

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES  
STATE OF WASHINGTON

In re: Sarah Buel,

Appellant.

Determination of Compliance No. 172-19

OAH Docket No. 04-2019-LI-01054

No. 2020-15-WPA

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the Initial Order served on February 18, 2020, having considered the petition for review filed by the Appellant, Sarah Buel, and the briefing submitted to the Director's Office, and having reviewed the record created at hearing, issues this Director's Order.

The Director makes the following Findings of Fact, Conclusions of Law, and Final Decision and Order.

**I. FINDINGS OF FACT**

1. The Office of Administrative Hearings issued and served the Initial Order on February 18, 2020. The Initial Order affirmed the Department's Determination of Compliance No. 172-19.
2. On March 17, 2020, the Appellant timely filed a petition for review with the Director.
3. The Director adopts and incorporates the Initial Order's findings of facts 4.1 through 4.4 and 4.7 through 4.16.

4. Under Article 8.1 of the collective bargaining agreement, Article 43 is used to determine the “rate of pay” for temporary employees. Article 43.4 states that the salary for Organizer-in-Training, Organizers, and Journey Organizers is considered “full compensation for all hours worked” and that “[a]ny additional compensation for hours worked over 40 in a workweek will be paid in accordance with Article 21.4 — Hours of Work and Overtime for Nonscheduled Staff.” Ex. 22. This provision of the collective bargaining agreement applied to Ms. Buel’s temporary position as an organizer with WFSE.
5. Article 21.4 relates to payment for overtime hours. The section states that “[o]vertime for Organizer-in-Training, Organizer, and Journey Organizer will be compensated at the rate one-half of the annual hourly rate (annual salary/2080 \* .5) for all work assigned by a supervisor above forty (40) hours in one workweek.” Ex. 22. This provision of the collective bargaining agreement applied to Ms. Buel’s temporary position as an organizer with WFSE.
6. WFSE and Ms. Buel mutually understood that Ms. Buel’s hours would fluctuate from week to week and that her fixed salary constituted straight-time pay for all hours of work. They further understood that WFSE would pay Ms. Buel one-half hour’s pay for each hour over 40 in the workweek.
7. The Director adopts and incorporates the Initial Order’s “Issues” statement, the “Order Summary,” and the “Hearing” summary.

## II. CONCLUSIONS OF LAW

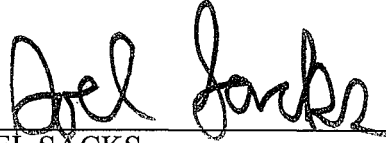
1. Based on Ms. Buel’s timely filed petition for review, there is authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.
2. The Director adopts and incorporates the Initial Order’s Conclusions of Law 5.1 through 5.13 and 5.17 through 5.18.
3. When an employee’s salary compensates them for all hours worked (including those over 40 in a workweek), the employer may use the “fluctuating workweek” method to pay overtime wages. An employee is paid for a “fluctuating workweek” when the employee is paid a fixed salary and it is clearly understood and agreed by both employer and employee that the hours will fluctuate from week to week and that the fixed salary constitutes straight-time pay for all hours of work. *Fiore v. PPG Indus. Inc.*, 169 Wn. App. 325, 443-45, 279 P.3d 972 (2012). In such circumstances, because it is understood that all hours worked are paid by the salary, the employee is entitled to “one-half hour’s pay for each hour over 40 in the work week.” *Id.* Our Supreme Court has determined that an employer’s practice of paying overtime wages to salaried employees based on a “fluctuating workweek” does not violate the Minimum Wage Act. *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 519, 7 P.3d 807 (2000); *see also Monahan v. Emerald Performance Materials, LLC*, 705 F. Supp. 1206 (2010).

4. Ms. Buel contends she is still owed \$3,055.91 for 162 hours of overtime compensation, asserting she should have been paid for "time and one half" for overtime. But WFSE and Ms. Buel both clearly understood and agreed that Ms. Buel's hours would fluctuate from week to week and that her fixed salary constituted straight-time pay for all hours of work. They further understood and agreed that WFSE would pay Ms. Buel one-half hour's pay for each hour over 40 in the workweek.
5. WFSE correctly paid overtime wages to Ms. Buel based on a fluctuating workweek.

### **III. DECISION AND ORDER**

Consistent with the above Findings of Fact and Conclusions of Law, the Determination of Compliance No. 172-19 is affirmed. The Initial Order of February 18, 2020, is incorporated by reference herein.

DATED at Tumwater, Washington this 10 day of November 2020.



JOEL SACKS  
Director

## **SERVICE**

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

## **APPEAL RIGHTS**

**Reconsideration.** Any party may file a petition for reconsideration. RCW 34.05.470. Any petition for reconsideration must be filed within 10 days of service of this Order and must state the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order **or** (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing, or by emailing to [DirectorAppeal@LNI.WA.GOV](mailto:DirectorAppeal@LNI.WA.GOV), or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

**NOTE: A petition for reconsideration is not required before seeking judicial review.** If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the petition **or** (b) serve the parties with a written notice specifying the date by which it will act on the petition. RCW 34.05.470(3).

**Judicial Review.** Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. RCW 49.48.084(5) provides, "Orders that are not appealed within the time period specified in this section and Chapter 34.05 RCW are final and binding, and not subject to further appeal." Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.

### DECLARATION OF MAILING


I, Lisa Deck, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 10 day of November 2020 via U.S. Mail, postage prepaid, and email, to the following:

Sarah Buel  
PMB 4653 PO Box 257  
Olympia, WA 98507  
[sarahroseyoga@yahoo.com](mailto:sarahroseyoga@yahoo.com)

Ben McDonald  
Washington Federation of State Employees,  
Council 28  
1212 Jefferson Street SE, Suite 300  
Olympia, WA 98501  
[benm@wfse.org](mailto:benm@wfse.org)

Michael Duggan, AAG  
Attorney General's Office  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
[Michael.Duggan@atg.wa.gov](mailto:Michael.Duggan@atg.wa.gov)  
[lniseaeservice@atg.wa.gov](mailto:lniseaeservice@atg.wa.gov)

DATED this 10 day of November 2020 at Tumwater, Washington.

  
\_\_\_\_\_  
Lisa Deck

CEC

RECEIVED

WASHINGTON STATE  
OFFICE OF ADMINISTRATIVE HEARINGS

FEB 19 2020  
AGO L&I DIVISION  
SEATTLE

In the matter of:

Sarah Buel,

Appellant.

Docket No. 04-2019-LI-01054

**INITIAL ORDER**

Agency: Labor and Industries  
Program: Wage Payments  
Agency No. DOC-172-19

**1. ISSUES:**

1.1. Whether the Department of Labor and Industries' 'Determination of Compliance #172-19' is incorrect? Specifically, whether the Department incorrectly determined the Employer, Washington Federation of State Employees Council 28, did not violate Revised Code of Washington (RCW) 49.46.130 by failing to pay 'time and half' for all hours worked in excess of 40 in a week? The Appellant/Wage Claimant, Sarah Buel, alleges she is owed \$3,055.91 in overtime pay for 162 overtime hours for the period of May 18, 2015 to March 31, 2016.

**2. ORDER SUMMARY:**

2.1. **AFFIRMED.** The Department of Labor and Industries' 'Determination of Compliance #172-19' is correct. Specifically, the Department correctly determined the Washington Federation of State Employees Council 28 (Employer) did not violate Revised Code of Washington (RCW) 49.46.130 by failing to pay 'time and half' for all hours worked in excess of 40 in a week. The Department's 'Determination of Compliance #172-19' is **AFFIRMED**.

**3. HEARING:**

3.1. Hearing Date: November 22, 2019  
3.2. Written Closing Briefs: December 20, 2019  
3.3. Admin. Law Judge: TJ Martin  
3.4. Appellant: Sarah Buel (Appellant/Wage Claimant)  
3.4.1. Representative: The Appellant represented herself.  
3.4.2. Witnesses: The Appellant did not call any witnesses.  
3.5. Agency: Department of Labor and Industries (Department)  
3.5.1. Representative: Michael Duggan, Assistant Attorney General  
3.5.2. Witnesses: Liz Larsen, WFSE Council 28 Director of Administration  
Breann Olsen, Department Industrial Relations Agent II

- 3.6. Exhibits: Department's Exhibits 1 through 23 were admitted.  
Appellant's Exhibits A through D were admitted.
- 3.7. Court Reporting: Janice L. Tegarden, Central Court Reporting
- 3.8. Observing: Amanda Goss, Assistant Attorney General  
Elizabeth Turnbow, WFSE Council 28 Representative

#### **4. FINDINGS OF FACT:**

The following facts are found by a 'preponderance of the evidence':

##### ***Jurisdiction-***

- 4.1. On February 8, 2019, the Department of Labor and Industries (Department) issued 'Determination of Compliance #172-19', finding the Washington Federation of State Employees #28 doing business as WFSE/AFSCME Polling Center of Washington for Washington Federation of State Employees, did not fail to pay Sarah Tracy Buel (Appellant/Wage Claimant/Ms. Buel) for all hours worked. *Exhibit (Ex.) 1*.
- 4.2. On February 24, 2019, Ms. Buel, appealed the Department's 'Determination of Compliance #172-19'. *Exhibits (Exs.) 3 & 4*.

##### ***Sarah Buel and Overtime Hours Worked-***

- 4.3. On May 18, 2015, the Employer, Washington Federation of State Employees (WFSE) hired the Appellant/Wage Claimant, Sarah Buel, to a temporary Organizer position. Ms. Buel's position was included in the 'Collective Bargaining Agreement Between Washington Federation of State Employees AFSCME Council 28 and Office and Professional Employee International Union Local No. 8, AFL-CIO For The Period of July 1, 2013 – June 30, 2016' (hereinafter 'collective bargaining agreement' and/or 'c.b.a.'). Ms. Buel's salary was set at \$42,448 annually. *Testimony of Liz Larsen (Testimony of Larsen) and Exhibits 13 and Exs. B-D*.
- 4.4. During her employment with the WFSE between May 18, 2015 and March 31, 2016, Ms. Buel was a salaried, non-exempt, overtime-eligible employee. *Testimony of Larsen and Ex. 10; Pg. 14*.
- 4.5. Article 8 of the collective bargaining agreement applies to Ms. Buel, granting her, even as a temporary worker, the benefits of Section 43 and 21 of the c.b.a., relating to compensation. *Testimony of Larsen*.
- 4.6. Article 21 of the collective bargaining agreement applies to Ms. Buel and her compensation. In particular, Section 21.4 establishes overtime compensation as the salaried rate plus 'one-half'. *Testimony of Larsen and Ex. 22; Pg. 22*.
- 4.7. Since Ms. Buel was a salaried, non-exempt employee, any overtime hours were compensated at her salaried rate plus 'one-half'. *Testimony of Larsen*.

- 4.8. Neither Ms. Buel nor the WFSE, dispute Ms. Buel worked 162 overtime hours during her temporary employment. *Testimony of Breann Olsen (Testimony of Olsen) and Testimony of Sarah Buel (Testimony of Ms. Buel)*.
- 4.9. Under the collective bargaining agreement, Ms. Buel was paid the same amount whether she worked forty hours, or less than forty hours, in any given week, referred to as a 'fluctuating work week'. *Testimony of Buel*.
- 4.10. No evidence exists in the record Buel's complaint was ever filed as a union grievance.

***Department Investigation of Buel's Wage Complaint-***

- 4.11. On September 12, 2018, Ms. Buel filed a 'Worker Rights Complaint' with the Department of Labor and Industries (Department). In her complaint, Ms. Buel alleged she was not correctly paid for overtime during the period of May 18, 2015 to March 31, 2016. Ms. Buel asserted she was still owed \$3,055.91 for 162 hours of overtime worked. *Testimony of Buel, Ex. 5; Page (Pg.) 1 and Exs. 6 & 7*.
- 4.12. On September 18, 2018, Department Supervisor Russ Hauss assigned Ms. Buel's Wage Complaint to Department Industrial Relations Agent II Breann Olsen (Olsen) for investigation. *Ex. 5; Pg. 1*.
- 4.13. From September 18, 2018 to December 19, 2018, Ms. Olsen investigated Ms. Buel's Wage Complaint. Ms. Olsen obtained information from Ms. Buel and the WFSE Council 28. *Testimony of Breann Olsen (Testimony of Olsen), Exs. 5-20 and Exs. A-D*.
- 4.14. As a part of her investigation, Ms. Olsen completed a 'Wage Transcription Sheet' for all hours worked by Ms. Buel. *Testimony of Olsen and Ex. 17; Pg. 4-5*.
- 4.15. On December 19, 2018, Ms. Olsen completed an Agent Summary regarding her investigation of Ms. Buel's wage complaint. *Testimony of Olsen and Ex. 2*.
- 4.16. Based on Ms. Olsen's investigation, the Department determined Ms. Buel was paid for all hours worked, including overtime hours. *Testimony of Olsen and Ex. 2*.

**5. CONCLUSIONS OF LAW:**

Based upon the facts above, the following conclusions are made:

***Jurisdiction-***

- 5.1. The undersigned administrative law judge has jurisdiction over the persons and subject matter under Revised Code of Washington (RCW) 49.48.084(3) and Chapters 34.05 and 34.12 RCW.



[Continued]

***Sarah Buel's Worker Rights Complaint-***

- 5.2. The Department of Labor & Industries (Department) is responsible for implementing and enforcing the provisions of Chapters 49.46, 49.48 and 49.52 of the RCW and Title 296 Washington Administrative Code (WAC), pertaining to wages, for the purpose of protecting the immediate and future health, safety, and welfare of the people of the State of Washington.
- 5.3. The Department's authority includes enforcing wage payments such as: (a) Requirement to pay minimum wages (RCW 49.46.020); (b) Payment of overtime wages in excess of more than 40 hours of work in a week (RCW 49.46.13); (c) Payment of final wages (RCW 49.48.010); and (d) Withholding of lawful deductions from wages (RCW 49.52.060); and (e) Enforcement of any wages as authorized by statute, ordinance, and/or contract (RCW 49.52.050).
- 5.4. If an employee files a wage complaint, the Department must investigate. RCW 49.48.083(1). If the Department finds the employer has violated one or more wage payment requirements, it shall issue a 'Citation and Notice of Assessment'. RCW 49.48.083(2). If the Department determines that the employer has complied with the law, the Department shall issue a 'Determination of Compliance'. RCW 49.48.083(1).
- 5.5. In the present case, on September 12, 2018, Ms. Buel filed a 'Worker Rights Complaint Form' (Complaint) with the Department. As a result, the Department was required by law to investigate the complaint.

***Burden and Standard of Proof Challenging a 'Determination of Compliance'-***

- 5.6. In appealing a Department 'Determination of Compliance' (Determination), the party challenging the decision has the burden of proof to establish, by a 'preponderance of the evidence', the Department's Determination is in error.
- 5.7. In the present case, the Appellant, Sarah Buel, has the burden of proof to establish, by a 'preponderance of the evidence', the Department's 'Determination of Compliance #172-19' is in error.

[Cont.]

***Sarah Buel and Overtime Hours Worked-***

5.8. Chapter 49.46 Revised Code of Washington (RCW) establishes the Washington State 'Minimum Wage Act' (MWA), in order to establish minimum standards of employment within the state of Washington for the purpose of protecting the immediate and future health, safety and welfare of the people of this state. This Act covers wage payments such as minimum wage, overtime wages, and wages for final pay periods. RCW 49.46.005.

5.9. Any employer who pays an employee less than wages to which such employee is entitled shall be liable to such employee for the full amount of such wage rate. RCW 49.46.090(1).

5.10. RCW 49.46.130(1) addresses overtime wages:

Except as otherwise provided in this section, no employer shall employ any of his or her employees for a workweek longer than forty hours unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he or she is employed.

5.11. Such overtime wages are based on an employee's regular rate of pay, as defined by WAC 296-128-550. In relevant part, WAC 296-128-550 provides:

The overtime may be paid at one and one-half times the piecework rate during the overtime period, or the regular rate of pay may be determined by dividing the amount of compensation received per week by the total number of hours worked during that week. The employee is entitled to one and one-half times the regular rate arrived at for all hours worked in excess of forty hours per week.

5.12. The evidence must establish the failure to pay by the employer was 'willful' in that it was 'knowing and intentional' and not the result of a bona fide dispute regarding the contested wages. *Pope v. University of Wash.*, 121 Wn.2d 479 (1993).

5.13. As previously cited in the 'Burden of Proof' section, the burden is on the employee, in this case, Ms. Buel, to establish a prima facie evidence of wages which were agreed to, but 'willfully' failed to be paid by the employer. *MacSuga v. Spokane County*, 97 Wn.App. 435(1999) citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680(1946).

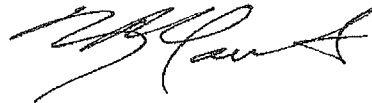
- 5.14. No dispute of material fact exists in the present case. Rather, this administrative tribunal is asked to address the legal issue as to whether the Employer, WFSE, properly calculated Ms. Buel's overtime compensation. Ms. Buel contends she is still owed \$3,055.91 for 162 hours of overtime compensation, asserting she should have been paid for 'time and one half' for overtime. While WFSE and the Department contend Ms. Buel was accurately compensated for all overtime at her annual salary plus 'one-half', consistent with the applicable collective bargaining agreement and based on *Fiore v. PPG Industries*, 169 Wn. App. 325, 279 P.3d 972 (20120).
- 5.15. Under *Fiore*, overtime compensation is determined based on how many hours per week the salary is intended to compensate. In the present case, Ms. Buel's salary was intended to compensate her for 40 hour per week, even if she worked less, referred to as a 'fluctuating work week'. Overtime compensation, for all hours worked over 40, would be based on a 'half-time' rate, rather than based on an hourly rate and 'time and one-half'. *Monahan v. Emerald Performance Materials, LLC*, 705 F. Supp. 1206 (2010) affirmed this half-time rate calculation as adequate compensation for overtime, non-exempt employees, as in the case of Ms. Buel.
- 5.16. In the present case, the Appellant contends she should have been paid 'time and one-half for any overtime hours' over 40 hours per week, with her base hourly rate being \$20.41. However, the WFSE did not use such an 'hourly calculation of \$20.41 per hour'. Rather, the Employer paid the Appellant an annual salary of \$42,448, which broke down into 24 pay periods over the calendar year. She was then paid overtime for any hours in excess of 86.67 per two week period. Overtime compensation was then calculated by multiplying the number of hours over 40 worked in a week by one-half time regular hourly rate of pay for that week, known as the 'fluctuating workweek' method. As a result, compensation at 'one-half' her salaried rate was used.
- 5.17. Based on the WFSE's calculation, Ms. Buel was compensated in accordance of the legally-correct calculations used on *Fiore* and *Monahan* as well as *Condo v. Sysco Corporation*, 1 F.3d 599, (1993).
- 5.18. Therefore, the Department of Labor and Industries' 'Determination of Compliance #172-19' is correct. Specifically, the Department correctly determined the Washington Federation of State Employees Council 28 (Employer) did not violate Revised Code of Washington (RCW) 49.46.130 by failing to pay 'time and half' for all hours worked in excess of 40 in a week. The Department's 'Determination of Compliance #172-19' is **AFFIRMED**.

**6. INITIAL ORDER:**

**THIS ADMINISTRATIVE COURT ORDERED:**

6.1. **AFFIRMED.** The Department of Labor and Industries' 'Determination of Compliance #172-19' is correct. Specifically, the Department correctly determined the Washington Federation of State Employees Council 28 (Employer) did not violate Revised Code of Washington (RCW) 49.46.130 by failing to pay 'time and half' for all hours worked in excess of 40 in a week. The Department's 'Determination of Compliance #172-19' is **AFFIRMED**.

Issued from Tacoma, Washington on the date of mailing.



---

TJ Martin  
Administrative Law Judge  
Office of Administrative Hearings

**CERTIFICATE OF SERVICE ATTACHED**

## PETITION FOR REVIEW

Any party that disputes this Initial Order may file a Petition for Administrative Review with the Director of the Department of Labor and Industries.<sup>1</sup> You may e-mail your Petition for Administrative Review to the Director at [directorappeal@lni.wa.gov](mailto:directorappeal@lni.wa.gov). You may also mail or deliver your Petition for Administrative Review to the Director at the Department's physical address listed below.

Mailing Address:

Director  
Department of Labor and Industries  
PO Box 44001  
Olympia, WA 98504-4001

Physical Address:

7273 Linderson Way SW  
Tumwater, WA 98501

If you e-mail your Petition for Administrative Review, please do not mail or deliver a paper copy to the Director.

Whether you e-mail, mail or deliver the Petition for Administrative Review, the Director *must actually receive* the Petition for Administrative Review during office hours at the Director's office within 30 days of the date this Initial Order was mailed to the parties. You must also provide a copy of your Petition for Administrative Review to the other parties at the same time.

If the Director does not receive a Petition for Administrative Review within 30 days from the date of the Initial Order, the Initial Order shall become final with no further right to appeal.<sup>2</sup>

If you timely file a Petition for Administrative Review, the Director will conduct an administrative review under chapter 34.05 RCW.

---

<sup>1</sup> RCW 49.48.084 and RCW 34.05.464.

<sup>2</sup> RCW 49.48.084 and Chapter 34.05 RCW.

**CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 04-2019-LI-01054**

I certify that true copies of this document were served from Tacoma, Washington via Consolidated Mail Services upon the following as indicated:

Sarah Buel PMB 4653 PO Box 257 Olympia, WA 98507 <b><i>Appellant/Wage Claimant</i></b>	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Michael Duggan, AAG Office of the Attorney General MS: TB-14 800 Fifth Avenue Suite 2000 Seattle, WA 98104 <b><i>Respondent Representative</i></b>	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input checked="" type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Washington Federation of State Employees, Council 28 Attn: Ben McDonald 1212 Jefferson Street SE, #300 Olympia, WA 98501 <b><i>Intervenor/Employer</i></b>	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail

Date: Tuesday, February 18, 2020

OFFICE OF ADMINISTRATIVE HEARINGS

*Carla Sullivan*

Carla Sullivan  
Legal Assistant 2

Michael Duggan, AAG  
Office of the Attorney General  
MS: TB-14  
800 Fifth Avenue Suite 2000  
Seattle, WA 98104

Docket: 04-2019-LI-01054  
Portal Access Code: 263058

**RECEIVED**  
FEB 19 2020  
AGO L&I DIVISION  
SEATTLE