panel reached this conclusion even though neither it nor ESD could explain how some of the amounts of the alleged overpayment were calculated. App. D 2 n.1.[10] But once again, because it accepted ESD's argument that the statute allows tax intercepts to be used to collect *any* overpayment debt, without a finding of fraud or culpable failure, this uncertainty made no difference to it.

Mr. Weisman timely moved for reconsideration. Reconsideration was denied, App. B, as was a Motion to Publish filed by ESD, App. C. This Petition is being filed within 30 days of the latter decision. See RAP 13.4(a).

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[10]See App. D 3n.2: There is no explanation in the record why ESD paid $519 instead of the calculated $790 for week ending July 25 based on his report of getting paid only 8 hours of sick leave." ESD's counsel was asked about this in argument before the Court of Appeals and was unable to explain it then, either. *See Weisman v. Dep't of Emp. Sec.*, No. 83893-8-I (March 7, 2023) (video recording by TVW, https://tvw.org /video/division-1-court-of-appeals-2023031229/?eventID= 2023031229) at App's Opening 5:40-5:10.

ARGUMENT

REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH U.S. SUPREME COURT AUTHORITY ON AN ISSUE OF FEDERAL LAW, AND THE MISUSE OF NONJUDICIAL TAX REFUND INTERCEPTS BY THE STATE DEPARTMENT OF EMPLOYMENT SECURITY IN THE COLLECTION OF ALLEGED OVERPAYMENT DEBTS PRESENTS SIGNIFICANT ISSUES OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THIS COURT. RAP 13.4(b)(1), (3), (4).

As the above makes clear, Petitioner would submit the decision below errs on several points which could warrant this Court's review. But underlying every aspect of the Court of Appeals' Opinion is the premise that the phrase "failure to report" in this federal statute means the same thing as "did not report." That decision calls out for this Court's review and intervention—because it conflicts with Supreme Court authority on an important question of federal law that is of great public interest, and because of the unchecked power it gives ESD over tens of thousands of Washington citizens.

The power ESD claims is wholly conferred by federal law. It derives from a federal statute and federal regulations based on it. 26 U.S.C. § 6402(f); 31 C.F.R. § 285.8(c). Both of those provisions describe procedures by which state agencies can seize federal income tax refunds in certain circumstances. The circumstances include overpayments of unemployment benefits, *if* the overpayments were the result of "fraud or the person's failure to report earnings."

The statutory scheme makes clear that an overpayment of benefits, alone, is not enough. It provides intercept authority only for "*covered* unemployed compensation debt[s]," a term defined by the statute to include only debts due to "fraud" or "failure to report earnings." 26 U.S.C. § 6402(f)(4). Thus, federal law authorizes these extrajudicial intercepts only for a subset of the overpayment debts ESD can collect via other means under state law. *See, e.g.,* RCW 50.20.190 (setting out a method for collecting "any amount [of] benefits under this title" to which a person is not entitled).

The statute and regulations do not define the word "failure," and there does not appear to be case law that speaks to the issue in this context. But the U.S. Supreme Court has answered the question elsewhere, holding that Congress's use of the word "fail" "connotes some omission, fault, or negligence on the part of the person who has failed to do something." *Williams v. Taylor,* 529 U.S. 420, 431, 130 S.Ct. 1479, 146 L.Ed. 2d 435 (2000); *accord* BLACK'S LAW DICTIONARY 594 (6th ed.1990) (defining "failure" as "[f]ault, negligence, or refusal").[11]

That the intercept statute should be no exception to this rule is consistent with basic statutory construction principles. Had Congress intended to make all overpayments subject to tax refund intercept, it simply would have said so; the limiting

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[11] *See also Kemp v. Ryan*, 638 F.3d 1245, 1258 (9th Cir. 2011); *Daniel v. Comm'r*, 822 F.3d 1248, 1281 (11th Cir. 2016); *Wolfe v. Johnson*, 565 F.3d 140, 167 (4th Cir. 2009); *Boyle v. McKune*, 544 F.3d 1132, 1140 (10th Cir. 2008); *Crowder v. Key*, 2021 U.S. Dist. LEXIS 37683, *7 (E.D. Wash. March 1, 2021).

language "due to fraud or the person's failure to report earnings," would be redundant surplusage. *See Obduskey v. McCarthy & Holthus LLP*, 586 U.S. ___, 139 S. Ct. 1029. 1037 (2019) (statutes are generally presumed not to contain superfluous language). But instead of simply authorizing intercept for any overpayment (the construction ESD and the Court of Appeals urge), Congress limited intercepts to only two categories: "fraud" and "failure to report earnings."

The pairing of "fraud" and "failure" further indicates that Congress intended to authorize use of this extraordinary collections power only where a debtor has engaged in some form of wrongdoing. *See Yates v. United States*, 574 U.S. 528, 543, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015) ("we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'") (*quoting Gustafson v. Alloyd Co.*, 513 U.S. 561, 115 S. Ct.

1061, 131 L. Ed. 2d 1 (1995)); *accord Greene v. Pierce County*, 197 Wn.2d 841, 853, 487 P.3d 499 (2021).

The Court of Appeals did not even mention any of this, but declared that the statute contained "no requirement that the debtor engaged in misconduct when failing to report earnings or intentionally did so" because the statute says that there can be a "failure to report earnings, even if the state does not find that such failure constituted fraud." App. D 11 and n.6. But that is a logical *non sequitur*. Saying that "failure" *does not* mean "fraud" says nothing about what it *does* mean. Negligence does not constitute fraud; neither does recklessness; neither does excusable neglect; neither does simple omission.

In fact, as just noted, the inclusion of the word "fraud" carries the opposite implication from the one the Court of Appeals drew from it. If Congress meant that a person "fails" to report earnings any time they do not properly do so, regardless of fault, the word "fraud" would be an awkward fit.

"Fraud or culpable failure" makes linguistic sense; "fraud or any other reason" does not.

The Court of Appeals decision is therefore wrong about this for several reasons; and that error is going to have a big impact. ESD has made it clear that it fully intends to continue using the power to make these unilateral extrajudicial seizures of money from past unemployment benefit recipients without any showing of fault. That is evident from its refusal to make even minor changes in its intercept notices or processes in response to the trial court's ruling; and from its motions for interlocutory review and a stay of a partial summary judgment amounting to barely a thousand dollars, and its request for publication of the Court of Appeals decision below for its use in future cases. That intention is understandable, since pushing a button to seize someone's property is much easier than taking the steps necessary to collect a debt through the courts—even with the streamlined procedures Washington law allows for collecting unemployment compensation debts. RCW 50.20.190.

But what is convenient for ESD is dangerous for the rights of the people the agency is supposed to serve. This decision and this interpretation of the law gives ESD great leverage over thousands of people who, like Mr. Weisman, received benefits through jerry-rigged programs implemented during the COVID-19 epidemic. The trial court found that this program was "vulnerable to, and in this instance, appears to be rife with miscalculations and errors that contributed to … confusion over time." RP 34:24–35:12. Mr. Weisman wrote about this confusion in his email challenge to the intercept (CP 120-121) and ESD's computer-generated auto response to his email confirmed it![12] CP 122. Yet ESD wants this power to help it collect an alleged debt for an alleged overpayment that it cannot explain, even after years of litigation. See App. D 3n2.

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[12] The autoresponder said "You might have received a letter from us saying that you must repay benefits (called an overpayment) that we paid on the fraudulent claim in your name. You can ignore that letter! … We're sorry for the anxiety it may have caused." CP 122.

Hundreds of thousands of Washingtonians apply to ESD for unemployment benefits each year.[13] ESD exists to aid and protect them in times of economic hardship and uncertainty. RCW 50.01.010. Yet the agency also maintains an active collections operation through which it can demand repayment of benefits it says it paid out in error, even if the error is one of which the recipient was unaware. App. E.

Although state law may allow ESD to recoup erroneous payments in some such circumstances, it must go to court to do so. *See* RCW 50.20.190. That provides transparency and the opportunity for judicial review or supervision. The federal law authorizing the extrajudicial process at issue here allows ESD to dispense with those protections. But it does so only for a limited subset of unemployment debts, and it provides its own procedural protections of notice and an opportunity to object.

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[13] *See* https://media.esd.wa.gov/esdwa/Default/ESDWAGOV/labor-market-info/Libraries/Economic-reports/Annual-Report/2021-labor-market-and-economic-report.pdf (accessed 6/28/2023).

The trial court held that ESD violated this federal law by ignoring its limitations and dispensing with those protections. The Court of Appeals agreed with ESD about the limits on this power (or lack thereof), making the procedures and protections irrelevant. This not only contravened federal law and established rules of statutory interpretation, but it also tipped the scales too far in ESD's favor in its efforts to extract money from economically vulnerable people who it claims to have overpaid, which is a matter of substantial public concern.

CONCLUSION

Review should be granted here.

DATED: July 3, 2023.

This document consists of 4854 words subject to RAP 18.17(c).

Respectfully submitted,

MacDONALD HOAGUE & BAYLESS

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document on the following individual(s):

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[ ] Via Overnight Delivery

DATED this 3rd day of July 2023, at Seattle, Washington.

/s/ Chris Bascom
Legal Assistant

APPENDIX A

FILED
4/10/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL WEISMAN,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT SECURITY; and CAMI FEEK, Commissioner of the Washington State Department of Employment Security, in her official capacity,

Appellants.

No. 83893-8-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — The Washington State Department of Employment Security (ESD) determined that Michael Weisman, a state employee, underreported the hours he worked for two weeks resulting in an overpayment of unemployment insurance benefits (UB) for which he was eligible to cover his furloughed time. ESD notified Weisman that he was overpaid, that he was liable for the overpayment and, unless he paid the debt, his tax refund could be intercepted to offset his debt. Weisman did not timely appeal the overpayment determinations, but also did not pay his debt. After ESD sent Weisman a notice of intent to intercept his tax refund, Weisman eventually filed a complaint in superior court. The court granted Weisman's motion for partial summary judgment determining that his procedural due process rights were violated because ESD did not follow federal offset law before intercepting his tax refund. ESD contends

that it did in fact follow federal offset law and provided Weisman proper notice and meaningful opportunity to be heard prior to intercepting his tax refund. We agree with ESD. Accordingly, we reverse and remand.

FACTS

The following facts are not in dispute. Michael Weisman was a staff attorney for the Washington State Department of Health (DOH), and he usually worked 40 hours a week. In June 2020, following the inception of the COVID-19 pandemic, Weisman applied for unemployment insurance benefits (UB) through an approved SharedWork plan between the ESD and DOH. SharedWork benefits are unemployment benefits intended for employees who are furloughed rather than fully unemployed. DOH required SharedWork claimants to apply for unemployment benefits each week. A SharedWork claimant is paid partial UB based on the percentage of lost work from a given work week multiplied by the individual's weekly benefit amount.

During the 7 weeks Weisman participated in the program, his employer reduced his usual 40 hours a week by 20 percent, and he worked 32 hours a week. Based on his earnings, his regular weekly benefit amount was $790 in UB. Based on that amount, he was entitled to 20 percent of that amount, or $158 in UB weekly.[1]

For the week ending July 4, Weisman reported receiving 8 hours of holiday pay and did not work any regular hours, when, in fact, he had worked 32 hours that week. Based on his report of only receiving 8 hours of holiday pay, ESD paid Weisman $790, his regular weekly UB amount instead of $158, resulting in a $632 overpayment. The

[1] Weisman also was eligible to receive up to $600 each week in benefits through the Federal Pandemic Unemployment Compensation (FPUC) program until the end of July 2020. ESD never requested a return of any FPUC dollars, which are not at issue in this appeal.

next 2 weeks, Weisman reported working 32 hours each week and was paid the $158 in UB each of those weeks.

During the week ending July 25, Weisman reported that he received 8 hours of sick pay and did not work for his employer that week, when in fact he had worked 32 hours that week. The report of only receiving 8 hours of sick pay resulted in a calculation of Weisman being entitled to the $790 regular weekly UB. But according to ESD, it paid Weisman $519[2] in UB, resulting in a $361 overpayment for that week because he should only have received the $158. In total, ESD overpaid Weisman $993 for both weeks.

In the end of July 2020, ESD sent Weisman a fact-finding letter notifying him that ESD had received information that he may have worked and received pay for at least one day between July 19 and July 25 from DOH. The letter asked him to answer several questions so that ESD can decide whether it can pay or continue to pay him UB. The letter notified Weisman that ESD may have already paid him in unemployment benefits and that if ESD had paid him too much and it was his fault, he would have to pay it back. The letter warned Weisman that if he did not pay back the overpayment, ESD could take money from his federal income-tax refund. The letter also informed Weisman "[i]f you had an overpayment and it was not your fault, you can request a waiver. If we approve your request, you won't have to pay us back." Nothing in the record indicates that Weisman requested a waiver.

[2] There is no explanation in the record why ESD paid $519 instead of the calculated $790 for week ending July 25 based on his report of getting paid only 8 hours of sick leave. Regardless, based on Weisman working 32 hours, he was only entitled to the $158 UB.

On August 5, Weisman signed an ESD weekly correction form where he agreed with DOH's reporting that he worked 32 hours for the week ending July 4. Weisman checked the box indicating, "I agree with the information my employer reported. I understand if I was overpaid I am liable for repayment."

Two days later, Weisman signed and submitted the fact-finding letter regarding week ending July 25. In the letter Weisman agreed that he had worked 32 hours and was furloughed for the other 8 hours that week.

On September 24, an ESD representative interviewed Weisman by telephone regarding his claims for week ending July 4 and July 25. Weisman explained that he was confused about the system and misunderstood the website. He confirmed that he had been paid to work 32 hours each of the weeks.

ESD then sent Weisman several overpayment determination letters. The first letter dated September 24 notified Weisman that he owed $519 to ESD because it had overpaid him $519 for the week ending July 25 when he was entitled to $0 UB. The next letter dated September 25 notified Weisman that he owed ESD $632 for the week ending July 4 because it had paid him $790 UB when he was entitled to $158. The third letter dated October 22 replaced the earlier letter about week ending July 25. It notified Weisman that he owed ESD $361 because it had paid him $519 in UB when he was actually entitled to $158.

Besides the difference in the amounts owed, paid, and the relevant weeks in question, the substance of the letters were the same. The letters explained how Weisman could make payment if he agreed with the decision and how he could appeal if he disagreed. It gave him a specific 30-day deadline to appeal and warned him that if

he failed to make payments on time ESD could garnish his wages or bank accounts, or withhold his income tax refund.

Because Weisman did not pay the debts or timely appeal, ESD sent Weisman a "Notice of Intent to Intercept Federal (IRS) Income Tax Refund" (intercept notice) on November 28. The notice informed Weisman that in order to avoid the offset of his tax refund to repay ESD, he had 60 days to: (1) pay the overpayment balance; (2) arrange an acceptable written payment plan; or (3) send evidence to support why he believed all or part of the debt was "not past due or legally enforceable under the Treasury Offset Program because it is not based on fraud or on your failure to report earnings."[3] The intercept notice directed that the supporting evidence must be sent to the provided address or email for Employment Security Collections (Collections). The notice also told Weisman to call or email collections if he had any questions.

On January 15, 2021, Weisman sent Collections an email addressing his concerns and asking ESD to cancel his overpayment determinations. He wrote,

> I am writing to find out what is going on with my claim, and why I received an overpayment letter.
>
> I am a state employee and was directed to file [UB] claims when we were furloughed 1 day each week in June and July, and again in late August/September under the Shared Work program. We were to receive full compensation for our lost wages plus $600/wk. So I did as we were directed. By my calculations I was underpaid, but whatever, it was something.
>
> Then I received a letter telling me I was overpaid. There was no explanation in the letter. There is no explanation how it was calculated in the letter or on the ESD web site. Or at least, I was unable to find any

[3] The intercept notice also informed Weisman that he could file IRS Form 8379, Injured Spouse Claim and Allocation, with his tax return. It further notified him that if he filed for bankruptcy, he would not be subject to offset while an automatic stay is in effect. ESD asked to be notified of such a stay by sending evidence concerning the bankruptcy.

> explanation. It was difficult for me to find out what I was paid, or not paid, or why. There are simply no answers.
>
> One day, out of the blue, I received a call from an adjudicator. This person was speaking very fast and seemed to be quite excited and upset. She kept accusing me of fraud. She was unable to explain what I had done wrong, and I of course denied the allegations. I never committed any fraud. I'll admit, however, the ESD web-based program is not suited to the Shared Work claims and its possible I may have checked a wrong box, but I honestly just don't know. I was never offered any explanation, it does not appear on the web site, and it is not in any of the letters I received.
>
> I have heard on the news recently that ESD has the discretion to cancel repayments where there is no evidence of fraud. I am requesting cancellation of my overpayment determination. I am unable to appeal because ESD never provided me with any determination that I could appeal, because there was no calculation or explanation. I have not committed any fraud or any intentional misrepresentation.

That same day, Collections generated an automatic reply email explaining that COVID-19 pandemic has caused high workloads and slowed response times to about 15-20 business days. The email also stated,

> You do not owe us any money as a result of a fraudulent claim
> You might have received a letter from us saying that you must repay benefits (called an overpayment) that we paid on the fraudulent claim in your name. You can ignore that letter! Our computer system automatically generates the letter when we deny an unemployment application. We're sorry for the anxiety it may have caused. We understand that these letters can be scary.
>
> You might still owe money for an overpayment on a legitimate claim you filed with us in the past or the future. Please respond to any requests for information we might send you about it.

Collections responded to Weisman on January 21 and provided him copies of the original determination letters that explained his overpayment and to call the claim center if he needed further explanation. The email also stated that, "[i]f you disagree with the overpayment you must file an appeal." It provided instructions on how to appeal through the ESD website. The email further alerted Weisman that his balance "is now

active in collections. Even if you are going to file an appeal you must make payment every 30 days to avoid garnishment. Also you are responsible for any penalty or interest that accrues. . ."

By January 27, 60 days after ESD issued the intercept notice, Weisman had not resolved his account to prevent the offset.

On January 28, Weisman responded to ESD's email, stating,

> The determination letters you sent state that I did not enter my gross earnings on 2 different weeks. I did enter my gross earnings on each of those weeks. I remember doing this, of course. But further evidence is that I received [unemployment insurance] payments for those weeks.

ESD replied the same day referencing its previous email and reaffirming that if he disagreed with the overpayment and he is not able to file an appeal via eServices, he could write a letter and mail or fax it to the Appeal Unit.

On January 29, because the debt satisfied the criteria for the Federal Treasury Offset Program, ESD's computer system automatically referred Weisman's debt to financial management services, which administers the Treasury Offset Program. That same day, Weisman filed an appeal of the October 22, 2020 ESD determination letter. In his explanation of why he disagreed with the determination, he wrote,

> I received determination letters that made no sense, they were inaccurate, and they were wrong. I DID provide the ESD with all the information required for my claim, for both of the weeks mentioned in the letters. I am a state employee in the SharedWork program. I filled out timesheets from my employer, Department of Health each week. That information was supposed to be shared with ESD. The letters I received kept changing the determination, and I waited for ESD to catch the error and fix the problem. But that never happened.
>
> . . . .
>
> I heard on the news that ESD was not going to seek collection of overpayments that were no fault of the claimant. But I did not find any way

> to contact ESD about this. I wrote, I called but the phone lines are now closed.
>
> I would like the collections on my claim cancelled and my claim determined to be correct. If ESD needs new information from me, I would like clear communication of what ESD needs and how I can provide it. Just let me know what you need.

In May 2021, Weisman's tax return was intercepted to pay the balance of his debt to ESD.

An administrative hearing was held on August 11. According to the Administrative Law Judge's (ALJ) findings, Weisman maintained he was not appealing the October 22 determination letter and denied filing the appeal dated January 29. The ALJ noted that under RCW 50.32.075, the 30-day deadline for an appeal may be waived if good cause for the late-filed appeal is shown, but concluded that because Weisman did not believe he had even filed a request for an appeal on January 29 there was no basis or ability to determine whether or not there was good cause to hear the appeal. The ALJ dismissed the appeal as untimely.[4] Weisman appealed to an ESD commissioner, who observed that Weisman sought recourse from the intercept letter and requested a default order be issued against ESD and wanted a hearing regarding damages. The commissioner observed,

> Given the claimant's contention that "money" has been wrongfully withheld from him, it is somewhat puzzling that, when provided the opportunity, he chose not to proceed with appeal of the October 22, 2020, Determination of overpayment. (Regarding timeliness: The claimant's testimony that he did not receive the Determination would generally provide good cause for a late filed appeal.)

The commissioner affirmed the dismissal by the ALJ. Weisman petitioned for judicial review of that decision under the Administrative Procedures Act. About two weeks later

[4] The transcript for the administrative hearing is not contained in the record. Though Weisman petitioned judicial review of the commissioners ruling, that ruling is not part of this appeal.

he also brought suit against ESD in King County Superior Court under 42 U.S.C. § 1983, alleging that ESD intercepted his federal tax refund in violation of 26 U.S.C. § 6402(f)(3), 31 C.F.R. § 285.8(c)(3), and his due process rights under the Fourteenth Amendment to the U.S. Constitution were violated. He sought an injunction and declaratory relief requiring ESD to return his tax refund, enjoining ESD from intercepting his future tax refunds, and requiring ESD to adopt, amend, or rescind rules necessary to ensure compliance with federal law and due process. The court denied Weisman's motion to consolidate his petition and complaint, but linked the cases and assigned them to the same superior court judge.

Weisman moved for partial summary judgment of its complaint, arguing that ESD did not have established procedures to consider challenges to intercepts and did not allow him 60 days to present evidence before the intercept occurred. Weisman also argued that ESD violated due process by not considering evidence he submitted before the intercept took place. ESD rebutted these arguments and asked the court in ESD's response motion to grant summary judgment in its favor and dismiss the complaint in its entirety. The court granted Weisman's partial summary judgment motion finding that ESD's intercept of Weisman's tax refund violated 26 U.S.C. § 6402(f)(3), 31 C.F.R. 285.8(c)(3), and the due process clause of the Fourteenth Amendment. The court did not enter any written findings of fact, but explained orally that Weisman "very clearly" said in his January 15 email to Collections that he did not commit fraud or failed to report, the two bases for the intercept process. The court also found that the intercept notice was deficient for not describing the type of evidence that would satisfy its internal

regulations. The court also found that ESD failed to provide Weisman meaningful review by not considering his January 15 email as evidence.

The court ordered ESD to return $1,043.66 of Weisman's tax refund. A commissioner of this court granted ESD's motion for discretionary review.

DISCUSSION

This court reviews summary judgment orders de novo. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Keck, 184 Wn.2d at 370-71.

For the first time on appeal, Weisman argues that ESD can only intercept a tax refund when the failure to report earnings is *intentional* or involves misconduct.[5] Generally, we will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). Nevertheless, even if we were to consider this argument, the plain language of the statute contradicts Weisman's argument.

Federal law allows states to use the treasury department intercept process to satisfy a "covered unemployment compensation debt." 26 U.S.C. § 6402(f)(4). A covered unemployment compensation debt is a "past-due debt for erroneous payment of unemployment compensation due to *fraud or the person's failure to report earnings*

[5] At oral argument Weisman maintained that he did raise this argument below. Wash. Court of Appeals oral argument, Weisman v. Dep't of Emp. Sec., No. 83893-8-I (March 7, 2023), *video recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2023031229/?eventID=2023031229. A review of the record contradicts this claim. While Weisman may have argued below that he did not intentionally fail to report earnings, that is distinct from arguing that the offset laws requires the failure to report earnings to be intentional or involve misconduct.

which has become final under the law of a State . . . and which remains uncollected." 26 U.S.C. § 6402(f)(4)(A) (emphasis added). In cases of statutory interpretation, this court looks first to the plain language of the statute to discern the legislature's intent. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The plain language of the statute provides that covered unemployment debt includes past-due debts due to the misconduct of fraud or when someone simply fails to report earnings. There is no requirement that the debtor engaged in misconduct when failing to report earnings or intentionally did so.[6]

We now consider whether ESD violated 26 U.S.C. § 6402(f)(3) and 31 C.F.R. 285.8(c)(3). 31 C.F.R. § 285.8(c)(3) provides the following:

> (i) Advance notification to the debtor of the State's intent to collect by Federal tax refund offset. The State is required to provide a written notification to the debtor informing the debtor that the State intends to refer the debt for collection by tax refund offset. The notice must give the debtor at least 60 days to present evidence, in accordance with procedures established by the State, that all or part of the debt is not past due or not legally enforceable, or, in the case of a covered unemployment compensation debt, the debt is not due to fraud or the debtor's failure to report earnings…
>
> . . .
>
> (ii) Determination. The State must, in accordance with procedures

[6] A Department of Labor's (DOL) March 8, 2011 advisory letter to state workforce agencies explained that the treasury offset program "may now be used to collect erroneous payments that are either due to fraud or to the persons' failure to report earnings, even if the state does not find that such failure constituted fraud." U.S. Dep't of Lab., Emp't & Training Admin. Advisory Sys., Unemployment Insurance Program Letter No. 11-11, at 2 (Mar. 8, 2011), https://wdr.doleta.gov/directives/attach/UIPL/UIPL11-11.pdf. Again in DOL's 2018 advisory to state workforce agencies, DOL stated that workforce agencies must use the treasury offset program "to collect erroneous payments made to [unemployment compensation] claimants that are due to fraud or to the person's failure to report earnings. This is true *even if the state does not find that the failure to report earnings constituted fraud*." U.S. Dep't of Lab., Emp't & Training Admin. Advisory Sys., Unemployment Insurance Program Letter No. 02-19, at 2 (Dec. 12, 2018) https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2018/UIPL_2-19_Acc.pdf.

> established by the State, consider any evidence presented by a debtor in response to the notice described in paragraph (c)(3)(i) of this section and determine whether an amount of such debt is past due and legally enforceable and, in the case of a covered unemployment compensation debt, the debt is due to fraud or the debtor's failure to report earnings....

Under 26 U.S.C. § 6402(f)(3), a State may not seize a federal tax refund until it provides the debtor "at least 60 days to present evidence that all or part of such liability is not legally enforceable or is not a covered unemployment compensation debt" and "considers any evidence presented by such person. . ." ESD fulfilled the notice requirements and correctly referred the debt to the treasury offset program. ESD sent Weisman the intercept notice on November 28, 2020, and did not submit Weisman's debt to the offset program until January 29, 2021, which was 62 days later. The notice expressly notified Weisman of the limited ways he could avoid offset by acting within 60 days from the date of the notice, including the following:

> If you believe all or a part of the debt is not past due or legally enforceable under the Treasury Offset Program because it is not based on fraud or on your failure to report earnings, you must send evidence to support your position to the address or email below. We will inform you of our decision about your debt.

Weisman asserts that ESD's notice of intercept was deficient because it did not describe what type of evidence it would accept. Weisman cites to ESD's internal manual to support his claim that ESD will only consider documentation of full payment. However, in describing what the claimant can do to challenge the tax intercept, the manual states a claimant can:

> 3. Prove the debt is:
>
> a. not past due; or
> b. legally enforceable because it is not based on fraud; or
> c. their failure to report earnings.

> Proof must be documentation such as an ESC billing that reflects the [debts] are paid in full. This is not an "appeal" such as a claimant would file during the appeal period. This is merely a review of their proof for these specific situations listed. ESC will inform the client of our decision about their debt.

The manual provides that presenting documentation that reflects the debt is paid in full is one way to show a debt is not past due. It does not suggest that the only acceptable evidence to challenge whether a debt is based on a failure to report earnings is proof of full payment of the debt. The fact that the intercept notice did not define what type of "evidence" is acceptable, is to Weisman's benefit, not detriment. This allowed him to submit what he believed to be evidence for consideration by ESD.

The offset program allows states to establish its own procedures on how a debtor may present evidence. 31 C.F.R. § 285.8(c)(3) ("The notice must give the debtor at least 60 days to present evidence, in accordance with procedures established by the State"). ESD's intercept notice warned Weisman that ESD intended to collect through a federal tax-refund offset. It further explained that Weisman could avoid offset if, within 60 days, he: (1) paid the balance, (2) set up a payment plan, or (3) sent evidence to Collection's address or email that supported his belief that the debt was not past due or legally enforceable because it is not based on fraud or on failure to report earnings. The notice was not deficient.

Next, Weisman argued below and the trial court found that the January 15 email "clearly" asserted that the debt was not based on fraud or a failure to report earnings. Weisman contends that by failing to consider the January 15 email, ESD violated both 26 U.S.C. § 6402(f)(3) and 31 C.F.R. 285.8(c)(3) by refusing to consider "any" evidence. Weisman argues, and the trial court agreed, that his assertion alone should be sufficient

for consideration without having to submit additional documentation. ESD argues that a general denial without more is not evidence.

However, we need not resolve whether a general assertion is sufficient to trigger ESD's consideration and evaluation of whether the debt was legally enforceable through the offset program. This is because, contrary to the trial court's oral findings, Weisman did not clearly assert in his January 15 email that the debt was not based on failure to report earnings.

Instead, he stated that he did not commit fraud or any "intentional misrepresentation," but admitted that the ESD web-based program was not suited to the SharedWork claims and it was possible he may have checked a wrong box. It is evident from the January 15 email that Weisman indicated the overpayment may have resulted by mistakenly underreporting his earnings because of a confusing reporting system. But questioning why he may have underreported his earnings is not equivalent to submitting evidence that the debt was not based on his failure to report earnings. Thus, we agree with ESD that it did not consider any evidence because there was no evidence to consider. Weisman did not send evidence that he paid the debt, did not arrange for payment of the debt, and, though he denied that the debt was based on fraud, he did not claim that the debt was not based on failure to report earnings.

Even if it could be argued that the January 15 email suggested that Weisman claimed the debt was not based on his failure to report earnings, the record established that Collections did consider the email. This consideration is evident by ESD resending Weisman the overpayment determination letters in response to his January 15 email. The overpayment determination letters explicitly told Weisman that the reason for the

ESD action was because "[y]ou didn't report your gross earnings when you submitted your weekly claim." The letters also explicitly laid out the benefits that ESD paid him, the amount to which he was entitled, and the amount he was overpaid. This suggests that Collections did consider the email, researched its own records, and confirmed the debt was based on Weisman's failure to report earnings. We observe that at the time Weisman sent his January 15 email, he was already aware that ESD investigated why Weisman only initially reported 8 hours of holiday pay the week ending July 4, and 8 hours of sick pay the week ending July 25, and that Weisman confirmed with ESD that he had been paid to work 32 hours each of those weeks.

Moreover, Weisman's email was not evidence that his debt was not legally enforceable. It was merely a request to cancel his debt because he had "heard" ESD was doing that for others.

We therefore conclude ESD did not violate 26 U.S.C. § 6402(f)(3) or 31 C.F.R. 285.8(c)(3).

Weisman also asserts that his due process was violated when Collections staff misdirected him to a forum without jurisdiction to consider an appeal of the intercept notice. We disagree.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation of a protected interest. State v. Beaver, 184 Wn. App. 235, 246, 336 P.3d 654 (2014). The notice must be "'reasonably calculated, under all the circumstances, to apprise interested

parties of the pendency of the action and afford them an opportunity to present their objections.'" State v Nelson, 158 Wn.2d 699, 703, 147 P.3d 553 (2006) (internal quotation marks omitted) (quoting Jones v. Flowers, 547 U.S. 220, 226, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006)).

The question is whether ESD provided Weisman proper notice and an opportunity to be heard prior to intercepting his tax refund. Weisman's focus only on the intercept notice ignores the fact that by the time the debt was eligible for the intercept program it was already a final debt under the law. He cannot assert a due process violation and have us ignore the other notices he received and opportunities he was given prior to the debt becoming final.

Congress recognized that the determination as to whether a covered unemployment compensation debt is final is under state law, not the federal offset statute, which defines "covered unemployment compensation debt" as

> a past-due debt for erroneous payment of unemployment compensation due to fraud or the person's failure to report earnings which has become *final under the law of a State* certified by the Secretary of Labor pursuant to section 3304 and which remains uncollected.

26 U.S.C. § 6402(f)(4)(A) (emphasis added). Weisman's debt was a covered unemployment debt because it was a debt that became final under Washington law. The Employment Security Act, chapter 50.32 RCW, and the Administrative Procedure Act (APA), chapter 34.05 RCW, provide the procedure to contest an unemployment benefits determination. If a claimant fails to appeal a benefits determination within 30 days, it is "conclusively deemed to be correct" and therefore final under Washington law. RCW 50.32.020.

When claimants timely appeal an overpayment, they can have a hearing on both the amount of the overpayment and the reason for overpayment. WAC 192-220-060(1)(a), (b). If a claimant files an appeal after the 30-day deadline, an appeal tribunal can waive limitations for good cause shown. RCW 50.32.075.

Before ESD intercepted Weisman's property, ESD investigated whether he did not report his earnings. ESD sent Weisman a claims correction form and fact-finding form when ESD first learned of a discrepancy between the earnings Weisman initially reported and what his employer reported. In the fact-finding form, Weisman was told that if an overpayment was not his fault he could request a waiver, and if the waiver was approved, Weisman would not have to pay ESD back. ESD interviewed Weisman over the telephone about the discrepancies and gave him another opportunity to explain. ESD confirmed with Weisman that he did not correctly report his earnings. ESD sent overpayment determination letters explaining the calculation of the overpayment and how to appeal if he disagreed. These letters specified that if he did not pay ESD back, his income tax refund could be withheld. ESD then sent the intercept notice informing him the limited ways he could avoid the offset, including submitting evidence within 60 days to be considered by Collections. When Weisman emailed Collections asserting that he was confused and wanted ESD to cancel his debt, ESD again provided the overpayment determination letters telling him how to appeal them. Weisman did file an appeal and was given an administrative hearing. At the hearing, he asserted that he did not want to challenge the overpayment determination letters even though he had the opportunity to show good cause for filing the appeal late. Collections did not misdirect Weisman in the appeal process.

In light of the above, ESD provided Weisman with proper notice and a meaningful opportunity to be heard before intercepting his tax refund.

Attorney Fees

Weisman requests attorney fees under 42 U.S.C. § 1983, which allows for reasonable attorney fees for certain constitutional claims if he prevails. Because we reverse, we deny his request.[7]

CONCLUSION

Because ESD followed federal offset law and did not violate Weisman's procedural due process rights, we reverse the trial court's order on Weisman's motion for partial summary judgment and remand for further proceedings consistent with this opinion.[8]

Coburn, J.

WE CONCUR:

Díaz, J.

Smith, C.J.

[7] The parties dispute whether a showing of prejudice is required to award damages. Weisman correctly argues that nominal damages are available when there is a procedural due process violation even if compensatory damages are unavailable. See Carey v. Piphus, 435 U.S. 247, 266, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978); Frudden v. Pilling, 877 F.3d 821, 830 (9th Cir 2017). Because we hold that ESD did not deny Weisman due process, we need not address prejudice.

[8] ESD asks that we consider its request to grant summary judgment in its favor and dismiss the case in its entirety, a request it also made below. However, the issue before us was the granting of a partial summary judgment and Weisman contends there are issues raised in the complaint that were not part of this motion. ESD does not dispute this characterization of Weisman's claims. Thus, we decline ESD's invitation to dismiss the case in its entirety.

APPENDIX B

FILED
5/10/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHAEL WEISMAN,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT SECURITY; and CAMI FEEK, Commissioner of the Washington State Department of Employment Security, in her official capacity,

Appellants.

No. 83893-8

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Michael Weisman, having filed a motion for reconsideration herein of the opinion filed April 10, 2023, and a majority of the panel having determined the motion should be denied; now, therefore, it is hereby

ORDERED the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Coburn, J.

APPENDIX C

FILED
6/5/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHAEL WEISMAN,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT SECURITY; and CAMI FEEK, Commissioner of the Washington State Department of Employment Security, in her official capacity,

Appellants.

No. 83893-8-I

ORDER DENYING MOTION TO PUBLISH, WITHDRAWING OPINION, AND SUBSTITUTING OPINION

The appellants, Washington State Department of Employment Security, and non-party, Igor Lukashin, both filed a motion to publish the opinion dated April 10, 2023. Respondent Michael Weisman has responded. Following consideration of the motions, the panel has determined the motions should be denied.

Now, therefore it is hereby

ORDERED that the motion to publish is denied; and it is further

ORDERED that the opinion filed on April 10, 2023 is withdrawn; and it is further

ORDERED that a substitute opinion shall be filed.

Colum, J.

Díaz, J.

Smith, C.J.

APPENDIX D

FILED
6/5/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL WEISMAN,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT SECURITY; and CAMI FEEK, Commissioner of the Washington State Department of Employment Security, in her official capacity,

Appellants.

No. 83893-8-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — The Washington State Department of Employment Security (ESD) determined that Michael Weisman, a state employee, underreported the hours he worked for two weeks resulting in an overpayment of unemployment insurance benefits (UB) for which he was eligible to cover his furloughed time. ESD notified Weisman that he was overpaid, that he was liable for the overpayment and, unless he paid the debt, his tax refund could be intercepted to offset his debt. Weisman did not timely appeal the overpayment determinations, but also did not pay his debt. After ESD sent Weisman a notice of intent to intercept his tax refund, Weisman eventually filed a complaint in superior court. The court granted Weisman's motion for partial summary judgment determining that his procedural due process rights were violated because ESD did not follow federal offset law before intercepting his tax refund. ESD contends

that it did in fact follow federal offset law and provided Weisman proper notice and meaningful opportunity to be heard prior to intercepting his tax refund. We agree with ESD. Accordingly, we reverse and remand.

FACTS

The following facts are not in dispute. Michael Weisman was a staff attorney for the Washington State Department of Health (DOH), and he usually worked 40 hours a week. In June 2020, following the inception of the COVID-19 pandemic, Weisman applied for unemployment insurance benefits (UB) through an approved SharedWork plan between the ESD and DOH. SharedWork benefits are unemployment benefits intended for employees whose hours have been reduced by 10 to 50 percent. RCW 50.60.030(3). DOH required SharedWork claimants to apply for unemployment benefits each week. A SharedWork claimant is paid partial UB based on the percentage of lost work from a given work week multiplied by the individual's weekly benefit amount.

During the 7 weeks Weisman participated in the program, his employer reduced his usual 40 hours a week by 20 percent, and he worked 32 hours a week. Based on his earnings, his regular weekly benefit amount was $790 in UB. Based on that amount, he was entitled to 20 percent of that amount, or $158 in UB weekly.[1]

For the week ending July 4, Weisman reported receiving 8 hours of holiday pay and did not work any regular hours, when, in fact, he had worked 32 hours that week. Based on his report of only receiving 8 hours of holiday pay, ESD paid Weisman $790, his regular weekly UB amount instead of $158, resulting in a $632 overpayment. The

[1] Weisman also was eligible to receive up to $600 each week in benefits through the Federal Pandemic Unemployment Compensation (FPUC) program until the end of July 2020. ESD never requested a return of any FPUC dollars, which are not at issue in this appeal.

next 2 weeks, Weisman reported working 32 hours each week and was paid the $158 in UB each of those weeks.

During the week ending July 25, Weisman reported that he received 8 hours of sick pay and did not work for his employer that week, when in fact he had worked 32 hours that week. The report of only receiving 8 hours of sick pay resulted in a calculation of Weisman being entitled to the $790 regular weekly UB. But according to ESD, it paid Weisman $519[2] in UB, resulting in a $361 overpayment for that week because he should only have received the $158. In total, ESD overpaid Weisman $993 for both weeks.

In the end of July 2020, ESD sent Weisman a fact-finding letter notifying him that ESD had received information that he may have worked and received pay for at least one day between July 19 and July 25 from DOH. The letter asked him to answer several questions so that ESD can decide whether it can pay or continue to pay him UB. The letter notified Weisman that ESD may have already paid him in unemployment benefits and that if ESD had paid him too much and it was his fault, he would have to pay it back. The letter warned Weisman that if he did not pay back the overpayment, ESD could take money from his federal income-tax refund. The letter also informed Weisman "[i]f you had an overpayment and it was not your fault, you can request a waiver. If we approve your request, you won't have to pay us back." Nothing in the record indicates that Weisman requested a waiver.

[2] There is no explanation in the record why ESD paid $519 instead of the calculated $790 for week ending July 25 based on his report of getting paid only 8 hours of sick leave. Regardless, based on Weisman working 32 hours, he was only entitled to the $158 UB.

On August 5, Weisman signed an ESD weekly correction form where he agreed with DOH's reporting that he worked 32 hours for the week ending July 4. Weisman checked the box indicating, "I agree with the information my employer reported. I understand if I was overpaid I am liable for repayment."

Two days later, Weisman signed and submitted the fact-finding letter regarding week ending July 25. In the letter Weisman agreed that he had worked 32 hours and was furloughed for the other 8 hours that week.

On September 24, an ESD representative interviewed Weisman by telephone regarding his claims for week ending July 4 and July 25. Weisman explained that he was confused about the system and misunderstood the website. He confirmed that he had been paid to work 32 hours each of the weeks.

ESD then sent Weisman several overpayment determination letters. The first letter dated September 24 notified Weisman that he owed $519 to ESD because it had overpaid him $519 for the week ending July 25 when he was entitled to $0 UB. The next letter dated September 25 notified Weisman that he owed ESD $632 for the week ending July 4 because it had paid him $790 UB when he was entitled to $158. The third letter dated October 22 replaced the earlier letter about week ending July 25. It notified Weisman that he owed ESD $361 because it had paid him $519 in UB when he was actually entitled to $158.

Besides the difference in the amounts owed, paid, and the relevant weeks in question, the substance of the letters were the same. The letters explained how Weisman could make payment if he agreed with the decision and how he could appeal if he disagreed. It gave him a specific 30-day deadline to appeal and warned him that if

he failed to make payments on time ESD could garnish his wages or bank accounts, or withhold his income tax refund.

Because Weisman did not pay the debts or timely appeal, ESD sent Weisman a "Notice of Intent to Intercept Federal (IRS) Income Tax Refund" (intercept notice) on November 28. The notice informed Weisman that in order to avoid the offset of his tax refund to repay ESD, he had 60 days to: (1) pay the overpayment balance; (2) arrange an acceptable written payment plan; or (3) send evidence to support why he believed all or part of the debt was "not past due or legally enforceable under the Treasury Offset Program because it is not based on fraud or on your failure to report earnings."[3] The intercept notice directed that the supporting evidence must be sent to the provided address or email for Employment Security Collections (Collections). The notice also told Weisman to call or email collections if he had any questions.

On January 15, 2021, Weisman sent Collections an email addressing his concerns and asking ESD to cancel his overpayment determinations. He wrote,

> I am writing to find out what is going on with my claim, and why I received an overpayment letter.
>
> I am a state employee and was directed to file [UB] claims when we were furloughed 1 day each week in June and July, and again in late August/September under the Shared Work program. We were to receive full compensation for our lost wages plus $600/wk. So I did as we were directed. By my calculations I was underpaid, but whatever, it was something.
>
> Then I received a letter telling me I was overpaid. There was no explanation in the letter. There is no explanation how it was calculated in the letter or on the ESD web site. Or at least, I was unable to find any

[3] The intercept notice also informed Weisman that he could file IRS Form 8379, Injured Spouse Claim and Allocation, with his tax return. It further notified him that if he filed for bankruptcy, he would not be subject to offset while an automatic stay is in effect. ESD asked to be notified of such a stay by sending evidence concerning the bankruptcy.

> explanation. It was difficult for me to find out what I was paid, or not paid, or why. There are simply no answers.
>
> One day, out of the blue, I received a call from an adjudicator. This person was speaking very fast and seemed to be quite excited and upset. She kept accusing me of fraud. She was unable to explain what I had done wrong, and I of course denied the allegations. I never committed any fraud. I'll admit, however, the ESD web-based program is not suited to the Shared Work claims and its possible I may have checked a wrong box, but I honestly just don't know. I was never offered any explanation, it does not appear on the web site, and it is not in any of the letters I received.
>
> I have heard on the news recently that ESD has the discretion to cancel repayments where there is no evidence of fraud. I am requesting cancellation of my overpayment determination. I am unable to appeal because ESD never provided me with any determination that I could appeal, because there was no calculation or explanation. I have not committed any fraud or any intentional misrepresentation.

That same day, Collections generated an automatic reply email explaining that COVID-19 pandemic has caused high workloads and slowed response times to about 15-20 business days. The email also stated,

> You do not owe us any money as a result of a fraudulent claim
> You might have received a letter from us saying that you must repay benefits (called an overpayment) that we paid on the fraudulent claim in your name. You can ignore that letter! Our computer system automatically generates the letter when we deny an unemployment application. We're sorry for the anxiety it may have caused. We understand that these letters can be scary.
>
> You might still owe money for an overpayment on a legitimate claim you filed with us in the past or the future. Please respond to any requests for information we might send you about it.

Collections responded to Weisman on January 21 and provided him copies of the original determination letters that explained his overpayment and to call the claim center if he needed further explanation. The email also stated that, "[i]f you disagree with the overpayment you must file an appeal." It provided instructions on how to appeal through the ESD website. The email further alerted Weisman that his balance "is now

active in collections. Even if you are going to file an appeal you must make payment every 30 days to avoid garnishment. Also you are responsible for any penalty or interest that accrues. . ."

By January 27, 60 days after ESD issued the intercept notice, Weisman had not resolved his account to prevent the offset.

On January 28, Weisman responded to ESD's email, stating,

> The determination letters you sent state that I did not enter my gross earnings on 2 different weeks. I did enter my gross earnings on each of those weeks. I remember doing this, of course. But further evidence is that I received [unemployment insurance] payments for those weeks.

ESD replied the same day referencing its previous email and reaffirming that if he disagreed with the overpayment and he is not able to file an appeal via eServices, he could write a letter and mail or fax it to the Appeal Unit.

On January 29, because the debt satisfied the criteria for the Federal Treasury Offset Program, ESD's computer system automatically referred Weisman's debt to financial management services, which administers the Treasury Offset Program. That same day, Weisman filed an appeal of the October 22, 2020 ESD determination letter. In his explanation of why he disagreed with the determination, he wrote,

> I received determination letters that made no sense, they were inaccurate, and they were wrong. I DID provide the ESD with all the information required for my claim, for both of the weeks mentioned in the letters. I am a state employee in the SharedWork program. I filled out timesheets from my employer, Department of Health each week. That information was supposed to be shared with ESD. The letters I received kept changing the determination, and I waited for ESD to catch the error and fix the problem. But that never happened.
>
> . . . .
>
> I heard on the news that ESD was not going to seek collection of overpayments that were no fault of the claimant. But I did not find any way

> to contact ESD about this. I wrote, I called but the phone lines are now closed.
>
> I would like the collections on my claim cancelled and my claim determined to be correct. If ESD needs new information from me, I would like clear communication of what ESD needs and how I can provide it. Just let me know what you need.

In May 2021, Weisman's tax return was intercepted to pay the balance of his debt to ESD.

An administrative hearing was held on August 11. According to the Administrative Law Judge's (ALJ) findings, Weisman maintained he was not appealing the October 22 determination letter and denied filing the appeal dated January 29. The ALJ noted that under RCW 50.32.075, the 30-day deadline for an appeal may be waived if good cause for the late-filed appeal is shown, but concluded that because Weisman did not believe he had even filed a request for an appeal on January 29 there was no basis or ability to determine whether or not there was good cause to hear the appeal. The ALJ dismissed the appeal as untimely.[4] Weisman appealed to an ESD commissioner, who observed that Weisman sought recourse from the intercept letter and requested a default order be issued against ESD and wanted a hearing regarding damages. The commissioner observed,

> Given the claimant's contention that "money" has been wrongfully withheld from him, it is somewhat puzzling that, when provided the opportunity, he chose not to proceed with appeal of the October 22, 2020, Determination of overpayment. (Regarding timeliness: The claimant's testimony that he did not receive the Determination would generally provide good cause for a late filed appeal.)

The commissioner affirmed the dismissal by the ALJ. Weisman petitioned for judicial review of that decision under the Administrative Procedures Act. About two weeks later

[4] The transcript for the administrative hearing is not contained in the record. Though Weisman petitioned judicial review of the commissioners ruling, that ruling is not part of this appeal.

he also brought suit against ESD in King County Superior Court under 42 U.S.C. § 1983, alleging that ESD intercepted his federal tax refund in violation of 26 U.S.C. § 6402(f)(3), 31 C.F.R. § 285.8(c)(3), and his due process rights under the Fourteenth Amendment to the U.S. Constitution were violated. He sought an injunction and declaratory relief requiring ESD to return his tax refund, enjoining ESD from intercepting his future tax refunds, and requiring ESD to adopt, amend, or rescind rules necessary to ensure compliance with federal law and due process. The court denied Weisman's motion to consolidate his petition and complaint, but linked the cases and assigned them to the same superior court judge.

Weisman moved for partial summary judgment of its complaint, arguing that ESD did not have established procedures to consider challenges to intercepts and did not allow him 60 days to present evidence before the intercept occurred. Weisman also argued that ESD violated due process by not considering evidence he submitted before the intercept took place. ESD rebutted these arguments and asked the court in ESD's response motion to grant summary judgment in its favor and dismiss the complaint in its entirety. The court granted Weisman's partial summary judgment motion finding that ESD's intercept of Weisman's tax refund violated 26 U.S.C. § 6402(f)(3), 31 C.F.R. 285.8(c)(3), and the due process clause of the Fourteenth Amendment. The court did not enter any written findings of fact, but explained orally that Weisman "very clearly" said in his January 15 email to Collections that he did not commit fraud or failed to report, the two bases for the intercept process. The court also found that the intercept notice was deficient for not describing the type of evidence that would satisfy its internal

regulations. The court also found that ESD failed to provide Weisman meaningful review by not considering his January 15 email as evidence.

The court ordered ESD to return $1,043.66 of Weisman's tax refund. A commissioner of this court granted ESD's motion for discretionary review.

DISCUSSION

This court reviews summary judgment orders de novo. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Keck, 184 Wn.2d at 370-71.

For the first time on appeal, Weisman argues that ESD can only intercept a tax refund when the failure to report earnings is *intentional* or involves misconduct.[5] Generally, we will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). Nevertheless, even if we were to consider this argument, the plain language of the statute contradicts Weisman's argument.

Federal law allows states to use the treasury department intercept process to satisfy a "covered unemployment compensation debt." 26 U.S.C. § 6402(f)(4). A covered unemployment compensation debt is a "past-due debt for erroneous payment of unemployment compensation due to *fraud or the person's failure to report earnings*

[5] At oral argument Weisman maintained that he did raise this argument below. Wash. Court of Appeals oral argument, Weisman v. Dep't of Emp. Sec., No. 83893-8-I (March 7, 2023), *video recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2023031229/?eventID=2023031229. A review of the record contradicts this claim. While Weisman may have argued below that he did not intentionally fail to report earnings, that is distinct from arguing that the offset laws requires the failure to report earnings to be intentional or involve misconduct.

which has become final under the law of a State . . . and which remains uncollected." 26 U.S.C. § 6402(f)(4)(A) (emphasis added). In cases of statutory interpretation, this court looks first to the plain language of the statute to discern the legislature's intent. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The plain language of the statute provides that covered unemployment debt includes past-due debts due to the misconduct of fraud or when someone simply fails to report earnings. There is no requirement that the debtor engaged in misconduct when failing to report earnings or intentionally did so.[6]

We now consider whether ESD violated 26 U.S.C. § 6402(f)(3) and 31 C.F.R. 285.8(c)(3). 31 C.F.R. § 285.8(c)(3) provides the following:

> (i) Advance notification to the debtor of the State's intent to collect by Federal tax refund offset. The State is required to provide a written notification to the debtor informing the debtor that the State intends to refer the debt for collection by tax refund offset. The notice must give the debtor at least 60 days to present evidence, in accordance with procedures established by the State, that all or part of the debt is not past due or not legally enforceable, or, in the case of a covered unemployment compensation debt, the debt is not due to fraud or the debtor's failure to report earnings…
>
> . . .
>
> (ii) Determination. The State must, in accordance with procedures

[6] A Department of Labor's (DOL) March 8, 2011 advisory letter to state workforce agencies explained that the treasury offset program "may now be used to collect erroneous payments that are either due to fraud or to the persons' failure to report earnings, even if the state does not find that such failure constituted fraud." U.S. Dep't of Lab., Emp't & Training Admin. Advisory Sys., Unemployment Insurance Program Letter No. 11-11, at 2 (Mar. 8, 2011), https://wdr.doleta.gov/directives/attach/UIPL/UIPL11-11.pdf. Again in DOL's 2018 advisory to state workforce agencies, DOL stated that workforce agencies must use the treasury offset program "to collect erroneous payments made to [unemployment compensation] claimants that are due to fraud or to the person's failure to report earnings. This is true *even if the state does not find that the failure to report earnings constituted fraud*." U.S. Dep't of Lab., Emp't & Training Admin. Advisory Sys., Unemployment Insurance Program Letter No. 02-19, at 2 (Dec. 12, 2018) https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2018/UIPL_2-19_Acc.pdf.

> established by the State, consider any evidence presented by a debtor in response to the notice described in paragraph (c)(3)(i) of this section and determine whether an amount of such debt is past due and legally enforceable and, in the case of a covered unemployment compensation debt, the debt is due to fraud or the debtor's failure to report earnings....

Under 26 U.S.C. § 6402(f)(3), a State may not seize a federal tax refund until it provides the debtor "at least 60 days to present evidence that all or part of such liability is not legally enforceable or is not a covered unemployment compensation debt" and "considers any evidence presented by such person. . ." ESD fulfilled the notice requirements and correctly referred the debt to the treasury offset program. ESD sent Weisman the intercept notice on November 28, 2020, and did not submit Weisman's debt to the offset program until January 29, 2021, which was 62 days later. The notice expressly notified Weisman of the limited ways he could avoid offset by acting within 60 days from the date of the notice, including the following:

> If you believe all or a part of the debt is not past due or legally enforceable under the Treasury Offset Program because it is not based on fraud or on your failure to report earnings, you must send evidence to support your position to the address or email below. We will inform you of our decision about your debt.

Weisman asserts that ESD's notice of intercept was deficient because it did not describe what type of evidence it would accept. Weisman cites to ESD's internal manual to support his claim that ESD will only consider documentation of full payment. However, in describing what the claimant can do to challenge the tax intercept, the manual states a claimant can:

> 3. Prove the debt is:
>
> a. not past due; or
> b. legally enforceable because it is not based on fraud; or
> c. their failure to report earnings.

> Proof must be documentation such as an ESC billing that reflects the [debts] are paid in full. This is not an "appeal" such as a claimant would file during the appeal period. This is merely a review of their proof for these specific situations listed. ESC will inform the client of our decision about their debt.

The manual provides that presenting documentation that reflects the debt is paid in full is one way to show a debt is not past due. It does not suggest that the only acceptable evidence to challenge whether a debt is based on a failure to report earnings is proof of full payment of the debt. The fact that the intercept notice did not define what type of "evidence" is acceptable, is to Weisman's benefit, not detriment. This allowed him to submit what he believed to be evidence for consideration by ESD.

The offset program allows states to establish its own procedures on how a debtor may present evidence. 31 C.F.R. § 285.8(c)(3) ("The notice must give the debtor at least 60 days to present evidence, in accordance with procedures established by the State"). ESD's intercept notice warned Weisman that ESD intended to collect through a federal tax-refund offset. It further explained that Weisman could avoid offset if, within 60 days, he: (1) paid the balance, (2) set up a payment plan, or (3) sent evidence to Collection's address or email that supported his belief that the debt was not past due or legally enforceable because it is not based on fraud or on failure to report earnings. The notice was not deficient.

Next, Weisman argued below and the trial court found that the January 15 email "clearly" asserted that the debt was not based on fraud or a failure to report earnings. Weisman contends that by failing to consider the January 15 email, ESD violated both 26 U.S.C. § 6402(f)(3) and 31 C.F.R. 285.8(c)(3) by refusing to consider "any" evidence. Weisman argues, and the trial court agreed, that his assertion alone should be sufficient

for consideration without having to submit additional documentation. ESD argues that a general denial without more is not evidence.

However, we need not resolve whether a general assertion is sufficient to trigger ESD's consideration and evaluation of whether the debt was legally enforceable through the offset program. This is because, contrary to the trial court's oral findings, Weisman did not clearly assert in his January 15 email that the debt was not based on failure to report earnings.

Instead, he stated that he did not commit fraud or any "intentional misrepresentation," but admitted that the ESD web-based program was not suited to the SharedWork claims and it was possible he may have checked a wrong box. It is evident from the January 15 email that Weisman indicated the overpayment may have resulted by mistakenly underreporting his earnings because of a confusing reporting system. But questioning why he may have underreported his earnings is not equivalent to submitting evidence that the debt was not based on his failure to report earnings. Thus, we agree with ESD that it did not consider any evidence because there was no evidence to consider. Weisman did not send evidence that he paid the debt, did not arrange for payment of the debt, and, though he denied that the debt was based on fraud, he did not claim that the debt was not based on failure to report earnings.

Even if it could be argued that the January 15 email suggested that Weisman claimed the debt was not based on his failure to report earnings, the record established that Collections did consider the email. This consideration is evident by ESD resending Weisman the overpayment determination letters in response to his January 15 email. The overpayment determination letters explicitly told Weisman that the reason for the

ESD action was because "[y]ou didn't report your gross earnings when you submitted your weekly claim." The letters also explicitly laid out the benefits that ESD paid him, the amount to which he was entitled, and the amount he was overpaid. This suggests that Collections did consider the email, researched its own records, and confirmed the debt was based on Weisman's failure to report earnings. We observe that at the time Weisman sent his January 15 email, he was already aware that ESD investigated why Weisman only initially reported 8 hours of holiday pay the week ending July 4, and 8 hours of sick pay the week ending July 25, and that Weisman confirmed with ESD that he had been paid to work 32 hours each of those weeks.

Moreover, Weisman's email was not evidence that his debt was not legally enforceable. It was merely a request to cancel his debt because he had "heard" ESD was doing that for others.

We therefore conclude ESD did not violate 26 U.S.C. § 6402(f)(3) or 31 C.F.R. 285.8(c)(3).

Weisman also asserts that his due process was violated when Collections staff misdirected him to a forum without jurisdiction to consider an appeal of the intercept notice. We disagree.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation of a protected interest. State v. Beaver, 184 Wn. App. 235, 246, 336 P.3d 654 (2014). The notice must be "'reasonably calculated, under all the circumstances, to apprise interested

parties of the pendency of the action and afford them an opportunity to present their objections.'" State v Nelson, 158 Wn.2d 699, 703, 147 P.3d 553 (2006) (internal quotation marks omitted) (quoting Jones v. Flowers, 547 U.S. 220, 226, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006)).

The question is whether ESD provided Weisman proper notice and an opportunity to be heard prior to intercepting his tax refund. Weisman's focus only on the intercept notice ignores the fact that by the time the debt was eligible for the intercept program it was already a final debt under the law. He cannot assert a due process violation and have us ignore the other notices he received and opportunities he was given prior to the debt becoming final.

Congress recognized that the determination as to whether a covered unemployment compensation debt is final is under state law, not the federal offset statute, which defines "covered unemployment compensation debt" as

> a past-due debt for erroneous payment of unemployment compensation due to fraud or the person's failure to report earnings which has become *final under the law of a State* certified by the Secretary of Labor pursuant to section 3304 and which remains uncollected.

26 U.S.C. § 6402(f)(4)(A) (emphasis added). Weisman's debt was a covered unemployment debt because it was a debt that became final under Washington law. The Employment Security Act, chapter 50.32 RCW, and the Administrative Procedure Act (APA), chapter 34.05 RCW, provide the procedure to contest an unemployment benefits determination. If a claimant fails to appeal a benefits determination within 30 days, it is "conclusively deemed to be correct" and therefore final under Washington law. RCW 50.32.020.

When claimants timely appeal an overpayment, they can have a hearing on both the amount of the overpayment and the reason for overpayment. WAC 192-220-060(1)(a), (b). If a claimant files an appeal after the 30-day deadline, an appeal tribunal can waive limitations for good cause shown. RCW 50.32.075.

Before ESD intercepted Weisman's property, ESD investigated whether he did not report his earnings. ESD sent Weisman a claims correction form and fact-finding form when ESD first learned of a discrepancy between the earnings Weisman initially reported and what his employer reported. In the fact-finding form, Weisman was told that if an overpayment was not his fault he could request a waiver, and if the waiver was approved, Weisman would not have to pay ESD back. ESD interviewed Weisman over the telephone about the discrepancies and gave him another opportunity to explain. ESD confirmed with Weisman that he did not correctly report his earnings. ESD sent overpayment determination letters explaining the calculation of the overpayment and how to appeal if he disagreed. These letters specified that if he did not pay ESD back, his income tax refund could be withheld. ESD then sent the intercept notice informing him the limited ways he could avoid the offset, including submitting evidence within 60 days to be considered by Collections. When Weisman emailed Collections asserting that he was confused and wanted ESD to cancel his debt, ESD again provided the overpayment determination letters telling him how to appeal them. Weisman did file an appeal and was given an administrative hearing. At the hearing, he asserted that he did not want to challenge the overpayment determination letters even though he had the opportunity to show good cause for filing the appeal late. Collections did not misdirect Weisman in the appeal process.

In light of the above, ESD provided Weisman with proper notice and a meaningful opportunity to be heard before intercepting his tax refund.

Attorney Fees

Weisman requests attorney fees under 42 U.S.C. § 1983, which allows for reasonable attorney fees for certain constitutional claims if he prevails. Because we reverse, we deny his request.[7]

CONCLUSION

Because ESD followed federal offset law and did not violate Weisman's procedural due process rights, we reverse the trial court's order on Weisman's motion for partial summary judgment and remand for further proceedings consistent with this opinion.[8]

Coburn, J.

WE CONCUR:

Díaz, J.

Smith, C.J.

[7] The parties dispute whether a showing of prejudice is required to award damages. Weisman correctly argues that nominal damages are available when there is a procedural due process violation even if compensatory damages are unavailable. See Carey v. Piphus, 435 U.S. 247, 266, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978); Frudden v. Pilling, 877 F.3d 821, 830 (9th Cir 2017). Because we hold that ESD did not deny Weisman due process, we need not address prejudice.

[8] ESD asks that we consider its request to grant summary judgment in its favor and dismiss the case in its entirety, a request it also made below. However, the issue before us was the granting of a partial summary judgment and Weisman contends there are issues raised in the complaint that were not part of this motion. ESD does not dispute this characterization of Weisman's claims. Thus, we decline ESD's invitation to dismiss the case in its entirety.

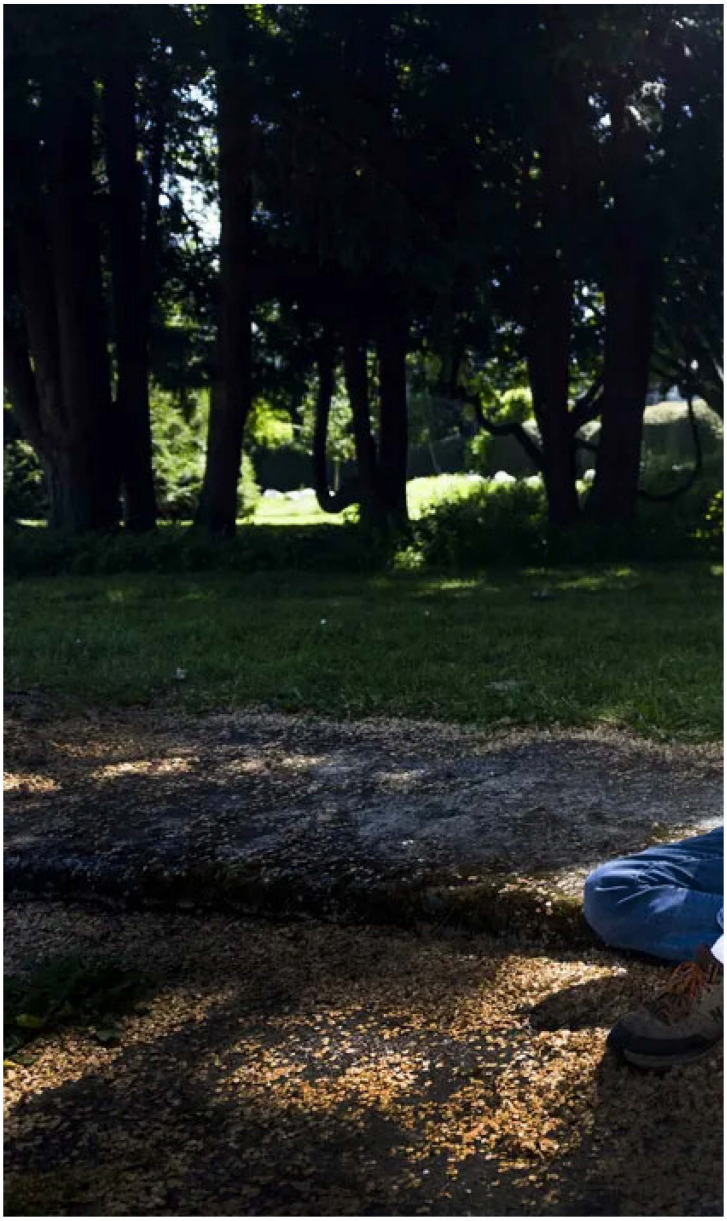
APPENDIX E

Business

The Seattle Times

Thousands of WA workers remain trapped in unemployment overpayments

June 2, 2023 at 7:48 pm



David Ullman, photographed at Martha Washington Park in Seattle on Friday, June 2, 2023, is mired in a dispute with the Employment Security Department over benefit overpayments. Roughly 115,000 who ESD says were overpaid in... (Daniel Kim / The Seattle Times) **More**

By Paul Roberts
Seattle Times business reporter

Amid concerns of recession and more layoffs in Washington later this year, the state's unemployment system is still dealing with the burdens of the pandemic.

Workers who file for jobless benefits with the Employment Security Department still aren't getting paid as fast as they were before COVID hit in early 2020. When problems arise, more than half of claimants can't get through to the agency's customer service.

The situation is even more dire for the roughly 115,000 who ESD says were overpaid in benefits during the pandemic and are now being asked to collectively repay roughly $1 billion. Although the ESD said in April that claimants could apply to have those overpayments waived, only 14,000 had applied as of this week — in part, some claimants say, because ESD hasn't done enough to publicize the program.

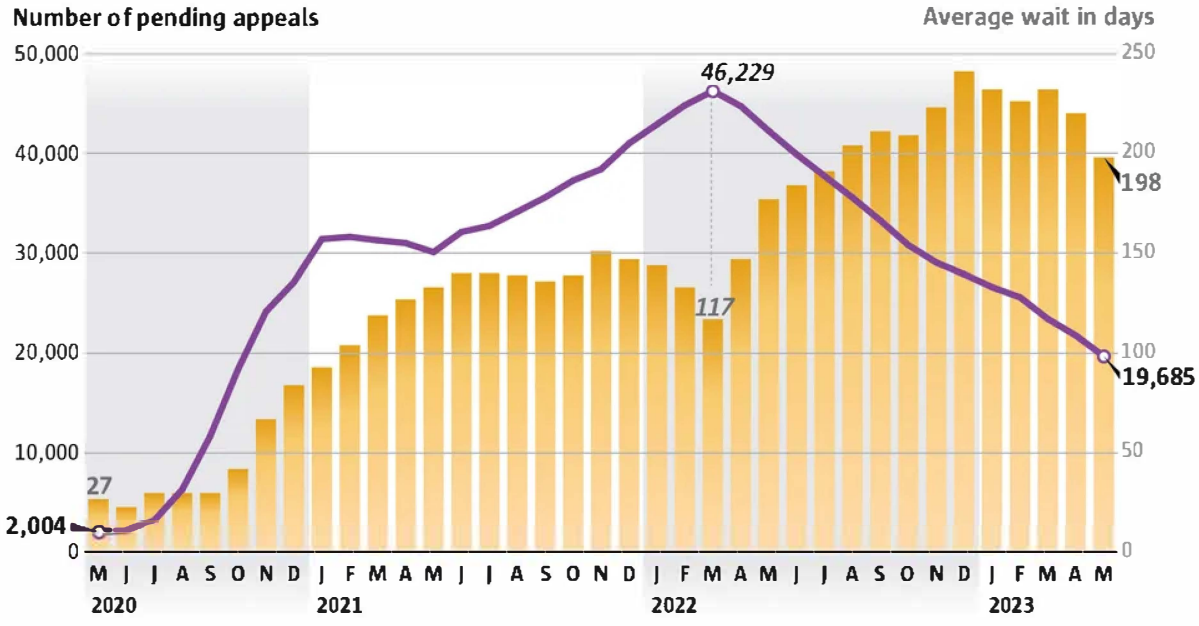
"This was absolutely the first I'd heard about it," said David Ullman, a Mountlake Terrace resident who was notified he must repay around $8,000 in pandemic benefits. Ullman, 46, said he spent months fighting to get the benefits in the first place, only to "get another letter saying that I need to repay the money."

ESD officials say they're stepping up efforts to publicize the waiver program, including a massive email and paper-letter campaign this month. But they're cautioning claimants not to expect quick decisions and warning that, due to the complicated nature of each claimant's case, it may take until next year to resolve the entire backlog.

"Our highest priority is ensuring that we make fair and consistent decisions, so people who qualify get the relief they need," said JR Richards, director of ESD's unemployment insurance customer support division, in an emailed statement Friday.

Slow-motion relief

Washington's unemployment system hopes to waive pandemic overpayment debt for thousands of workers — but is still struggling with massive backlogs, staffing shortages and technical issues.



Source: Washington State Employment Security Department

Reporting by PAUL ROBERTS, graphic by MARK NOWLIN / THE SEATTLE TIMES

Much of ESD's lagging recovery from the pandemic reflects a dramatic fall in its staff and other resources.

Most agency operations are paid for with federal funds, which are indexed to the number of claims the agency receives. Those federal funds soared early in the pandemic, as Washington and other states saw massive layoffs, but they've since dropped off dramatically.

As a result, ESD's customer service staff fell from 964 in late 2021 to just 239 full-time positions now, of which only 200 are filled, agency officials say.

Staffing reductions have also affected call center performance, including long wait times, dropped calls and inexperienced call center workers, according to claimants.

"I couldn't tell you how many times I did speak to [call center staff] who were, like, 'I'm sorry, this is my second day,'" said Eddie Veevaert, a Monroe resident who received benefits after losing his job as a wireless sales manager early in the pandemic, but has since been told to repay more than $50,000.

For the month of April, 41% of incoming calls were answered — the most since September — but 20% were abandoned, also the most since September, according to

data provided by ESD. Average hold times were 34 minutes, down from 39 minutes in January.

Agency officials expect substantial improvement since the April 20 rollout of a new phone system, which allows callers to schedule a callback rather than wait on hold, among other new functions.

The agency has also struggled to quickly pay benefits to new claimants. For example, in April, ESD paid 64% of new claims within 21 days, according to federal data.

While that's a notable improvement over March and February, it's still well behind January 2020, when ESD paid 93% of claims within 21 days despite a claims workload that was 53% larger than in April.

But perhaps the biggest pandemic hangover is the massive overpayments backlog.

Many of these claimants initially qualified for benefits but were later deemed ineligible, for reasons that ranged from failing to provide additional documentation to confusion over the state's often complicated unemployment process, say claimants, agency officials and worker advocates.

Under a 2022 federal policy, ESD can waive debt for many of these claimants, but the waiver process generally requires often-intensive case-by-case review. To pay for that, state lawmakers this year approved nearly $12 million for a dedicated ESD team to process the overpayment caseload.

But even with the funding, questions remain.

Because the new funding isn't available until July, ESD hasn't processed any of the 14,000 waiver applications already received. That's kept ESD officials from being able to estimate what percentage of overpayments they'll ultimately be able to waive.

Rory O'Sullivan, a partner at Seattle-based Washington Employment Benefits Advocates, which represents claimants, said he and others are eager to see the results for the first batch of applications.

"If a high percentage of them are approved, that'll be great," O'Sullivan said. But for those with heavy overpayment debt, and who "were really struggling during the pandemic, and only got by because of the benefits," being denied a waiver could be "really traumatic."

The wait is agonizing for people like Florence Barrett, a Tacoma resident who owes nearly $6,400 in benefit overpayments. Barrett said she applied for a waiver soon after the application process opened in April, but so far, the agency "never even looked at my case."

Those who are denied a waiver can appeal — but they'll face yet another pandemic-related problem: a monthslong wait at the state Office of Administrative Hearings, which handles appeals.

Although the OAH has hired more temporary judges to handle the larger caseload, appellants can still expect to wait around six-and-a-half months for a hearing, down from nearly eight months in December.

Whether the waiver program will generate a new batch of appeals and even longer wait times is impossible to know at this point, said Brendon Tukey, division chief administrative law judge who manages the OAH's unemployment insurance appeals caseload.

But Tukey notes, the possibility of extra appeals and longer wait times was unavoidable, given the state's decision to try to help people with overpayments.

The state "could have avoided that overpayment backlog entirely by just not offering [waivers]," says Tukey.

But "a policy decision was made ... we want to give people a chance for a second bite at a waiver," he says. "And that just takes time."

Coverage of the pandemic's economic impacts is partially underwritten by Microsoft Philanthropies. The Seattle Times maintains editorial control over this and all its coverage.

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Business

The Seattle Times

Thousands of WA workers may have to repay millions of dollars in pandemic benefits

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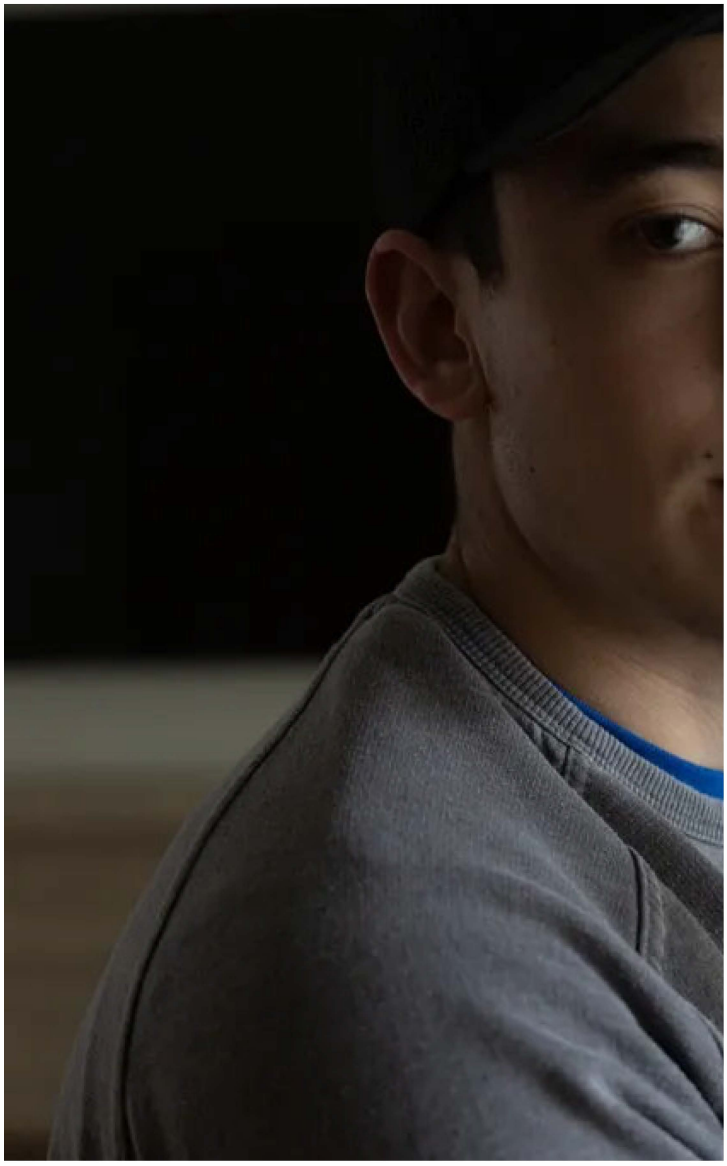

Brendan Dillon, 19, is a college student who collected unemployment insurance early in the pandemic and was then told he needed to repay it. (Kevin Clark / The Seattle Times)

By Paul Roberts

Seattle Times business reporter

For the tens of thousands of Washingtonians being asked to repay more than $1 billion in pandemic unemployment benefits, state plans to cancel some of that debt are getting complicated.

In January, the state Employment Security Department said it will review the cases of around 136,000 Washingtonians collectively on the hook for $1.2 billion in "overpayments," or jobless benefits ESD says they shouldn't have received.

Under a federal waiver program, ESD will be able to cancel some of those overpayment debts, which are often for tens of thousands of dollars, in cases where the overpayment isn't found to be the fault of the claimant. ESD plans to start the review process in late March.

But this week, ESD reset expectations for that relief.

First, only 21,000 or so claimants can count on having their debt waived, the agency said. How many of the remaining 115,000 might be eligible for debt relief or when they'll find out isn't yet clear, in part because ESD is short-staffed and can't count on extra funding for the complicated review process.

That means months of additional stress for people like Brendan Dillon, a Washington State University student with $20,000 in debt for pandemic benefits he got after being laid off from a restaurant in early 2020.

"Twenty-thousand dollars in debt and I'm 19 years old," said the dismayed Bellevue resident.

It's also more stress for Kenneth Moon, 36, a disabled Spanaway resident who faces a $19,000 debt, which he's paying off at $250 a month.

Federal pandemic benefits seemed "perfect for his situation," said Moon's father, Gary, of the jobless claim his son filed in 2020 after COVID-19 temporarily closed the Auburn auto dealer where he worked part time.

"I had no idea that there would come a time when they would say, 'No ... you've got to pay it all back,'" Gary said.

ESD's sprawling overpayment backlog is one of the larger and more painful legacies of federal pandemic policies that churned out billions of dollars in relief during the pandemic's first chaotic months.

Those funds were a lifeline for millions of people in Washington and elsewhere who found themselves jobless. But that rescue came with complicated, shifting eligibility rules that claimants could easily break without knowing.

In some cases, overpayments occurred because ESD retroactively determined that claimants who'd qualified for federal pandemic benefits actually should have been paid state benefits; the agency notified these claimants that they needed to, in effect, reapply for state benefits.

But because the notifications were hard to understand and frequently arrived long after claimants had returned to work, they often were disregarded. That triggered overpayment debts and letters demanding payment, as well as warnings that the claimants could face garnishment of wages and bank accounts, deductions from their tax refunds or lottery winnings, and liens on their property.

"They started hitting me with the overpayment letters" in late 2021, said Shirley Baerg, 66, of Lake Stevens, of her nearly $31,000 in overpayment debt from pandemic benefits. "And then comes the 'Well, if you don't pay this off, we're gonna garnish your income tax [refund] and your bank accounts.'"

Baerg's overpayment was eventually canceled after she appealed her case, but she had to wait a year to get a date with the state Office of Administrative Hearings, which has been swamped by the overpayments issue.

"It took such an emotional toll on me," said Baerg, who at one point was so worried about losing all her savings so close to retirement that she emptied her accounts. "I just didn't want them messing with anything," she says.

Last year, the U.S. Department of Labor tackled the overpayments problem by authorizing states to waive overpayment debt that resulted from a narrow list of circumstances. For example, states can cancel debt if a claimant was eligible for benefits, but was incorrectly paid a higher amount.

Under these "blanket" federal waivers, ESD says it can automatically cancel overpayment debt for about 21,000 claimants, who won't need to take any action.

But sorting the remaining 115,000 claimants requires more time.

One reason is that each of these cases will need to be manually reviewed against other, more complicated criteria.

For example, ESD may waive debt in cases involving a range of "personal factors," such as limited English proficiency, physical or mental health disabilities, homelessness or education level.

Claimants who think they qualify under these criteria will need to request waivers on the agency website. ESD staff will then determine whether claimants qualify, which will likely require "some back and forth with a claimant," says ESD spokesperson Clare DeLong.

That points to another problem: staffing. ESD is currently short-staffed for its normal claims workload, much less for a overpayment backlog equivalent to the population of Everett. Of the agency's 239 customer service positions, 26 are vacant.

ESD has asked for another $11.7 million in state funds for a dedicated 118-person overpayment team. The request, which got the greenlight from the state Office of Budget Management still needs approval in a legislative budget with lots of competing priorities.

Several legislators say they're optimistic the funding will come through. The budget office's approval "certainly makes it easier for us to add it ... without having to fight the governor's office on it," says state Rep. Gerry Pollet, D-Seattle, who has pushed for additional agency funding.

But even if approved, funds won't arrive till July 1 and hiring 118 new staffers won't happen quickly, given the tight job market, says DeLong. In the meantime, ESD will start processing the backlog in late March, after the regular claims volume typically drops off, by reassigning some of its customer service staff.

"ESD is committed to waiving as many overpayments as we can," DeLong said. But the agency is tamping down expectations and cautioning that the waivers won't apply to everyone and won't come quickly.

"I think it's fair to say that it's going to take months to resolve this," DeLong said. "And the fewer resources and staff we have, the longer it'll take."

Many of those in the overpayment backlog may struggle to wait. Even if the debt is eventually canceled and any payments refunded, "making payments on something that they may or may not owe is still really devastating economically," Lexy Salas, a campaign organizer with the labor advocacy group Working Washington.

And after months of failed efforts resolve their overpayments, often with frustrating efforts to reach ESD customer service, "there there's a lot of mistrust from claimants especially when it comes to ESD's administrative abilities," Salas says.

Dillon, the WSU student, agrees.

After trying for months to resolve his $20,000 overpayment issue while also dealing with school and work, he said, "it's hard to be optimistic."

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