LAW OFFICES
DOWD, BLOCH, BENNETT, CERVONE, AUERBACH & YOKICH
8 SOUTH MICHIGAN AVENUE • 19TH FLOOR
CHICAGO, ILLINOIS 60603-3315
(312) 372-1361 | FAX (312) 372-6599
WWW.DBB-LAW.COM

MELISSA J. AUERBACH
BARRY M. BENNETT
ROBERT E. BLOCH
ROBERT S. CERVONE
J. PETER DOWD
JOSIAH A. GROFF
JUSTIN J. LANNOYE
DAVID P. LICHTMAN
GEORGE A. LUSCOMBE III
RONALD M. WILLIS
STEPHEN A. YOKICH

JEREMY M. BARR
WILLIAM M. KINNEY
ELIZABETH L. ROWE

October 25, 2017

By ILRB E-File, U.S. Mail, Email, and Personal Delivery
General Counsel Helen J. Kim
Illinois Labor Relations Board
160 N. LaSalle Street, Suite S-400
Chicago, Illinois 60601-3103
Email: Helen.J.Kim@illinois.gov
Efile: ilrb.filing@illinois.gov

Re: Request for Preliminary Relief Pursuant to 80 Ill. Admin. Code 1220.70
ILRB State Panel Case No. S-CA-16-132
Service Employees International Union, Healthcare Illinois & Indiana, Charging Party & State of Illinois, Department of Central Management Services (Human Services), Respondent

General Counsel Kim:

Charging Party Service Employees International Union, Healthcare Illinois & Indiana ("SEIU" or the "Union") respectfully requests the Illinois Labor Relations Board ("Board" or "ILRB") to seek preliminary relief pursuant 5 ILCS 315/11(h) to enjoin Respondent State of Illinois, Department of Central Management Services (Human Services) ("Respondent" or the "State") from enforcing its rules imposing a 45 hour per week cap on bargaining unit employee hours under threat of a three-month suspension and termination. The Union is the exclusive representative of the 28,000 individual providers ("Providers") in the Respondent's Home Services Program ("HSP") who provide vital home care services to the thousands of HSP Consumers. HSP Consumers are persons with disabilities who rely on their HSP home care services to live independently and safely in their homes. Without preliminary relief, these

Providers face losing their jobs, and an ILRB reinstatement order cannot remedy that harm. Only Consumers have the right to decide to rehire their Providers. And a backpay remedy for hours lost due to the State's unlawfully implemented policy cannot make these $13-per-hour workers whole for the loss of a home or other immediate injury they will suffer now because of the loss of pay. Finally, traditional Board remedies cannot repair the injury to the bargaining process or the status of the Union as exclusive representative in the eyes of Providers, caused by the State's unilateral implementation of a condition of employment impacting thousands of Providers.

An Administrative Law Judge Has Already Found that the State Violated the Act and That an Order Barring Implementation of the Overtime Policy is Appropriate and Necessary

In a Recommended Decision and Order ("RDO", enclosed), dated September 5, 2017, Administrative Law Judge Matthew S. Nagy (the "ALJ"), concluded, among other things, that:

1. The Respondent violated section 10(a)(4) of the Act when it unilaterally implemented its overtime policy without first bargaining it with the Union to agreement or impasse.

2. The Respondent violated Section 10(a)(4) of the Act when it submitted the overtime policy to the administrative rulemaking process without first bargaining the substance of the proposed rules with the Union.

(RDO 36 (Conclusions of Law ¶¶ 1-2).)

The ALJ recommended an order directing the State to "Maintain the *status quo* as it existed before May 1, 2016 with respect to overtime and background checks, and refrain from implementing any administrative rules or regulations which would alter the *status quo.*" (RDO 37 (Recommended Order (¶ 2.c).)

The State filed exceptions to the RDO on October 10, 2017. The Union filed its brief in response to the State's exceptions and in support of certain limited cross-exceptions contemporaneously with this letter.

Pending the Board's resolution of the exceptions, and consistent with the ALJ's Recommended Order, the Union requests preliminary relief to enjoin the State from enforcing administrative rules and regulations imposing an overtime cap that alters the *status quo* as it existed before May 1, 2016.

The State Began Enforcing its Final Rules Implementing its Overtime Policy on August 1

The RDO sets forth most of the relevant facts. (RDO 1-21.) At the time of the hearing in this case, the State had, through the Joint Committee on Administrative Rules ("JCAR") rulemaking process, issued proposed rules to implement an overtime policy imposing a weekly 45 hour cap on hours. (RDO 12 (¶¶ 86-93); 19 & 19 n 9.) Those proposed rules were originally

published at 40 Ill. Reg. 11079, 11107-11114 (Aug. 19, 2016) with some differences from the revised proposed rules submitted to JCAR at second notice.

On July 14, 2017, after the record closed in this case, the State issued its final rules implementing that overtime policy, effective August 1, 2017. Those final rules were published at 41 Ill. Reg. 8187, 8460-67 (July 14, 2017). (*See* Affidavit of Terri Harkin ("Harkin Aff."; enclosed), at ¶¶ 6-11.) The rules imposed a 45 hour weekly cap on hours, unless the HSP Consumer qualified for certain limited exceptions. The State enforces its overtime policy with "sanctions" including two written warnings, followed by a three-month suspension upon the third occurrence of unjustified overtime. Further unjustified overtime leads to termination. (*Id.*)

Based on the most recent information available to the Union, the State has already issued the first written warnings to more than 500 Providers for just the period of August 1 to August 15, 2017. (Harkin Aff. ¶¶ 16-17.)

Workers who attempt to comply with the overtime policy are now losing substantial amounts of pay because they are limiting their hours to 45 hours per week. (Harkin Aff. ¶14; Affidavit of Bob Eli ("Eli Aff.," enclosed), at ¶¶ 13-16; Affidavit of Alice McKittrick ("McKittrick Aff."), enclosed), at ¶¶ 13-16.) If not for the State's new rules, these workers would continue to work more than 45 hours per week to meet their Consumers' service needs. (*Id.*) There is also reason to believe that many Providers, in order to protect the health and safety of their Consumers, continue to work more than 45 hours per week but are not billing the State for those hours, fearing suspension and termination under the State's overtime policy. (*See id.*)

The State's Unilateral Implementation of Its Overtime Policy is Causing Irreparable Harm for which the Traditional Remedies Available from the Board will be Inadequate

Preliminary injunction relief is appropriate and necessary to protect these home care Providers from continuing irreparable harm caused by the State's unilateral enforcement of its overtime policy.

First, it is clear that "there is reasonable cause to believe that the Act may have been violated." *See Univ. Ill. Hosp.*, 2 PERI ¶ 1138 (IELRB 1986) (decided under the similar provisions of the Illinois Educational Labor Relations Act ("IELRA") and Illinois Educational Labor Relations Board ("IELRB") regulations). As noted above, the ALJ concluded, after a full hearing on the merits, that the State has violated the Act by unilaterally implementing its overtime policy and by submitting its overtime policy to administrative rulemaking. (RDO 36 (Conclusions of Law ¶¶ 1-2).)

Second, the record evidence, as well as the supplemental affidavits submitted with this letter, establish that "if preliminary relief is not sought [the Union and the Providers] will suffer irreparable harm and that the remedies available from the Board will be inadequate." 80 Ill. Admin. Code 1220.70.

"The Illinois Appellate Court has repeatedly held that, in the context of injunctive relief, 'irreparable harm' does not mean injury that is beyond repair or compensation in damages, but rather means injury of a continuing nature. *E.g.*, *Victor Township Drainage Dist. 1 v. Lundeen Family Farm Partnership*, 2014 IL App [2d) 140009, __ N.E.2d ___ (Ill. App. 2nd Dist. 2014); *Hadley v. Department of Corrections*, 362 Ill. App. 3d 680, 840 N.E.2d 748 [4th Dist. 2005), aff d, 224 Ill.2d 365, 864 N.E.2d 162 (2007); *Lucas v. Peters*, 318 Ill. App. 3d 1, 741 N.E.2d 559 (1st Dist. 2000); *Local 1894, A FSCME v. Halsapple*, 201 Ill. App. 3d 1040, 559 N.E.2d 577 (4th Dist. 1990)." *Bd. of Trs. of the Univ. of Ill.*, 31 PERI ¶ 72 (IELRB 2014).

Here, it is undisputable that the State's unilateral implementation of its overtime policy is causing continuing injury to Providers. Many Providers, who would otherwise have worked more than 45 hours per week, are now limiting their hours (or billing) to 45 hours per week. This is a substantial loss of income for workers who make only $13 per hour straight time that will continue until the State rescinds its unlawful policy. These near-poverty wage workers face the threat of not being able to make mortgage or rent payments, putting their homes at risk, or other necessary daily costs of living. (*See* Eli Aff. ¶ 16; McKittrick Aff. ¶¶ 15-16; Harkin Aff. ¶¶ 14, 20.)

Under the materially similar provisions of the IELRA and IELRB regulations, the IELRB has determined that such a continuing violation represents irreparable harm for which its traditional remedies are inadequate. *See Bd. of Tr./Univ. of Ill. at Urbana-Champaign,* 23 PERI ¶ 86 (IELRB 2007) ("In addition, the Union states that at least one employee was at risk of losing his home and was forced to file for bankruptcy as a result of the University's alleged violations. This indicates that employees may suffer financial consequences that cannot later be undone if the University is not ordered to immediately correct its violations."). *See also Univ. of Hawaii Prof'l Assem. v. Cayetano*, 183 F.3d 1096, 1106 (9th Cir. 1999) ("Plaintiffs are wage earners, not volunteers. They have bills, child support obligations, mortgage payments, insurance premiums, and other responsibilities. Plaintiffs have the right to rely on the timely receipt of their paychecks. Even a brief delay in getting paid can cause financial embarrassment and displacement of varying degrees of magnitude.").

Moreover, while a make-whole remedy is appropriate and necessary, it will be insufficient to remedy fully the State's unlawful actions. Calculating the hours more than 45 in a week that a Provider would have worked but for the State's policy will create significant problems of proof necessitating the use of estimates of lost pay. *See, e.g., Otis*, 30 PERI ¶ 217 (ILRB-LP 2014). It is, therefore, likely that at least some Providers will end up being undercompensated for their lost hours of work.

Additionally, the hundreds—and likely more—Providers who have continued to work and bill more than 45 hours per week since August 1, 2017, now face imminent discipline, including a three-month suspension. (*See* McKittrick Aff. ¶ 10; Harkin Aff. ¶¶ 10, 14.) This, too, is a continuing harm. Three months without income is a draconian penalty for these low-wage workers. No one could expect a $13 per hour worker to have the savings to live without income for three months. Many Providers would not be able to obtain a new job to replace the lost income because they could not abandon their Consumers. Once again, they are at risk of losing

homes and otherwise going deeper into debt. A back-pay award in the future could not fully remedy that harm the Providers face now.

For other Providers, a three-month suspension will be the equivalent of termination. (*See* Harkin Aff. ¶ 14.) With his or her Provider suspended for three months, a Consumer may hire a new replacement Provider if the Consumer is able to find one. If that happens there is no guarantee that the Consumer would rehire his or her previous Provider at the end of the suspension. There is also no guarantee that the Provider would be able to find another Consumer to hire her. The Board would be powerless to remedy this harm with a future reinstatement order. Unlike in most bargaining units, the individual Consumers here, not the State, have the sole right to hire Providers. (*See* RDO 3 (¶ 14), 26 ("Hiring, firing, and directing work of PAs is the exclusive province of the Consumer."); Jt. Ex. 4 (art. VI).) Thus, neither the State nor the Board would have the power to order a Consumer to rehire a Provider that the Consumer has already replaced because of the three-month suspension. (*See* Harkin Aff. ¶ 14.)

Further, the State's unilateral implementation of the overtime policy causes irreparable injury to the bargaining process and the Union's status as exclusive representative. By unilaterally imposing a term and condition of employment that impacts thousands of Providers, the State has used an economic weapon upsetting the balance between the parties and frustrating the possibility of successful bargaining. And it has likely undermined the status of the Union in the eyes of the Providers. They cannot help but see the State's power to ignore the Union for the purpose of imposing such a substantial change in working conditions, effecting the livelihoods of thousands of Providers. For these reasons, both under the IELRA and National Labor Relations Act, labor boards and courts have found preliminary injunctions necessary to prevent this irreparable harm to the system of collective bargaining. *See Bd. of Trs. of the Univ. of Ill.*, 31 PERI ¶ 72 (IELRB 2014) ("The University's conduct, if not restrained, could potentially erode the Union's support among bargaining unit employees by suggesting that the University will take unilateral action regardless of the Union's status as their exclusive bargaining representative, as well as create a chilling effect on other employees who might be considering seeking union representation."); *Bd. of Trs./Univ. of Ill. at Urbana-Champaign*, 23 PERI ¶ 86 (IELRB 2007) ("While the IELRB can award a remedy compensating employees for work opportunities of which they have been deprived, the IELRB's remedies are not designed to correct the unquantifiable harm to the parties' bargaining relationship that is being caused by the University's alleged unilateral actions."); *Pembroke Comm'ty Consol. Sch. Dist. No. 259*, 8 PERI ¶ 1055 (IELRB 1992) ("In addition, the damage to the parties' relationship may also be irreparable without an injunction to maintain the status quo until the IELRB completes its adjudication of the underlying Complaint. The decisions of the District to unilaterally alter these critical health care benefits without first bargaining with the Union and obtaining "mutual agreement" to such midterm modifications or, alternatively, bargaining to impasse or agreement, severely restricts the possibility of meaningful bargaining."); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1362 (9th Cir. 2011) ("[F]ailure to bargain in good faith, has long been understood as likely causing an irreparable injury to union representation."); *Small v. Avanti Health Sys.*, 661 F.3d 1180, 1191 (9th Cir. 2011) ("Given the central importance of collective bargaining to the cause of industrial peace, when the Director establishes a likelihood of success on a failure to

bargain in good faith claim, that failure to bargain will likely cause a myriad of irreparable harms."). *See also* NLRB General Counsel, Section 10(j) Manual, § 2.1(5) (identifying employer "implementing important changes in working conditions either discriminatorily or without bargaining with union" as among the violations likely requiring preliminary injunctive relief to effectively remedy) (*available at* www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/redacted_10j_manual_5.0_reduced.pdf)).

Finally, the scope of the State's violation cannot be ignored. Hundreds of Providers face imminent three-month suspensions. And likely thousands are being economically harmed by the State's prohibition on overtime hours that they would have worked but for the State's unlawfully implemented policy. (*See* RDO 6 (¶¶ 39-40 (noting that more than 8,000 Providers worked mover than 40 hours in a week in calendar years 2014 & 2015, more than 2.1 million overtime hours in 2015 alone).) *See Chi. Bd. of Educ.*, 7 PERI ¶ 1114 (IELRB 1991) (concluding employer's unfair labor practice was "serious and extraordinary" to justify preliminary injunctive relief where "[t]he District's actions affect literally thousands of unit employees and their dependents").

For all of these reasons, the Board should exercise its power under Section 11(h) of the Act to seek an injunction barring the State's enforcement of its overtime policy regulations.[1]

Very respectfully,

George A. Luscombe III

Enclosures

cc: Thomas S. Bradley
Scott A. Gore
Jeremy L. Edelson
Michael A. Kuczwara, Jr.
Darin M. Williams

[1] In case there were any question, the Union's request here is timely. After suspending its original overtime policy in August 2016, the State did not begin enforcing its overtime policy through rulemaking until August 2017. (*See* RDO 19; Harkin Aff. ¶ 7.) Providers began receiving notices of their first written warnings under the policy around the beginning of September 2017. (*See* Eli Aff. ¶ 14; McKittrick Aff. ¶ 11.) The Union was only able to obtain information from the State concerning the number of disciplines issued to Providers when the State responded to the Union's FOIA request on October 11, 2017, after a nearly month long, unexplained delay. (Harkin Aff. ¶¶ 15-16.) And the State has failed to respond to the Union's continuing information request seeking the number of occurrences issued by pay period on an ongoing basis. (Harkin Aff. ¶ 18.)

CERTIFICATE OF FILING AND SERVICE

I, George A. Luscombe III, an attorney, certify that on October 25, 2017, I caused to be electronically filed with the Illinois Labor Relations Board a copy of the attached letter to ILRB *General Counsel* Helen J. Kim, and its enclosed affidavits of Terri Harkin, Bob Eli, and Alice McKittrick, and cause to be served copies of such documents by U.S. Mail, postage pre-paid, personal delivery, and email on the following:

Helen J. Kim
General Counsel
Illinois Labor Relations Board
160 N. LaSalle St., Suite S-400
Chicago, IL 60601-3103
helen.j.kim@illinois.gov

Thomas S. Bradley
Scott A. Gore
Jeremy L. Edelson
Michael A. Kuczwara, Jr.
Darin M. Williams
LANER MUCHIN
515 N. State St., Suite 2800
Chicago, IL 60654
tbradley@lanermuchin.com
sgore@lanermuchin.com
jedelson@lanermuchin.com
mkuczwara@lanermuchin.com
Dwilliams@lanermuchin.com

Attorneys for Respondent
State of Illinois, Department of Central Management Services

Dated: October 25, 2017

George A. Luscombe III