

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM ELEVEN
CAUSE NO. 49D11-0108-CP-001309

PAULA BRATTAIN, et al,)
)
Plaintiffs,)
)
vs.)
)
RICHMOND STATE HOSPITAL, et al,)
)
Defendants.)

FILED

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JUL 28 2009

Elizabeth A. White
CLERK OF THE MARION CIRCUIT COURT

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

Comes now the Court, and, this matter having come before the Court, and the parties, by counsel, having submitted this matter to the Court for decision based on the trial before the Court on March 10, 11, 12 and 13, 2009, at which sworn evidence was heard, now the Court, being duly advised in the premises, pursuant to Trial Rule 52(A) of Indiana Rules of Trial Procedure, issues the following:

FINDINGS OF FACT

- (1) The Court has jurisdiction over the parties and the subject matter of this action.
- (2) The Plaintiffs filed their initial complaint in this cause of action in Marion Circuit Court on July 29, 1993.
- (3) Following a change of judge from the Honorable John M. Ryan, on September 20, 1993 The Honorable John R. Price (hereinafter "Judge Price") was selected as Special Judge in this cause of action.

(4) On September 27, 1993, the Defendants filed a Motion to Dismiss in which they claimed this cause of action should be dismissed because the Plaintiffs had failed to exhaust their administrative remedies pursuant to the Administrative Orders and Procedures Act.

(5) On March 8, 1994, Judge Price issued Findings of Fact and Conclusions of Law in which he denied Defendants' Motion to Dismiss.

(6) Following denial of a Motion to Reconsider which the Defendants had filed on March 14, 1994, the Defendants filed a Petition for Interlocutory Appeal on May 12, 1994.

(7) On May 16, 1994, the Court Granted Defendants' Petition for Interlocutory Appeal.

(8) On June 26, 1996, the Petition for Certification of Question for Interlocutory Appeal was Denied by the Indiana Court of Appeals.

(9) On December 9, 1997, the Defendants filed a Motion for Summary Judgment. Plaintiffs opposed the Motion and were granted leave by the Court to also seek Summary Judgment pursuant to Trial Rule 56(B) of the Indiana Rules of Trial Procedure.

(10) On August 12, 1998, Judge Price conducted a hearing on the parties' Motions for Summary Judgment.

(11) On August 28, 1998, the Court entered an Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiffs' Motion for Summary Judgment.

(12) In his ruling granting Plaintiffs' Motion for Summary Judgment, Judge Price found that:

- (a) although, in most cases, a party must exhaust administrative remedies before seeking relief from the courts, in certain circumstances, the failure to exhaust administrative remedies does not preclude a claim;
- (b) those circumstances include situations where compliance with the rules of exhaustion would be futile, where an applicable statute is charged to be void or where strict compliance would result in irreparable harm;
- (c) in his deposition, the attorney for the Indiana State Personnel Department acknowledged that prior to the relief granted in the case of *Arden & Coulter v. State Employees Appeals Commission* (hereinafter “SEAC”) 578 NE. 2d 769 (Ind. App. 1991), there was no relief available to the Plaintiffs or to others similarly situated from SEAC or the State Personnel Director;
- (d) prior to the judicial relief granted in *Arden & Coulter v. SEAC*, all claims involving the change of work hours were denied;
- (e) since there was no relief available from either SEAC or the State Personnel Director it would have been futile for the Plaintiffs and all others similarly situated to exhaust administrative remedies;
- (f) exhaustion of administrative remedies is futile when an agency is powerless to effect a remedy;
- (g) exhaustion of administrative remedies is futile when there is no reason to believe that a party will be granted relief;
- (h) as a matter of law, the Plaintiffs in this case and all others similarly situated were not required to exhaust administrative remedies because to do so would have been futile;

- (i) the Plaintiffs timely filed their Complaint;
- (j) the Plaintiffs were not bound by any administrative time limitations because administrative relief was futile;
- (k) the Plaintiffs were state employees subject to contract and not employees at will;
- (l) whenever governmental employees enter into performance of their duties, a valid written contract is created that includes all relevant statutory provisions as if strictly set out in the contract;
- (m) a state employee's contract is regulated by the terms of the State Personnel Act;
- (n) the statute of limitations applicable to the Plaintiffs' claims is twenty (20) years;
- (o) I.C. 34-1-2-1.5(a) does not apply to Plaintiffs' cause of action because it does not govern employment related actions not subject to written contracts;
- (p) I.C.34-1-2-1.5(b) does not apply to Plaintiffs' cause of action because it was not enacted when this lawsuit was filed;
- (q) the statute of limitations in effect at the commencement of this litigation governs the action whether it lengthens or shortens the time allowed; and
- (r) the claims of certain of the Plaintiffs are not precluded as a matter of law simply because they are overtime exempt employees.

(13) On September 11, 1998, the Defendants filed their Motion to Correct Errors

and for Recusal in which they requested that Judge Price recuse himself because his wife, as a teacher at the Indiana School for the Blind, might be affected by this litigation and create a conflict for him.

(14) On September 15, 1998, Judge Price entered an Order of Recusal. On the same date, he granted the Motion to Correct Errors and entered an Order vacating and striking his Order of August 28, 1998.

(15) On September 17, 1998, the Clerk of the Marion Circuit Court entered an Order of Appointment of Special Judge naming the Honorable Steven Eichholtz (hereinafter “Judge Eichholtz”) as Special Judge to preside in this cause of action, which was reassigned to Marion Superior Court, Civil Division, Room Number Five (5).

(16) Thereafter the Plaintiffs filed their Notice of Appeal of Judge Price’s decision.

(17) On November 5, 1998, Judge Eichholtz entered a stay of proceedings on the Defendants’ Motion.

(18) In April 2000, Judge Eichholtz resigned from the bench and was succeeded in Marion Superior Court, Civil Division, Room Number Five (5) by the Honorable David Shaheed (hereinafter “Judge Shaheed”).

(19) On April 27, 2000, Plaintiffs filed their Motion for Certification of Interlocutory Order and Motion for Stay of Trial Court Proceedings.

(20) On May 22, 2000, Judge Shaheed entered a Certification of Interlocutory Order and stayed further trial court proceedings pending the outcome of the interlocutory appeal.

(21) On December 31, 2000, Judge Shaheed left the bench and was succeeded in

Marion Superior Court, Civil Division, Room Number Five (5) by the Honorable Gary Miller (hereinafter “Judge Miller”).

(22) On February 21, 2001, the Indiana Court of Appeals entered their decision on the interlocutory appeal, wherein they affirmed Judge Price’s Order of Recusal and reversed his order granting the motion to correct errors which vacated the entry of summary judgment in favor of the Plaintiffs. The Court of Appeals thereby reinstated the trial court’s Order of Summary Judgment in favor of the Plaintiffs and remanded the case for appointment of a special judge.

(23) Although the Court of Appeals’ Order requiring the appointment of a special judge had already been accomplished on September 17, 1998 when the Clerk of the Marion Circuit Court entered her Order of Appointment of Judge Eichholtz, nevertheless, on April 27, 2001, Judge Miller appointed the following special judge panel and ordered the parties to strike from it: The Honorable John F. Hanley, The Honorable Patrick L. McCarty, and The Honorable S. K. Reid.

(24) On May 18, 2001, the parties entered a Report of Striking and Selection of Special Judge stating that the parties had struck from the panel and selected Judge Hanley as the new Special Judge.

(25) On July 27, 2001, the Plaintiffs filed a Praecipe for Hearing on Damages and Class Certification. On that same day, Judge Miller entered an Order of Appointment naming Judge Hanley as Special Judge.

(26) On August 28, 2001, The Court conducted a status conference with counsel for the parties in which they discussed the status of the case and their respective positions on proceeding.

(27) On September 5, 2001, The Court entered an Order on the status conference which included the Defendants' intention not to present evidence or argument that Judge Price's Summary Judgment Order was tainted by his recusal but that they would likely file a Motion for Reconsideration of this Order. The parties subsequently submitted briefs outlining their respective positions on the status of this litigation. The Plaintiffs stated their position that liability had already been established. The Defendants stated their belief that liability was yet to be established.

(28) On February 6, 2002, the Defendants filed their Motion to Reconsider the Summary Judgment Order entered on August 28, 1998.

(29) On February 8, 2002, the Plaintiffs filed their Amended Complaint naming the following Plaintiffs as proposed class representatives for their class action, representing the following respective classes: Paula Brattain (merit/overtime eligible employees); Francis Ernst (non-merit/overtime eligible employees); Rebecca Strong (merit/overtime exempt employees) and Terry Sutcliffe (non-merit/overtime exempt employees).

(30) On November 14, 2002, the Plaintiffs filed their Request for Class Certification Hearing.

(31) On January 23, 2003, the Court conducted a hearing on Defendants' Motion to Reconsider the Summary Judgment entry of August 28, 1998 and on Plaintiffs' Request for Class Certification. At the conclusion of the hearing, the Court gave the parties until February 10, 2003, to submit post-hearing briefs and proposed orders.

(32) On February 28, 2003, the Court Denied Defendants' Motion to Reconsider the Summary Judgment Order of August 28, 1998, and, in a separate Order, on the same date, entered an Order Granting Class Certification.

(33) On March 31, 2003, thirty-one (31) days after entry of the foregoing Orders, the Defendants filed their Motion for Certification of Interlocutory Appeal and Stay of Trial Court Proceedings.

(34) On April 22, 2003, after reviewing the briefs submitted by the parties on the issues presented, the Court Denied Defendants' Motion for Certification of Interlocutory Appeal and Stay of Trial Court proceedings.

(35) On July 8, 2004, the Plaintiffs filed their request for Attorneys Conference which was conducted by the Court on September 17, 2004.

(36) Thereafter, the parties spent the next three (3) years engaged in discovery proceedings.

(37) On February 19, 2008, the Plaintiffs filed their Praecipe for Bench Trial. This cause of action was then set for trial for August 19 – 21, 2008.

(38) On April 30, 2008, the Defendants filed a new Motion for Summary Judgment. The Motion was Denied on July 14, 2008.

(39) On the eve of trial, the parties entered into a Settlement Agreement to resolve this litigation, setting up a procedure for submission of claims and establishing a liability cap of \$8.5 million to be paid by the Defendants. The Defendants were given the option to terminate the agreement within ten (10) days after the end of the claims period if claims made exceeded the amount of the liability cap. The Court preliminarily approved the settlement on August 18, 2008.

(40) On October 20, 2008, the Defendants filed their Motion for Approval of Class Action Settlement which was approved by the Court as a Final Order on October 30, 2008.

(41) On November 10, 2008, the Defendants elected to exercise their option to terminate the Settlement Agreement as claims submitted had exceeded \$8.5 million.

(42) On November 24, 2008, the Court established a new trial date of March 10 through March 13, 2009.

(43) Plaintiff Paula Brattain died while this cause of action was pending and was replaced as the class representative for merit/overtime eligible employees by Jennie Veregge.

(44) The State of Indiana (hereinafter “the State”) maintains a system for assigning each State employee a “job classification.” It has maintained such a system since long before September 19, 1973.

(45) Under the State’s job classification system, State employees who are assigned the same job classification perform comparable work, and their jobs require comparable qualifications.

(46) A “split class” is a job classification under the State’s job classification system in which the State required one or more State employees to work 40 hours per week for the same pay as one or more State employees in the same job classification whom the State required to work only 37.5 hours per week.

(47) State employees required to work 40-hour weeks in a “split class” were paid a lower hourly wage than State employees required to work only 37.5-hour weeks in the same job classification.

(48) The State concedes the “split classes” existed pursuant to the State’s policies and practices from at least September 19, 1973 until September 19, 1993 (hereinafter the “Class Period”).

(49) In 1953, the Indiana General Assembly passed a statute, Ind. Code § 4-1-2-1, requiring that state employees working in state offices work 37.5 hours per week.

(50) Ind. Code § 4-1-2-1 provided, in relevant part:

It is the intent of this chapter that state offices be open and able to conduct public business at all times during an eight and one-half (8-1/2) hour working day. Each employee shall work for a full seven and one-half hours each working day and provision for a one- hour lunch period shall be provided each employee.

(51) The State Personnel Board Rules required that state employees, who did not work in State Offices, would work 40 hours per week.

(52) Merit rule 31 I.A.C. § 2-11-1 (1988) provided:

The normal minimum working week shall be 40 hours except as otherwise established by statute or by specific ruling of the State Personnel Director. Shift hours shall be established by the appointing authority. Assignment of employees to specific shifts shall be the prerogative of the appointing authority.

(53) Non-merit rule 31 I.A.C. § 1-9-1 (1988) provided:

The normal minimum working week shall be 40 hours except as otherwise established by statute or by specific ruling of the Director. Shift hours shall be established by the appointing authority. Assignment of employees to specific shifts shall be the prerogative of the appointing authority.

(54) In 1987, the State Personnel Department learned that some state institution employees had ceased working 40 hours per week.

(55) After further investigation, it was reported that nine (9) state institutions were not in compliance with 31 I.A.C. § 2-11-1; that is, employees at those institutions were not working a minimum 40-hour work week.

(56) On October 5, 1987, the State Personnel Director issued a memorandum to all appointing authorities of agencies and institutions directing them to come into compliance with the applicable minimum work hour requirements if they were not already in compliance.

(57) The October 5, 1987, memorandum directed in relevant part as follows:

Persons employed full time in state institutions are to work a minimum of 40 hours per week in accordance with 31 I.A.C. 1-9-1 and 31 I.A.C. 2-11-1.

Persons employed full time in state offices are to work a minimum of 37-1/2 hours per week, with an hour off each day for lunch, in accordance with IC 4-1-2-1. The phrase "state offices" is interpreted as those places where the general public may conduct business with the various departments and agencies of their state government.

(58) Richmond State Hospital returned to compliance with the 40-hour rule on January 31, 1988.

(59) The State suggested at trial that it maintained "split classes" in some job classifications because some employees in such job classifications worked in "State offices" that are only open during normal business hours, whereas others worked in "State institutions" that must remain open 24 hours a day, making an 8 hour shift necessary. The State, however, did not uniformly employ any such policy during the class period. Evidence in the record shows that some State employees working in split classes in "State institutions" during the Class Period were permitted to work only 37.5 hours per week, while other State employees earning the same pay were not accorded the same preferential treatment.

(60) Nor was the State's policy uniform for employees such as correctional officers who had responsibility for the custody of individuals.

(61) On September 19, 1993, the State moved all State employees, including State

employees working at State institutions, to a base 37.5 –hour work week.

(62) The Court finds that the job classifications listed on Plaintiffs’ Exhibit C as having both 37.5-hour-per-week and 40-hour-per-week workers were “split classes” during the Class Period except for the positions listed in Findings of Fact Numbers 103 and 104.

(63) Plaintiffs Rebecca Strong, Terry Sutcliffe, Francis Ernst, and Jennie Veregge are current or former employees of the State of Indiana.

(64) Plaintiff Jennie Veregge (hereinafter “Veregge”) first began working for the State in 1987, at Richmond State Hospital, and continued working for the State at Richmond State Hospital through at least September 19, 1993.

(65) Veregge was classified as a “Clerk Typist V” from the beginning of her employment by the State in 1987 through as least September 19, 1993.

(66) When Veregge was initially hired, the State only required her to work 37.5 hours per week.

(67) Starting in February 1988, and continuing through September 19, 1993, Veregge was required by the State to work 40 hours per week.

(68) During this time period, as a matter of policy, for any week in which Veregge worked fewer than 40 hours, the State would either have docked Veregge’s pay or required her to expend vacation time, sick time, or personal leave time to make up the difference between the number of hours she worked that week and the 40 hour requirement. If Veregge had consistently worked fewer than 40 hours per week during this time period, despite the 40-hour-per-week requirement, the State would eventually have terminated her employment.

(69) The same is true for all State employees whom the State required to work 40 hours per week during the Class Period, including the other named Plaintiffs.

(70) The “Clerk Typist V” position was classified as an “overtime eligible” position for purposes of federal labor laws.

(71) Richmond State Hospital was classified as a “merit agency,” as that term is used in the relevant Indiana statutes, during the Class Period.

(72) Plaintiff Rebecca Strong (hereinafter “Strong”) first began working for the State in 1971. She began working at Richmond State Hospital in 1973, and continued working for the State at Richmond State Hospital through at least September 19, 1993.

(73) Strong was classified as a “Social Worker IV” from the beginning of her employment at Richmond State Hospital through at least September 19, 1993.

(74) When Strong was initially hired, she was only required to work 37.5 hours per week.

(75) Starting in February 1988, and continuing through September 19, 1993, Strong was required by the State to work 40 hours per week.

(76) The “Social Worker IV” position was classified as an “overtime exempt” position for purposes of federal labor laws.

(77) Plaintiff Francis Ernst (hereinafter “Ernst”) first began working for the State in 1969, at the State Highway Commission. The Highway Commission was subsequently renamed the Indiana Department of Transportation. Ernst continued working for the State in the Highway Commission or its successor agencies through at least September 19, 1993.

(78) Ernst was classified as an “Engineering Assistant Supervisor III,” from December 1989 through at least September 19, 1993.

(79) From the time Ernst became an “Engineering Assistant Supervisor

III,” continuing through September 19, 1993, Ernst was required by the State to work 40 hours per week.

(80) The “Engineering Assistant Supervisor III” position was classified as an “overtime eligible” position for purposes of federal labor laws.

(81) The Indiana Department of Transportation was not classified as a “merit agency” during the Class Period, nor were its predecessor agencies (including the Highway Commission).

(82) Plaintiff Terry Sutcliffe (hereinafter “Sutcliffe”) first began working for the State in 1969 at the State Highway Commission. Sutcliffe continued working for the State in the Highway Commission or its successor agencies (including the Indiana Department of Transportation) through at least September 19, 1993.

(83) Sutcliffe was classified as a “Highway Engineer I” starting in May 1973. He was subsequently classified as a Highway Engineer IV sometime in 1976, then a Highway Engineer III sometime in 1978.

(84) When Sutcliffe was initially hired as a Highway Engineer I, he was only required to work 37.5 hours per week. During this time, Sutcliffe was based either in the local Vincennes District office or in the Highway Commission’s headquarters in Indianapolis.

(85) Starting sometime in August 1973, and continuing through September 19, 1993, Sutcliffe was required by the State to work 40 hours per week. During this time period, Sutcliffe was based in various temporary field offices.

(86) The “Highway Engineer” positions Sutcliffe held were classified as “overtime exempt” positions for purposes of federal labor laws.

(87) Plaintiffs, and all others similarly situated to them, were required to work 40 hours in a split class during the Class Period. They entered into performance of their duties as state employees when they were first hired by the State, and they continued in the performance of their duties throughout the time they were employed by the State.

(88) Throughout the period in question, the State's treatment of its supposedly well-defined job classifications can most charitably be characterized as casual at best in its application.

(89) At trial, the Defendants called as a witness Jennifer Dworkin Vigran (hereinafter "Vigran") who served as Deputy Director of State Personnel from October 1991 until August 1994 and as Director of State Personnel from August 1994 until December 1996.

(90) Vigran testified that a scheme in which some employees worked 37.5 hours per week while others who held the same positions worked 40 hours per week "didn't make sense".

(91) In her testimony, Vigran noted that around the time she became Deputy Director of State Personnel, the Indiana Court of Appeals handed down its decision in the case of *Arden & Coulter v. State Employees Appeals Commission* 578 NE. 2d 769 (Ind. App. 1991), on September 26, 1991.

(92) Following the Indiana Supreme Court's refusal to accept transfer of the *Arden & Coulter* case, two (2) years later, in September 1993, the State ended the practice of requiring that employees in state offices work 37.5 hours while employees in state institutions holding the same positions work 40 hours.

(93) Vigran testified that her job after the decision in *Arden & Coulter* was “limiting future liability”.

(94) In *Arden & Coulter*, the State had advanced the position “that like-classified employees receive equal pay, regardless of whether they work 40 hours or 37.5 hours for that pay, because the effective hourly wage is immaterial; only the biweekly salary matters, and the biweekly salaries are the same” (578 NE 2nd at 772). The Court of Appeals characterized this as “a display of frighteningly flawless Orwellian logic” (578 NE 2d at 772).

(95) Yet, at trial, even though the State had abandoned the discredited state office/state institution distinction to justify differential treatment of its like-situated employees in 1993, the Defendants continued to advance this position as a valid construct and urged this Court to approve its effects. Clearly, little has changed in the last eighteen (18) years.

(96) At trial, another witness called by the Defendants was Brian Keith Beesley (hereinafter “Beesley”), an employee of the State Personnel Department for thirty-two (32) years and the Department’s chief attorney.

(97) Beesley testified that split classifications occurred due to the discrepancies between state law covering state offices, requiring employees to work a 37.5 hour week, and state policy for state institutions establishing a 40 hour work week for those employees. He further testified that some split classifications had existed for as long as forty (40) years.

(98) At trial, the Plaintiffs called as their expert witness David N. Fuller (hereinafter “Fuller”), the President of Value, Inc.

(99) Fuller analyzed the State’s own payroll and employment records, as well as data submitted by class members, in the process of calculating aggregate damages estimates for the class.

(100) In analyzing the State's payroll and employment records, Fuller built a special computer for this specific project in order to hold all of the data supplied by the State.

(101) The State provided to Fuller one hundred seventy three (173) rolls of microfilm which it had preserved containing the payroll and employment records of state employees during this period. Fuller found that one hundred fifty-six (156) of these rolls were usable and seventeen (17) were unable to be read.

(102) Based on Fuller's analysis and calculations, an employee required by the State to work 40 hours per week in a "split class" is damaged in an amount equal to 6.67% of the base pay the employee received from the State for the time during which he or she was working 40 hours per week in the "split class."

(103) In his analysis, Fuller established two (2) separate sets of figures for damages, the first being \$42,422,788.00, and the second being \$49,682,993.00; the second figure included the positions of Psychiatric Attendant 4, Cook 1, Cook 3 and Teachers Assistant 4.

(104) Fuller testified that the latter calculation included the four (4) job classifications listed above which had been excluded from the first calculation because of the "possibility that they were not split classifications."

(105) Fuller testified that the methodology he applied in arriving at these figures was based on the most conservative estimate of damages.

(106) Fuller also employed data taken from the claims submitted by employees after the parties had entered into their Preliminary Settlement Agreement in August 2008, based on information provided for the claims period of September 1973 to September 1993.

(107) Fuller's total damage calculation based on adjusted eligible claims submitted was \$81,989,273.00.

(108) Fuller testified that the methodology he applied to the claim form process has not been applied in the past but is generally accepted.

(109) In response to questions from the Court, Fuller testified that he accepted the information submitted by individual claimants as accurate and reliable and that he did not have an independent process to filter out duplicate claim forms or erroneously provided information.

(110) In short, Fuller's first two (2) calculations were based on information gleaned from the State's own records while the third calculation came from information provided by each individual claimant.

(111) Fuller has testified as an expert witness in this area in numerous trials and has had his opinions accepted by other courts.

(112) At trial, the Defendants called as their expert witness Robert Roeder (hereinafter "Roeder"). Roeder served as Director of Compensation for the State of Indiana from July 1973 to January 1976 and as Director of the State Personnel Department from January 1976 to January 1981.

(113) Roeder did not perform an independent review or evaluation of either the State's payroll and employment records or of the claim forms submitted. He only provided a critique of Fuller's reports.

(114) Despite criticism of some of Fuller's conclusions, Roeder testified that "arithmetically everything was correct" and that "for the most part, the methodology was reasonable".

(115) The Court finds that, although there are admittedly gaps in the information which causes there to be an incomplete record due to the passage of time, the most reliable

source of information of employment and pay records is contained in the microfilm records provided to Fuller by the State.

(116) Accordingly, the Court finds that the total amount of damages allowable in this cause of action is \$42,422,788.00.

(117) The Court takes judicial notice of the present economic conditions in this country and the possibility that entry of a judgment in this amount will not be widely appreciated for that reason. However, these are political considerations and not legal ones. The parties have had numerous opportunities to resolve this litigation over an extended number of years, in good economics times as well as bad, without the necessity of judicial intervention, and they have failed to do so. This decision today is the necessary result of that failure.

(118) It should be further noted that, while the Court regrets any discomfort that a judgment of this size may cause the State who will be required to pay it, a recent estimate showed that the State of Indiana spends approximately \$38 million per day every day of the year (Indianapolis Star, June 26, 2009, at 1). The judgment entered by this Court today therefore represents barely more than what it costs the State of Indiana to operate for only one single day.

CONCLUSIONS OF LAW

(1) Wherever appropriate or necessary herein the above-stated “Findings of Fact” shall be construed and interpreted as “Conclusions of Law”.

(2) The Court in prior rulings has already made the following conclusions of law:

(a) Whenever employees of the State enter into performance of their

duties, a valid written contract is created. Conditions of such a contract include all relevant statutory provisions as if such provisions were strictly set out in the contract. State employees' contracts are regulated by the terms of the state Personnel Act codified at Ind. Code 4-15-2-1, *et seq.* and the regulations thereon, 31 I.A.C. 2-1-1, *et seq.* Findings of Fact, Conclusions of Law and Judgment Denying Defendants' Motion for Summary Judgment and Granting Plaintiff(s') Motion for Summary Judgment ("1998 Summary Judgment Ruling"), Aug. 28, 1998, Conclusions of Law Nos. 21-23, 51-53, 75-77, 101-103.

- (b) Plaintiffs timely filed their complaint. 1998 Summary Judgment Ruling, Conclusions of Law Nos. 72, 98, 109.
- (c) Plaintiffs were not required to exhaust any available administrative remedies prior to filing this lawsuit because to do so would have been futile. 1998 Summary Judgment Ruling, Conclusions of Law Nos. 17, 41, 71, 97.
- (d) An employee's classification as "overtime exempt" does not as a matter of law preclude the employee from recovering damages for having been required by the State to work 40 hours in a "split" job classification. 1998 Summary Judgment Ruling, Conclusion of Law Nos. 84, 116. *See also* Order of July 14, 2008 (denying Defendants' Motion for Summary Judgment dated April 30, 2008, which sought

among other things a ruling that, as a matter of law, “(o)vertime exempt employees were not entitled to any additional pay”).

(3) Whether government employees have contractual rights is a question of law entirely within the province of the courts. *Whinery v Roberson*, 819 N.E. 2d 465, 472 (Ind. App. 2004).

(4) A government employee may sue for violation of employment rights in contract, and the terms and conditions of the employee’s contract include all relevant statutory provisions as if such provisions were set out in the contract. *Whinery v. Roberson*, 819 N.E. 2d 465, 473 (Ind. App. 2004); *Bernhardt v. State*, 479 N.E. 1367, 1369 (Ind. App. 1985); *Foley v. Consol. City of Indianapolis*, 421 N.E. 2d 1160, 1163 (Ind. App. 1981).

(5) A government employee’s relationship with the State, although not necessarily defined by a written employment contract is purely contractual. Laws having to do with remuneration become part of the employment contract, and so attach themselves as an incident thereof. *Whinery v. Roberson*, 819 N.E. 2d 465, 473 (Ind. App. 2004); *Marter v. City of Vincennes*, 118 Ind. App. 586, 590, 82 N.E. 2d 410, 411 (1948).

(6) Contractual elements are established by the State’s (1) offer to pay, (2) consideration of the Employees’ services and (3) the Employees’ acceptance through performance. *Whinery v. Roberson*, 819 N.E. 2d 465, 473 (Ind. App. 2004).

(7) Potential plaintiffs must first exhaust administrative remedies before seeking judicial relief. However, there are three (3) recognized exceptions to this rule: direct resort to the courts is justified where (1) compliance with the rule would be futile, (2) the statute is charged to be void on its face, or (3) irreparable injury would result. *State Board of Public Works v. Tioga Pines*, 575 N.E. 2d 303,307 (Ind. App. 1991); *Indiana High School Athletic*

Ass'n v. Raike, 164 Ind. App. 169, 329 N.E. 2d 66, 82 (1975). See also: *Rambo v. Cohen*, 587 N.E. 2d 140 (Ind. App. 1992); *Bowen v. Sonnenburg* 411 N.E. 2d 390, 403 (Ind. App. 1980).

(8) Plaintiffs are relieved from pursuing administrative remedies where the administrative remedy is inadequate or where it would be futile to attempt exhaustion. *Ahles v. Orr*, 456 N.E. 2d 425, 426 – 427 (Ind. App. 1983).

(9) All actions based upon written contracts other than those for the payment of money entered before 1982 must be commenced within twenty (20) years after the cause of action has accrued Whenever government employees enter into performance of their duties, a viable written contract is created. *Lake County v. State ex rel. Manich* 631 N.E. 2d 529,535 (Ind. App. 1994).

(10) Under Indiana law, “(t)he essential elements of a breach of contract action are the existence of a contract, the defendant’s breach thereof, and damages,” *Am. Family Mut. Ins. Co. v. Matusiak* 878 N.E. 2d 529, 533 (Ind. App. 2007) (quoting *Rogier v. Am Testing & Eng’g Corp.*, 734 N. E. 2d 606, 614 (Ind. App 2000) *trans denied*), *trans denied*.

(11) Because Plaintiffs Veregge, Strong, Ernst and Sutcliffe, and all others similarly situated, entered into performance of their duties as State employees from the time they were first hired by the State, they are deemed as a matter of law to have written employment contracts with the State that incorporate all relevant statutes and regulations in addition to all other laws applicable to their positions.

(12) Work need only be comparable, not equal, for equal pay to be required. Comparable work is a qualitative concept, not a quantitative concept. *Arden & Coulter v. State Employees Appeals Commission*, 578 NE. 2d 769, 772, n. 8 & 9 (Ind. App. 1991).

(13) Requiring State “merit” employees to work 40 hours per week for the same pay as other State employees in the same job classification whom the State required to work only 37.5 hours per week violates the Indiana “equal pay for comparable work” regulation that was in force during the Class Period, 31 I.A.C. § 2-4-2. *See Arden & Coulter v. State Employees’ Appeals Comm’n*, 578 N.E. 2d 769, 771-72, n.8 (Ind. Ct. App. 1991), *trans denied*.

(14) That regulation is incorporated into the employment contract of every State employee working for a State “merit agency,” *See* 1998 Summary Judgment Ruling, Conclusions of Law Nos. 23, 53, 77, 103. Any violation of that regulation accordingly constitutes a breach of the State’s employment contract with the State employee.

(15) By requiring Plaintiffs and others similarly situated, to work 40 hours per week in “split classes” during the Class Period, the State violated the “equal pay for comparable work” regulation and accordingly breached its employment contracts with Plaintiffs and with any other persons similarly situated.

(16) Class action determinations are governed by the provisions of Trial Rule 23 of The Indiana Rules of Trial Procedure.

(17) The determination of whether an action is maintainable as a class action is committed to the sound discretion of the trial court. *Associated Medical Networks, LTD. v. Lewis*, 824 N.E. 2d 679, 682 (Ind. App. 2005); *Northern Ind. Public Service Co. v. Bolka*, 693 N. E. 2d 613, 615 (Ind. App. 1998), *trans denied*.

(18) The State’s above-described breaches of its employment contracts with Plaintiffs and other similarly situated persons caused them monetary damages.

(19) Although Plaintiffs bear the burden of proving damages, the burden is not heavy. “No degree of mathematical certainty is required in awarding damages so long as the amount awarded is supported by evidence in the record.” *Prime Mortgage USA, Inc. v. Nichols*, 885 N. E. 2d 628, 656 (Ind. App. 2008) (quoting *Gasway v. Lalen*, 526 N.E. 2d 1199, 1203 (Ind. App. 1988)). “Evidence of loss is not objectionably uncertain if it is sufficient to enable the fact-finder to make a fair and reasonable finding. Less certainty is required to prove the amount of loss than the fact that some loss occurred.” *Floyd v. Jay County Rural Electric Membership Corp.*, 405 N. E. 2d 630, 634 (Ind. App. 1980). “(U)ncertainty as to the exact amount of damages is resolved against the wrongdoer; ‘justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong created.’” *Id* (quoting *Charlie Stuart Oldsmobile, Inc. v. Smith*, 357 N.E. 2d 247, 252 (Ind. App. 1976), *vacated in part on reh’g*, 369 N. E. 2d 947, and *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1945)).

(20) A judgment for aggregate class damages is appropriate where “monetary liability can be demonstrated by a mathematical computation based on a formula common to an identified class.” Newberg on Class Actions § 10.3 (2008). “Aggregate class proof of monetary relief may also be based on sampling techniques or other reasonable estimates, under accepted rules of evidence.” *Id*.

(21) In this case, the State’s monetary liability can be demonstrated by a mathematical computation upon which the parties basically agree; the base pay an employee received from the State for the time during which he or she was working 40 hours per week in a “split class,” multiplied by 6.67%. Given this, and given the records Plaintiff’s expert David N. Fuller utilized to calculate aggregate damages – including the State’s own

employment and payroll records – aggregate proof of class damages is proper in this case. *See, e.g. Liberles v. County of Cook*, 709 F.2d 1122, 1136 (7th Cir. 1983) (aggregate damages were appropriate in “equal pay for equal work” case involving three different categories of workers whom the court held were entitled to equal pay; “individualized hearings are unnecessary because all three groups of workers were entitled to be paid the same amount”).

(22) The State’s breach of its employment contracts with all 40-hour employees in “split classes” during the Class Period damaged these employees in an aggregate amount of \$42,422,788.00 during the Class Period. This total includes the damages of the named plaintiffs, and can be subtotaled as follows:

(a) The State’s breach of its employment contracts with all such employees whose job classification were “overtime eligible” for purposes of federal labor laws, and who were working in State “merit agencies” during the Class Period, damaged these employees in an aggregate amount of \$20,979,490.00 during the Class Period.

(b) The State’s breach of its employment contracts with all such employees whose job classifications were “overtime eligible” for purposes of federal labor laws, and who were working in State agencies that were not classified as “merit agencies” during the Class Period, damaged these employees in an aggregate amount of \$16,762,773.00 during the Class Period.

(c) The State’s breach of its employment contracts with all such employees whose job classifications were “overtime exempt” for purposes of federal labor laws

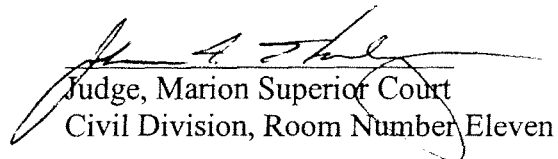
and who were working in State “merit agencies” during the Class Period, damaged these employees in an aggregate amount of \$2,696,812.00 during the Class Period.

(d) The State’s breach of its employment contracts with all such employees whose job classifications were “overtime exempt” for purposes of federal labor laws, and who were working in State agencies that were not classified as “merit agencies” during the Class Period, damaged these employees in an aggregate amount of \$1,983,713.00 during the Class Period.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiffs Jennie Veregge, Rebecca Strong, Francis Ernst, and Terry Sutcliffe, and all other current or former State employees who during the Class Period worked 40 hours per week in the job classifications identified as “split” by Plaintiffs’ Exhibit C, except those explicitly excluded by the Court’s Findings of Fact Nos. 103 and 104, should have, and are hereby granted, Judgment against the State of Indiana in the sum of \$42,422,788.00.

ALL OF WHICH IS ORDERED THIS 28th DAY OF JULY 2009


Judge, Marion Superior Court
Civil Division, Room Number Eleven

cc:

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