NO. 42332-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES AND DEPARTMENT OF PERSONNEL,

Appellants,

v.

MICHAEL SCHATZ, ET AL,

Appellees.

BRIEF OF APPELLANTS

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I. INTRODUCTION

The Plaintiffs in this case are two classes of employees that work on the forensic wards at the two psychiatric hospitals operated by the State of Washington, Department of Social and Health Services (DSHS). As Psychiatric Security Nurses (PSNs) and Psychiatric Security Attendants (PSAs), they tend to the day to day needs of patients criminally committed to Western and Eastern State Hospitals. In 2007, more than three years after their union began bargaining their wages, the PSNs and PSAs brought suit against DSHS and the Department of Personnel (DOP)[1] (collectively, the State) seeking higher wages, based on allegations of constitutional equal protection violations, statutory comparable worth violations, and arbitrary and capricious agency action. At trial, however, the PSNs and PSAs not only conceded but argued that their jobs are significantly different from the Licensed Practical Nurse (LPN) and Mental Health Technician (MHT) jobs to which they compared themselves. Thus, they do not challenge the classification difference and, accordingly, there is no constitutional equal protection issue. Nor is there a statutory reason for PSNs and PSAs to obtain judicial intervention into their collective bargaining relationship with the State.

In reality, then, the PSNs and PSAs were asking the court to make a subjective qualitative judgment about the value of their jobs as compared to others, and second-guess the decisions made by the employees' own

[1] DOP was abolished as of October 1, 2011, and its duties transferred to the Department of Enterprise Services and the Office of Financial Management. Laws of 2011, 1st Ex. Sess., Ch. 43, § 401.

union in negotiating their salaries, the agency charged with administering the civil service system, and the Legislature in its funding decisions. This Court has recognized that the courts of this state are ill-equipped to act as super personnel agencies. Accordingly, the Court should reverse the trial court and remand for dismissal and entry of judgment in favor of the State.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in entering Findings of Fact Nos. 6, 7, 17, 18, 19, 20, 21, 26, 29, 30, 32 and 34, which all state in various ways that PSNs are similarly situated to LPN 4s and that PSAs are similarly situated to MHT 3s. Clerk's Papers (CP) at 2216, 2219-22.

2. The superior court erred in entering Finding of Fact No. 15 to the extent it mischaracterizes the holding of the Thurston County Superior Court in Cause No. 80-2-00966-1 and the holding of the Court of Appeals in 8345-1-II. CP at 2218.

3. The superior court erred in entering Finding of Fact No. 27, which provides that PSN compensation lags significantly behind LPN 4 compensation and that PSA compensation lags significantly behind MHT 3 compensation, contrary to the reason for originally compensating PSNs and PSAs more than LPNs and HAs and directly contrary to the intended outcome of the prior litigation in which PSNs and PSAs won the right to be classified as such at higher compensation rates than LPNs and HAs.[2] CP at 2221.

4. The superior court erred in entering Findings of Fact Nos. 28, 46, and 47, which provide that the decision to pay PSNs and PSAs less than LPN 4s and MHT 3s, respectively, was arbitrary and capricious and not based on reality. CP at 2221, 2224.

5. The superior court erred in entering Findings of Fact Nos. 36, 37, 38, 39, 40 and 45, which provide that the salary ranges of the PSNs

[2] HA refers to the Hospital Attendant classification, which was the precursor to the Mental Health Technician classification.

and PSAs should be changed to the salary ranges of the LPN 4s and MHT 3s, respectively. CP at 2222-24.

6. The superior court erred in entering Findings of Fact Nos. 43 and 44, which provide that awarding PSNs compensation equal to that of LPN 4s and awarding PSAs compensation equal to that of MHT 3s is appropriate under equal protection and comparable worth doctrines. CP at 2224.

7. The superior court erred in entering Finding of Fact No. 45, which provides that pay rate adjustments shall be retroactive to May 16, 2004, with all corresponding increases. CP at 2224.

8. The superior court erred in entering Finding of Fact No. 48, which provides that the State did not provide Plaintiffs a meaningful and effective method to challenge the pay range to which the duties of their positions were assigned and that any administrative remedy would have been either non-existent or futile. CP at 2224.

9. The superior court erred in entering Conclusion of Law No. 3, to the extent it provides that the remedies awarded relate back to May 16, 2004 and continue prospectively until fully satisfied in accordance with the Court's Order. CP at 2225.

10. The superior court erred in entering Conclusions of Law Nos. 4, 6, and 7, which provide that paying Plaintiffs less than LPN 4s and MHT 3s violates their rights to comparable pay for comparable work under the concept of comparable worth codified at RCW 41.06.020(5), RCW 41.06.133(10), and RCW 41.06.155. CP 2225-26.

11. The superior court erred in entering Conclusions of Law Nos. 5, 8, 16, 18, and 22, which provide that paying Plaintiffs less than LPN 4s and MHT 3s violates their rights to equal protection under the State and Federal Constitutions and that the State has failed to establish a rational basis for paying Plaintiffs less. CP at 2226, 2228-29.

12. The superior court erred in entering Conclusion of Law No. 9, which provides that the onerous nature of the security duties coupled with the care and treatment of the patient in the forensic

wards of Western and Eastern State Hospitals is most properly remedied by establishing the appropriate salary range for LPN 4s for PSNs and MHT 3s for PSAs. CP at 2227.

13. The superior court erred in entering Conclusions of Law Nos. 10, 11, 19, and 22, which provide that the payment of PSNs and PSAs at one salary range lower then LPN 4s and MHT 3s, respectively, is arbitrary and capricious. CP at 2227-29.

14. The superior court erred in entering Conclusion of Law No. 12 to the extent it concludes that the State pays PSNs and PSAs salaries that disregard their duties and the burdens of their jobs. CP at 2227.

15. The superior court erred in entering Conclusion of Law No. 13, which provides an award of back pay, higher salary ranges going forward, plus any premium pay, including overtime. CP at 2227.

16. The superior court erred in entering Conclusion of Law No. 14, which provides for related contributions associated with back pay awards, including but not limited to, contributions to the Washington Public Employees Retirement System. CP at 2227.

17. The superior court erred in entering Conclusion of Law No. 15, which provides for interest on all sums not paid from the date of entry of the judgment forward at the statutory rate for interest in judgments. CP at 2227.

18. The superior court erred in entering Conclusion of Law No. 20, which provides that the superior court's inherent power under the Washington Constitution to review administrative decisions for illegal or arbitrary acts affords Plaintiffs a remedy for the arbitrary and capricious actions of the State in paying Plaintiffs less than similarly situated employees without a rational basis in reality for paying these Plaintiffs less than similarly situated employees and in conscious disregard of the actual working conditions and the more onerous and exacting nature of their duties. CP at 2228.

19. The superior court erred in entering Conclusion of Law No. 21, which provides that the Plaintiffs are entitled to prospective relief in the setting of the rates of pay pursuant to 42 U.S.C. § 1983 in as

much as the defendants have violated their rights of equal protection under the United States Constitution. CP at 2229.

20. The superior court erred in entering Conclusion of Law No. 23 to the extent that it provides that the State's waiver of sovereign immunity renders the decisions of *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989), and *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983), inapplicable to Washington State. The superior court, nevertheless, correctly concluded that Plaintiffs are not entitled to damages under 42 U.S.C. § 1983. CP at 2229.

21. The superior court erred in entering Conclusion of Law No. 25, which provides that the findings of fact and conclusions of law entered in the action brought in Thurston County Superior Court Cause No. 80-2-00966-1, affirmed in No. 8345-1-II are established as a matter of law and the State is collaterally estopped from relitigating those issues based upon the record herein and that the record in this case establishes the Plaintiffs' claims without resort to collateral estoppel, in any event. CP at 2229-30.

22. The superior court erred in entering Conclusions of Law Nos. 27 and 28, which direct that the pay ranges of PSNs and PSAs be adjusted as specified in Findings of Fact Nos. 37 and 38 effective May 16, 2004, and PSNs and PSAs be paid the difference between the two salary ranges for all hours compensated on or after May 16, 2004. CP at 2230.

23. The superior court erred in entering Conclusion of Law No. 29 and 30, which provide that absent a substantial change in circumstances and duties, the State shall not pay PSNs at a pay range lower than the LPN 4 pay range and PSAs at a pay range lower than the MHT 3 pay range. CP at 2230.

24. The superior court erred in entering Conclusion of Law No. 31 and Order Granting Plaintiffs' Motion for Attorneys' Fees dated July 22, 2011, which awards Plaintiffs attorneys' fees and costs. CP at 2230, 2192-96.

25. The superior court erred in denying the State's motion in limine to exclude Plaintiffs' expert testimony, allowing expert testimony that

does not meet the standard in Evidence Rule 702, and further allowing the expert to testify as to a legal conclusion. CP at 1542-1613, 1777-79; Verbatim Report of Proceedings (VRP) at 75.

26. The superior court erred in denying Defendants' Motion to Dismiss at the close of Plaintiffs' case. VRP at 576-87, 596-08.

27. The superior court erred in denying Defendants' Motion for Summary Judgment. CP at 545–1073, 1458-60; VRP (Feb. 6, 2009) at 1-18.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the State of Washington have a rational basis for paying employees according to their differing job classifications, where the employees expressly agreed to the applicable wage amounts through collective bargaining and where the job classifications each have distinctive duties, working conditions, and other privileges of employment? (Findings of Fact Nos. 6, 7, 17, 18, 19, 20, 21, 26, 29, 30, 32, 34, 43, 44; Conclusions of Law Nos. 3, 5, 8, 16, 18, 21, 22, 23)

2. Can employees obtain adjustment of their wages directly in superior court under the court's inherent power and the comparable worth statutes, where employees identify no specific decision by the State for review and where the State complied with the comparable worth requirements in 1993? (Findings of Fact Nos. 27, 28, 36, 37, 38, 39, 40, 43, 44, 45, 46, 47, 48; Conclusions of Law Nos. 3, 4, 6, 7, 9, 10, 12, 13, 14, 15, 20, 27, 29)

3. Is the State collaterally estopped by a twenty-five year old superior court decision regarding the allocation of positions into civil service classifications, where the Plaintiffs do not challenge their civil service classifications, and, therefore, the issues in the two cases are different? (Finding of Fact No. 15; Conclusion of Law No. 25)

4. Are attorney fees available to a prevailing party under both a fee shifting statute and the equitable common fund doctrine? (Conclusion of Law No. 31; Order Granting Plaintiffs' Motion for Attorneys' Fees, CP at 2192-96)

IV. STATEMENT OF THE CASE

DSHS employs various nursing and patient care staff at its psychiatric hospitals, Western State Hospital (WSH) and Eastern State Hospital (ESH).[3] Among the staff are licensed practical nurses and personal care (nursing assistant) staff. These employees are classified civil service employees. RCW 41.06.020(5), .040(2), .070.

Since 1960, when the Civil Service Act was passed by initiative, the State has been required to maintain a comprehensive classification plan for all positions employed in the classified service, based on investigation and analysis of the duties and responsibilities of each such position. Initiative 207, Laws of 1961, ch. 1 (codified in RCW 41.06). As a result, each classified position within State service is categorized into a specific job classification. A salary schedule, in turn, sets forth the salary range that may be afforded to employees based on the job classification they occupy. All positions within a single job classification are placed in the same salary range. WAC 357-28-020; Trial Exhibit (Ex.) 219 at 97. Additionally, the ability to promote, transfer, bump other employees during a layoff, or revert to another position derives from the specific job classification the employee occupies or has previously occupied. *See generally* WAC 357-19 (differentiating as to trial service periods,

[3] For a description of the hospitals, see CP at 1821-25, incorporated herein by this reference, and VRP at 757-64.

reversions, and transfers based on whether employee has held permanent status in the affected job classification); WAC 357-46-035 (providing right to layoff option based on whether employee has held permanent status in the relevant job classification). *See also* Exs. 219-221 (parties' collective bargaining agreements provide same layoff rights). Thus, employees are differentiated from one another based on the specific job classifications to which they are assigned.

There are two different civil service job classifications for employees performing licensed practical nurse functions—the LPN class series and the PSN classification. LPNs work primarily on the civil commitment wards of the hospitals. CP at 2215-16. PSNs are assigned to the criminal commitment (forensic) wards.[4] *Id.* The LPN classification is also used by DSHS at its residential facilities for the developmentally disabled and the Special Commitment Center for sexually violent predators. *See, e.g.,* VRP at 332, 1045. Other state agencies also use the LPN classification. The Department of Veterans Affairs employs LPNs in its veterans' homes and the Department of Corrections employs LPNs in the medical facilities within prisons. *See, e.g.,* VRP at 332, 743-44. On the other hand, the PSN classification is unique to DSHS's psychiatric

[4] The process for civil commitment to the hospitals is set forth in RCW 71.05 and the process for criminal commitment is set forth in RCW 10.77. *See* CP at 1821-22; VRP at 766-70, 851-54.

hospitals, i.e., it is not used in other DSHS facilities or by other state agencies. VRP at 685.

The nursing assistant staff is also split in two different civil service job classifications depending on whether they work on civil commitment wards or forensic wards. These job classifications are the MHT class series and the PSA classification, respectively. CP at 2215.

Within the LPN class series, there are three levels–LPN 1, LPN 2 and LPN 4–creating a career ladder. LPN 1s are entry level positions used for new employees to gain training and to learn the procedures of the hospital. VRP at 686. The employees work under close supervision. *Id.* LPN 2s are the journey-level workers that perform the full scope of licensed practical nursing responsibilities, including passing medications and administering treatments, and work more independently. Exs. 36, 210. *See also* VRP at 686, 689, 741, 869. LPN 4s perform the same nursing work that LPN 2s do, but have additional administrative responsibilities. *See generally* Ex. 209. The LPN 4 is the supervisory or lead level of the series. *Id. See also* VRP at 687, 867.

Prior to July 1, 2005, the LPN 4s at WSH and ESH were supervisors. VRP at 27, 156–57, 349–50, 868. They directed the work of the LPN 2s and LPN 1s as well as the MHTs. They conducted the performance evaluations of the LPN and MHT staff that reported to them.

VRP at 868, 1030. The LPN 4s working in the veteran's homes operated by the Department of Veteran's Affairs are still supervisors with all of the responsibilities that entails. Ex. 209 at 14-71; VRP at 745–46.

As of July 1, 2005, when there was a consolidation of management responsibilities within DSHS, LPN 4s at WSH and ESH were, with one exception,[5] no longer supervisors but continued to be designated as the lead worker on their wards, assigning work to the LPN 2s and MHTs on their wards, ordering supplies, and performing other tasks as needed. *See, e.g.,* VRP at 27, 29, 148, 149, 347, 575, 867, 870, 1122-24; Ex. 209. As the lead worker, the LPN 4 is the single responsible staff person on the ward for ensuring that all required tasks are performed and patient needs met. VRP at 145, 149, 687, 870, 873, 964-67, 982-90, 1002, 1007-10, 1030, 1100; Ex. 229 at 227. While there are typically several LPN 2s working on any given shift on any given civil ward, there is only one LPN 4 on each shift per ward. *See, e.g.,* VRP at 27, 29, 359, 873, 1023.

PSNs, who perform licensed practical nurse work on the forensic wards, do not have levels within their classification. VRP at 142, 320. There are no PSN 1, 2, 3s or 4s; there are only PSNs. There are typically several PSNs working on each ward each shift, and to the extent that they perform administrative work in addition to their nursing duties, they share

[5] Until 2011, WSH did continue to use an LPN 4 as a supervisor in the Program for Adaptive Living Skills. VRP at 869.

such tasks. VRP at 30-31, 97, 143, 146, 148, 289, 319, 348–49, 874, 1145. The PSN is not a designated lead worker. Ex. 213; VRP at 148, 347, 800, 874, 1109. The RN is the lead on the forensic wards. *See* VRP 347, 1015, 1109, 1129-30. Just as LPN 2s may act as lead in the absence of the LPN 4, PSNs may trade off acting as lead in the absence of the RN. VRP at 159, 160, 175, 178, 270, 319, 352, 994, 1012. But, there is no PSN designated as the lead worker for the ward with that level of responsibility and accountability one hundred percent of the time, as the LPN 4 is on a civil ward.

Within the MHT class series, there are three classifications currently used in patient care capacities at the hospital. Like LPNs, MHTs work up the series ladder by taking on increasing levels of responsibility for administrative tasks. MHT 1s are the journey-level classification in the MHT class series. VRP at 699. They escort and account for patients, assist in activities of daily living, and perform other nursing assistant tasks as needed. VRP at 877. MHT 2s and MHT 3s perform all of the same patient care responsibilities that MHT 1s do, with added administrative responsibilities. VRP at 877-78; s*ee generally* Exs. 211, 212. While there are typically several MHT 1s on any given shift on any given civil ward, there is only one MHT 2 and only one MHT 3 on each ward. *See, e.g.*, VRP at 802-04, 831, 878. MHT 3s, who only work day shift, have sole

responsibility for ordering supplies, completing certain ward paperwork, accounting for patient belongings, and other administrative tasks. *See, e.g.,* VRP at 31-32, 128, 359, 802-03, 831, 875-76, 945-46, 967-68, 1101, 1111-17; Ex. 211. MHT 2s, who only work day or swing shift, cover MHT 3 responsibilities when the MHT 3 is not present. *See, e.g.*, VRP at 803, 831-32, 876-77; Ex. 212.

In contrast, the PSAs, who work exclusively on the forensic wards, do not have levels within their classification. To the extent that PSAs perform administrative tasks, they share the tasks amongst several PSAs and other staff. *See, e.g.*, VRP at 153, 328, 448-49, 452, 806, 833, 878-79, 1103. Unlike the MHT 3, there is no single PSA with the entirety of the administrative responsibilities that a single MHT 3 has on a civil ward. *Id.*

The fact that these employees–PSNs and LPNs, PSAs and MHTs–are in different job classifications dates back to the 1980s when the Thurston County Superior Court overturned a decision of the State Personnel Board reallocating the employees working as PSNs and PSAs into the LPN and MHT (formerly HA) job classes. Ex. 27. *See also* Exs. 3-5, 141-143. Since that time, the PSNs, PSAs, and their union, the Washington Federation of State Employees (WFSE), have fought to retain their unique job classifications. VRP at 330-31, 668, 1035. Thus, in this case, the Plaintiffs are not challenging the fact that the State classifies

them separately from the LPNs and MHTs. VRP at 324-25, 330-31, 357, 363.

Prior to 2004, wages for each job classification were established by the Legislature through a statutory procedure.[6] Under this process, DOP applied specific statutory criteria to recommend to the Personnel Resources Board salary increases for specific civil service classifications. VRP at 518, 521, 635-36. If the Board agreed with the recommendation, the increases were sent to the Office of Financial Management for approval. VRP at 522. If approved as being fiscally feasible, the increases would be included in the Governor's budget proposal to the legislature. *Id.* The Legislature then had the ultimate authority to include or exclude any recommended salary increases in the final budget. Former RCW 41.06.150, .152 (2000). *See also, e.g.*, VRP at 518, 522, 635.

Under the Personnel System Reform Act (PSRA) of 2002, the Legislature established collective bargaining of wages with employees' exclusive bargaining representatives. Laws of 2002, ch. 354 (codified in RCW 41.80). Bargaining began in early 2004. VRP at 615. Thus, at all times relevant to this case, the wages of LPNs, PSNs, MHTs, and PSAs have been determined exclusively through collective bargaining. *Id.*

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[6] *See* CP at 549-55, 1840-46 (incorporated herein by this reference). *See also* VRP at 518-24.

V. STANDARD OF REVIEW

Where the trial court has weighed the evidence, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Unchallenged findings are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). The Court reviews conclusions of law de novo. *Sunnyside Valley*, 149 Wn.2d at 880.

VI. SUMMARY OF ARGUMENT

The superior court erred in finding that the State violated Plaintiffs' constitutional right to equal protection. Substantial evidence at trial established that Plaintiffs' are significantly different from LPN 4s and MHT 3s and Plaintiffs did not prove that the classification distinguishing them and LPN 4s and MHT 3s lacks a rational basis. Further, the superior court erred in failing to defer to the collective bargaining process by which Plaintiffs' wages have been determined at all times relevant to this case.

Moreover, the comparable worth statutes do not provide an avenue for employees or a court to make subjective judgments about the value of

particular civil service jobs. The trial court erred in exercising its inherent authority to review agency action. First, there was no "agency decision" for the court to review. Second, a writ of certiorari was inappropriate where the PSNs and PSAs neglected to avail themselves of any alternate forms of relief. Finally, if any relief was appropriate under a writ of certiorari, it should have been a remand to the agency.

VII. ARGUMENT

A. The State Does Not Violate Equal Protection By Paying PSNs And PSAs Different Base Salaries Than Other, Distinct Job Classifications

In directing the State to pay PSNs the same as LPN 4s and PSAs the same as MHT 3s, the trial court misconstrued and failed to properly apply equal protection law. Rather than address the only appropriate question, which is whether or not it is rational for the State to classify the employees working as PSNs and PSAs separately from the employees working as LPN 4s and MHT 3s, the trial court made a value judgment about how much the employees in the respective classifications should be paid as compared to each other. In doing so, the trial court exceeded its limited role to review the classification distinction itself. Once it was apparent that the PSNs and PSAs agree that they are properly classified differently than LPN 4s and MHT 3s, and that they are, regardless,

objectively different, the trial court should have dismissed the equal protection claim.

1. In analyzing a federal equal protection or state privileges and immunities claim, the Court reviews the State's classification to determine if it is rational.

As the party challenging the classification, the PSNs and PSAs bear the burden of proving an equal protection violation.[7] The trial court correctly chose the rational basis standard of review in this case, which does not turn on a fundamental or suspect classification, and involves finite government resources. CP at 2229; *WPEA v. State*, 127 Wn. App. 254, 263 ¶ 19, 110 P.3d 1154 (2005); *More v. Wash. State Dep't. of Ret. Sys.*, 133 Wn. App. 581, 585, 137 P.3d 73 (2006); *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 739, 57 P.3d 611 (2002). Under rational basis review, a "classification must be purely arbitrary to overcome the strong presumption that it is constitutional." *WPEA*, 127 Wn. App. at 263.

Equal protection analysis is not qualitative. The court does not determine whether one group of employees should get paid more than another group of employees. *See, e.g., Wisconsin Nat. Org. for Women v.*

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[7] In most cases, Article I, section 12 of the Washington Constitution grants no greater rights than the Equal Protection Clause of the Federal Constitution. *State v. Osman*, 157 Wn.2d 474, 483, n.11, 139 P.3d 334 (2006). The exception is where a minority class is given special privileges and immunities over a majority class. *Grant Cy. Fire Protection Dist. v. Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004). Plaintiffs do not allege a minority preference with respect to a "privilege." *See Madison v. State*, 161 Wn.2d 85, 95, 163 P.3d 757 (2007) (noting "privileges" are "those fundamental rights which belong to the citizens of the state by reason of [their state] citizenship").

State of Wis., 417 F. Supp. 978, 986 (D.C. Wis. 1976) ("The precise merit increase appropriate for one job as opposed to another is not a question for this court to decide."). Rather, the relevant inquiry in equal protection is whether there is a rational basis for differential treatment at all. *WPEA*, 127 Wn. App. at 267 ¶ 28.

Parties challenging a classification under rational basis review bear an extremely high burden. They must negate "every conceivable basis which might support" the rationality of the classification. *FCC v. Beach Commc'ns*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993).[8] The State does not have to prove or even rely on the rational basis identified by the court in order to prevail; that is "entirely irrelevant" to the inquiry. *Id.* Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic" of the State's choices. *Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). Particularly where the State is acting in its proprietary capacity as employer, courts grant it extraordinary deference. *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 598-99, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008).

Thus, the classification distinguishing PSNs from LPN 4s and PSAs from MHT 3s for purposes of pay should be upheld if there is any conceivable basis to distinguish them. "Where persons of different classes

[8] The trial court inappropriately shifted the burden of proof to the State. *See* CP at 2226 (Conclusions of Law (CL) No. 5, 8), 2229 (CL No. 22).

are treated differently, there is no equal protection violation." *State v. Ward*, 123 Wn.2d 488, 515, 869 P.2d 1062 (1994).

2. The State's classification system that distinguishes PSNs from LPN 4s and PSAs from MHT 3s is rational.

The treatment afforded to employees classified as PSNs and PSAs as opposed to those classified as LPN 4s and MHT 3s is based entirely on the fact that they occupy positions in separately-defined job classes. The State classifies positions into job classifications, and assigns those positions different pay, layoff rights, promotional rights, and other rights, privileges, and incidents of employment according to the specific job class assigned to each position. It is entirely rational to distinguish employees' pay based on the specific job classifications to which they are allocated.

a. For pay and other purposes, the State classifies individuals based on their job classification.

As found by the trial court, the State assigns pay to employees according to the job class they occupy. CP at 2222. Job classifications describe a group of positions performing similar work, often across the State in several different agencies. VRP at 510, 678. Job classifications distinguish employees not only as to pay and description of work, but also as to layoff rights, promotional rights, and other incidents of employment. *See generally* WAC 357-19; WAC 357-46-035; Exs. 219-221. Employees that do not believe they are properly assigned to the correct job

classification may request reallocation to a different class, and challenge their employer's decision to DOP. *See, e.g.*, VRP at 632, 719, 1037.

Each job class is assigned a salary range. Within each range are multiple steps that have a corresponding wage rate. VRP at 470-73. Employees advance through the steps as time progresses while working in their specific job classification. *Id.* The range of an employee's salary is determined exclusively by his or her specific job classification; all employees within the same job class are assigned the same base salary range. *Id.*

Since 2004, the pay range assigned to each job class relevant to this case has been determined through collective bargaining. RCW 41.80; VRP at 513-14, 613-15. Through their union, employees negotiate and reach agreement with the State as to how much each job class will be compensated, and the Legislature gets final say as to whether the agreements will be funded. RCW 41.80.010(3). Prior to 2004, the pay range assigned to each job class was determined through consideration of factors such as recruitment and retention needs, market rates, and other reasons the State might want to adjust the wages assigned to any given job class. VRP at 518. In either case, the State has always distinguished the pay it assigns to its employees based on the job class in which they work.

In addition to compensation, the State uses job classifications to distinguish its employees in many other ways. The most obvious, of course, is that employees' job duties and working conditions vary based on the job classification they occupy. *See, e.g.*, VRP at 490. Employees also have different layoff rights based on the job classifications they occupy or have previously occupied. WAC 357-46-035 (providing right to layoff option based on whether employee has held permanent status in the relevant job classification); Exs. 219-221 (same). For example, employees whose positions are designated for layoff have rights to bump less senior employees either working in the same job class, or in other job classes that the employees have previously worked in, out of their positions, rather than being separated from employment. *Id.* Specifically, where one or more LPN 4s are designated for layoff, they have the right to bump less senior LPNs in their layoff unit, but they do not have the right to bump PSNs out of their positions.[9] *Id.* As Plaintiffs acknowledged at trial, PSNs and PSAs are thus protected from being impacted by layoffs in the civil wards, where cuts are more frequent than in the forensic wards. VRP at 355-57. *See also* VRP at 668 (former WFSE representative testifying that PSNs and PSAs resisted reallocation to LPN and MHT classes in order to protect themselves from layoffs).

[9] Unless those LPNs previously held permanent status as PSNs.

PSNs are in a different job class from LPN 4s, and thus they are differentiated as to pay, layoff rights, and other incidents of employment. Likewise, PSAs are in a different job class from MHT 3s, and they receive different pay and have different employment circumstances from MHT 3s because they are in a different job class. Put another way, if employees working as PSNs were reclassified to LPN 4s, there is no question that they would be paid what LPN 4s are paid as opposed to what PSNs are paid. The distinguishing characteristic that determines their pay is the job class. The State does not maintain multiple job classifications for positions with identical duties and responsibilities. VRP at 490.

b. By their own admission, PSNs and PSAs are properly classified separately from LPNs and MHTs.

In this case, the PSNs and PSAs do not challenge that they are properly classified as PSNs and PSAs as opposed to LPN 4s and MHT 3s. *See, e.g.*, VRP at 324-25, 330-31, 357, 363. Quite to the contrary, they have consistently advocated to be classified separately from LPNs and MHTs, claiming there are meaningful differences between the working conditions and responsibilities of nurses and attendants working on the forensic wards (PSNs and PSAs) versus those working on non-forensic wards (LPNs and MHTs), which necessitate separate classifications. VRP at 330-31, 668, 1035. PSNs and PSAs emphasize that they work with a

different population of patients. *See, e.g.,* VRP at 103, 124–25. They claim, and the trial court found, that they require different knowledge, skills, and duties related to security. *See e.g.,* VRP at 27, 95, 102, 107, 118–19, 120, 124, 165, 219, 220; CP at 2220.[10] The fact that the PSNs and PSAs have so vigorously opposed being treated as LPNs and MHTs should eliminate their equal protection claim. *Ward*, 123 Wn.2d at 515.

The PSNs and PSAs cannot establish they are similarly situated to the LPNs and the MHTs, where they do not claim that they should be, and have actively opposed being, classified similarly. *Id.* The PSNs and PSAs cannot have their cake and eat it, too: either they are properly classified as distinct from LPNs and MHTs, in which case they have no constitutional right to the same pay, or they should be folded into the LPN and MHT class series and treated the same for all employment purposes, including layoff rights.

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[10] By a rough count, Plaintiffs' witnesses used the terms "different" or "difference" when comparing the PSN and PSA jobs to LPN 4s and MHT 3s no fewer than 150 times. *See, e.g.*, VRP at 33 (former PSN, LPN, and MHT 3, testifying "[i]t's a different job" working on forensics vs. civil wards), 45-46 (Plaintiffs' expert discussing differences in work environment, and opining that it is "a pretty big difference between the job as its performed in the clinical area versus the forensic area"), 47 (noting the forensic wards are "just completely different" from the non-forensic wards), 50-51, 53-54, 89, 90 (concluding "these conditions were markedly different, and it took a different type of person to perform the two different settings"), 106 (PSN Schatz testifying "[a]nother big difference is the clientele we get"), 107 (different sets of security procedures), 117 (PSA Mace testifying, "[i]t's different over there" in reference to the civil wards), 165 (PSN Darrah testifying, "[i]t's very, very different from that in the Center for Forensic Services").

c. PSNs and PSAs are objectively different from LPN 4s and MHT 3s.

Beyond the beliefs, actions, and desires of the PSNs and PSAs to remain classified separately from LPNs and MHTs, there are objective differences between PSNs and LPN 4s, and PSAs and MHT 3s. Although Plaintiffs alleged they are similarly situated to LPN 4s and MHT 3s, the testimony of both Plaintiffs' and Defendants' witnesses established concrete differences in the jobs. LPN 4s and MHT 3s have exclusive administrative responsibilities on their wards that PSNs and PSAs do not have. LPN 4s are the highest level of LPN on a ward and considered the lead or shift charge. *See, e.g.,* VRP at 27, 29, 148-49, 347; Ex. 209. Thus, there is only one LPN 4 on duty on a ward for each shift. *See, e.g.*, VRP at 27, 29, 359, 1023. That position is then solely responsible for a whole host of administrative functions. *See, e.g.*, VRP at 27, 29, 148-49, 347, 575, 867, 870; Ex. 209. Similarly, the MHT 3 is the highest level of MHT on the ward and is solely responsible for a host of administrative functions. There is only one MHT 3 per ward and the position is assigned only to the day shift. *See, e.g.*, VRP at 31-32, 128, 359, 802-03, 831, 945-46, 967-68, 1101, 1111-17; Ex. 211. In contrast, there are multiple PSNs and PSAs per shift on all three shifts. *See, e.g.*, VRP at 30-31, 97, 143, 146, 153, 148, 289, 319, 328, 348-49, 448-49, 452, 806, 833, 874, 1103,

1145. It is undisputed that administrative functions assigned to the LPN 4 and MHT 3 are scattered throughout the PSN and PSA staff, as well as other staff assigned to the forensic wards. VRP at 30-31, 97, 143, 146, 148, 153, 289, 319, 328, 348-49, 448-49, 452, 806, 833, 874, 1103, 1145.

LPN 4s and MHT 3s attain their level by virtue of increased levels of responsibility and accountability, which justifies higher salary ranges than the LPN 2s, LPN 1s, and PSNs, and MHT 2s, MHT 1s, and PSAs. Again, there are no levels within the PSN and PSA classifications.[11] Out of the possible LPN classifications, PSNs are most similar to LPN 2s with respect to responsibility, accountability, and employer expectations. VRP at 741. Even the Plaintiffs' union recognized this when it proposed salary adjustments at the bargaining table. Ex. 224. Likewise, out of the possible MHT levels, PSAs are most similar to MHT 1s, or possibly 2s, for the same reason. The salaries of PSNs and PSAs are in line with the middle of the LPN and MHT series.

The trial court found that the PSNs' and PSAs' duties were "essentially" the same as the duties of the LPN 4s and MHT 3s, and that PSNs and PSAs "actually perform most" of the work that distinguishes LPN 4s and MHT 3s. CP at 2219. Nonetheless, the undisputed evidence

[11] When the LPNs and MHTs working in the forensic wards were reclassified back to PSNs and PSAs by virtue of the superior court order, there were multiple levels of LPNs (1s, 2s, 3s, and 4s) and MHTs (1s and 3s) that were consolidated into one level of PSN and one level of PSA. VRP at 236, 239, 322-23.

establishes that there are differences. While LPN 4s and MHT 3s are always responsible for these administrative tasks at the Hospitals, and they never share those tasks with other employees on their shift, PSNs and PSAs may sometimes be responsible for those tasks, and always share them with other employees on their shift. It is not so much a question of "whether" the PSNs and PSAs can perform these administrative duties, but "how often" they do, and whether they are held singularly accountable when such tasks are not completed. The trial court seemed to recognize, but minimized, the differences in administrative duties between the relevant classifications, characterizing them as either "de minimus" or "not materially significant." CP at 2219, 2220. However, the State, in its proprietary discretion, has placed a premium on its ability on the civil wards to designate one individual on each ward and shift that is individually accountable for these responsibilities, something it is not able to do on the forensic wards where there are no PSNs or PSAs that are classified higher than the rest of the PSNs or PSAs.[12]

Additionally, the trial court went on to note that PSNs and PSAs "require additional knowledge, skills, and duties related to the security of these individuals that is more onerous and exacting than that which is required for LPN 4s and MHT 3s working on the civil commitment

[12] As Ms. Andrews testified, there is typically a higher salary associated with being designated as a lead worker. VRP at 695.

wards." CP at 2220. The superior court itself thus recognized there is a basis for treating PSNs differently from LPN 4s and PSAs differently from MHT 3s.

Moreover, the PSNs and PSAs themselves emphasized differences from positions on the civil wards. *See, e.g.*, VRP at 27, 95, 102, 103, 107, 118–20, 124-25, 165, 219, 220. Dani Kendall, a PSN, testified:

> Q. So you think that you're different than the LPNs, correct?
> A. Correct.

VRP at 325. Randy Mace, a PSA, testified, "There's not a lot that's exactly the same." VRP at 120. Michael Schatz, a PSN, testified:

> Q. But you're also maintaining that there's a big difference between what PSNs do and what the LPN series does, and this is this idea of security?
> A. Correct.
> Q. Do you think that's a relevant difference?
> A. I do.

VRP at 353. Several of the witnesses, including a PSA and an LPN 4, also testified that forensic patients generally require less assistance with activities of daily living such as toileting, showering, and eating than patients on the non-forensic wards. VRP at 121-22, 132, 840, 1013, 1103. The employees' own testimony demonstrates that PSNs and PSAs are not similarly situated to LPN 4s and MHT 3s.

d. The trial court misconstrued *WPEA*; the relevant classification in this case is job classification.

Despite the State's position that PSNs and PSAs are rationally distinguished from LPN 4s and PSAs based on their job classifications, the trial court rejected this distinction as the relevant classification. The trial court relied almost entirely on this Court's decision in *WPEA* to find a violation of equal protection, but its application was in error. VRP at 1267 (referencing *WPEA*, 127 Wn. App. 254, as the "controlling case in this situation").

In *WPEA*, lower-paid state employees in both higher education and general government classification systems filed an equal protection lawsuit claiming there was no rational basis justifying why they were paid differently than their counterparts performing the exact same work in either the higher education or general government systems. The State asserted the relevant classification for equal protection analysis was employees working in higher education versus employees working in general government. This Court rejected that classification, noting there was no consistency as to whether employees in the higher education system were paid more or less than employees performing the exact same work in the general government system. *WPEA*, 127 Wn. App. at 266 ¶ 27. "Rather, the lower base salaried employees [were] distributed

randomly between the two employment systems; higher education employees [were] not uniformly paid either more or less than general government employees." *Id.* Thus, the difference in pay between employees in higher education versus employees in general government performing the exact same work was not on account of the employees working in higher education as opposed to general government. The State could not show that the reason employees in higher education were paid less than employees in general government was because the employees were working in higher education, or vice versa.

The present case is entirely different. Here, it is exactly because PSNs and PSAs are in different job classes from LPN 4s and MHT 3s that they receive different pay. Pay is determined on a class-by-class basis. The State's position is entirely consistent with *WPEA*. This Court rejected the State's proposed classification in *WPEA* because "the lower paid employees [were] not paid less because they [were] in a particular group." *Id.* In the present case, PSNs are paid differently from LPN 4s because they are classified as PSNs, and PSAs are paid differently from MHT 3s because they are PSAs. If the PSNs and PSAs were classified as LPNs and MHTs, they would be paid as such.[13] The PSAs and PSNs agree (and

[13] It is important to note that if PSNs were put into the LPN classification and PSAs were put into the MHT classification, individual employees would be allocated among the levels. Not all PSNs could be allocated to LPN 4–only one per shift for each

vigorously advocate) that there is good reason they should be classified separately from the LPN and MHT class series. Thus, under *WPEA*, the "state workers' identity of duties defines the designated class." *Id.* at 267.

The trial court erred in not distinguishing the designated classes based on their distinct job classifications. For the same reason that PSNs are not similarly situated to LPN 4s, and PSAs are not similarly situated to MHT 3s, there are also rational reasons to treat them differently.

e. It is rational to distinguish pay among employees based on their job class.

As previously noted, the PSNs and PSAs quite intentionally do not challenge that they are classified differently from LPN 4s and MHT 3s. They believe they are different, and should remain in their special classifications. They like the security aspect of their positions, as well as the structure and consistency that working in a more secure environment provides. As PSN Dani Kendall testified on direct:

> I like our unit better, it's more structured, it's more consistent, you have people longer, you're able to see them all the way through to a healthy end and learn more about their mental illness.

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forensic ward, because, by definition, there can only be one lead worker. All but a handful of the PSNs would become LPN 2s. Similarly, not all PSAs could be allocated to MHT 3–only one per ward for the day shift. The rest of the PSAs would be allocated to the MHT 2 and MHT 1 levels. *See also* VRP at 236, 239, 322-23

VRP at 308. Being classified separately from LPNs and MHTs affords PSNs and PSAs a certain elite quality,[14] as well as protection in layoff situations from being bumped by LPNs or MHTs. Instead, the PSNs and PSAs challenge the fact that their job classifications are paid differently from the LPN 4s and MHT 3s. However, the difference in pay is inextricably linked to the difference in classification.

It is axiomatic that the State has limited resources with which to compensate its employees. *See also* VRP at 637. Unless every employee is to be paid the exact same amount, the State must have some basis to differentiate among its employees. This State uses a job classification system to distinguish among its employees. Employees are assigned a job classification based on the best fit to their duties, responsibilities, and working conditions. Compensation, accordingly, is assigned to each job classification. Employees in one job class are paid differently from employees in another job class because they are in different job classes. It is perfectly rational to differentiate pay on that basis. *See, e.g., Michigan Ass'n of Govment'l Employees*, 336 N.W.2d 463, 469 (Mich. App. 1983) ("There is a rational basis for this different treatment between one

[14] Several managers testified regarding difficulties in getting staff willing to work on the civil wards, as staff seem to prefer assignment on the forensic wards. VRP at 810-12, 838-39, 909. Several of the PSNs and PSAs acknowledged they had never applied for promotion to MHT 3 or LPN 4 positions, nor did they wish to work on the non-forensic wards. *See, e.g.* VRP at 131, 176, 329, 351-52.

classification of employees and another. If there were not, the commission would have to give the best of all contracts to all employees, regardless of classification.").

If the State were assigning different salary ranges to employees within the same job class with no rational basis for doing so, that would implicate equal protection. Or, if the State still maintained a dual compensation system for higher education and general government, where employees under both systems were doing the exact same work but being paid differently, and the difference in pay was not because of the differing systems, that would pose a problem under this Court's decision in *WPEA*. But in this case, PSNs and PSAs are paid differently than LPN 4s and MHT 3s because they are different job classes under the same job classification system.

The appropriate inquiry for the trial court was whether there was a rational basis to treat employees working as PSNs and PSAs differently than those working as LPN 4s and MHT 3s. The PSNs, the PSAs, and the trial court all agree there are differences substantiating a separate class for them. In fact, that is exactly what the Thurston County Superior Court determined in its 1983 decision, upon which the plaintiffs and the trial

court relied upon so heavily. Ex. 27; CP at 2218, 2229-30.[15] However, the trial court then went further and found that despite the differences, the PSNs and PSAs deserved to be paid at least the same as LPN 4s and MHT 3s. The trial court erred in making a value judgment about the relative worth of each class of employees, and the salary that should be assigned based on that worth. Equal protection analysis is a review of the distinction itself; it does not evaluate whether one group of employees should be paid more or less than the other. *Wisconsin Nat. Org. for Women*, 417 F. Supp. at 986.

As a matter of law, it is not wholly irrational to differentiate PSNs and PSAs from LPN 4s and MHT 3s.

B. The State Has A Rational Basis To Pay PSNs And PSAs Exactly What They Have Bargained To Be Paid

Setting aside the numerous reasons articulated above, the fact that these employees have specifically bargained to be paid exactly what they are paid should defeat any claim that their pay is "wholly irrational." With the passage of the PSRA in 2002, the Legislature shifted the responsibility of determining represented employee salaries to a joint negotiation

[15] The trial court found that the State is collaterally estopped from relitigating those issues, namely whether PSNs and PSAs should be classified separately from LPNs and MHTs. CP at 2229-30; Ex. 27. As discussed later, the trial court's conclusion is erroneous, given the different issues, parties and time that had passed since that case. Nonetheless, the State's position is completely consistent with the superior court's 1983 decision. That court determined that there were differences between PSNs and LPNs, and PSAs and MHTs, respectively, that were significant enough such that they should be classified separately. Ex. 27. This should end the equal protection inquiry.

between the employees, through their exclusive bargaining representatives, and State negotiators. RCW 41.80. Since 2004, when collective bargaining for wages began, neither DOP nor DSHS has had any authority to unilaterally adjust the base salaries assigned to those classifications. VRP at 513, 616, 656; RCW 41.80.110(1)(a); *see also NLRB v. Katz*, 369 U.S. 736, 743, 745-46, 82 S. Ct. 1107, 8 L.Ed.2d 230 (1962) (holding it is an unlawful refusal to bargain for an employer to increase wages outside of the collective bargaining process). Instead, represented employee salaries are agreed-upon through a give-and-take process in which some employment benefits are deemed more important and traded for other employment benefits. For example, some employees are more willing to accept lower pay to protect transfer rights. *See generally* VRP at 610-73.

Thus, since full scope collective bargaining was implemented in 2004, the wages assigned to PSNs, PSAs, LPNs, and MHTs have all been determined exclusively through their own negotiation and agreement with the State, subject to legislative approval. DOP has no direct role in establishing these employees' pay other than providing the bargaining parties with information and reflecting any changes the parties agree to in the State's salary schedules. It would actually be illegal for either DSHS or DOP to increase PSNs and PSAs' pay outside of the bargaining

process. RCW 41.80.110(1)(a); VRP at 616, 656. Once bargaining began in 2004, the State and represented employees had to negotiate any changes to pay, up or down, through that process.

It is rational for the State to pay the employees what they have bargained to be paid. Not only is that the amount the various employees have specifically agreed to receive in exchange for doing their job, but to pay otherwise would implicate illegal unfair labor practices. The State acknowledges that bargaining does not necessarily overcome invidious discrimination warranting a more exacting standard of review, such as if the distinction were being made based on race, gender, or any other protected classification. But in the realm of rational basis, where the distinction is based on job class, and no suspect class is implicated whatsoever, there simply is no basis for a court to intervene and undo the parties' express agreement as to pay.[16]

C. PSNs And PSAs Have No Right To Adjustment Of Their Wages For "Comparable Worth" Under RCW 41.06.133 Or .155

The trial court also incorrectly granted declaratory, injunctive, and writ of certiorari relief based on its determination that the pay afforded to

[16] Additionally, since collective bargaining was initiated, there is no unilateral State action the PSNs and PSAs can point to as violating their rights. This should also defeat their 42 U.S.C. § 1983 claims. *See, e.g., Danese v. Knox*, 827 F. Supp. 185, 196 (S.D.N.Y. 1993) ("Second and more fundamentally, the Port Authority did not unilaterally impose the classification challenged by plaintiffs on the proposed plaintiff class; this classification is the result of a collectively bargained contract entered into by the Port Authority and the proposed plaintiff class.").

PSNs and PSAs violated several statutes referencing "comparable worth." However, those statutes do not give PSNs and PSAs the right to an increase of wages.

It is important to clarify at the outset that the notion of "comparable worth" as it is used in this case is a purely statutory creation. It is not derived from any constitutional right. Although the theory of comparable worth had its origins in remedying gender discrimination, that theory was squarely rejected by the courts as a basis for liability and led to no required action on the part of states. *See American Fed'n of State Cy. and Municipal Employees, AFL-CIO (AFSCME) v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985).

In part as a response to concerns that employees working in historically female-dominated occupations were being paid less than employees working in historically male-dominated occupations that encompassed similar knowledge, skills, and abilities, and later to a sex discrimination lawsuit brought on behalf of female state employees, the Legislature passed legislation codifying as state civil service policy its own concept of comparable worth. *See* Ex. 228 at 326-29. Through its comparable worth legislation, the Washington State Legislature made a finite policy choice to adjust the salary ranges assigned to various job classifications based on the State's own studies and determinations that

certain job classifications were being historically undervalued (as judged by the State) in comparison to others. *See generally* Ex. 228.

The Legislature defined comparable worth as:

> The provision of similar salaries for positions that require or impose similar responsibilities, judgments, knowledge, skills, and working conditions.

RCW 41.06.020(6). Beginning in the late 1970s, the Legislature first directed that the suspected disparities be studied and scientifically analyzed.[17] The State adopted a methodology known as the "Willis Method" to assign points to each job classification based on factors such as knowledge and skills, mental demands, accountability, and working experience. VRP at 507. Based on the number of Willis points assigned to each job class, the State could determine whether job classes were being under or over paid compared to job classes with the same point value. *See* VRP at 476–78, 480–81, 524-27.

The Legislature then directed DOP to take comparable worth into account when it set salary ranges for job classifications.[18]

> The director shall adopt rules, consistent with the purposes and provisions of this chapter and with the best standards of personnel administration, regarding the basis and procedures to be followed for:
>
> . . .

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[17] Laws of 1977, 1st Ex. Sess., ch. 152, Sec. 2(5) (codified in RCW 41.06.160(5) (1977)), *repealed by* Laws of 2002, ch. 354, § 211; *see also AFSCME*, 770 F.2d 1401 (describing the history of comparable worth in Washington).

[18] Ex. 228 at 328-29, 331.

> (10) Adoption and revision of a state salary schedule to reflect the prevailing rates in Washington state private industries and other governmental units. **The rates in the salary schedules or plans shall be increased if necessary to attain comparable worth under an implementation plan under RCW 41.06.155** and, for institutions of higher education and related boards, shall be competitive for positions of a similar nature in the state or the locality in which an institution of higher education or related board is located. **Such adoption and revision is subject to approval by the director of financial management in accordance with chapter 43.88 RCW.**

RCW 41.06.133(10) (2007) (emphasis added). Thus, the Legislature's direction to DOP was to increase salaries: 1) only if necessary; 2) only under an implementation plan under RCW 41.06.155; and 3) subject to approval by the director of financial management. As in *WPEA*, the Plaintiffs have offered no evidence that any of these conditions would have been met. 127 Wn. App. at 261-62 ¶16. Thus, their claim based on this statute must fail.

Further, RCW 41.06.155 provides:

> Salary changes necessary to achieve comparable worth shall be implemented during the 1983-85 biennium under a schedule developed by the department. Increases in salaries and compensation solely for the purpose of achieving comparable worth shall be made at least annually. Comparable worth for the jobs of all employees under this chapter shall be fully achieved not later than June 30, 1993.

The Legislature thus expressed a policy decision to achieve comparable worth in the State's compensation plan by 1993. DOP undertook a

methodical and thorough survey of job classifications and recommended adjustments of salaries based on the outcome of its analysis using the Willis method. *See* VRP at 476–78, 480–81, 524-27.

Through a settlement reached with WFSE, the Legislature ultimately ratified a specific plan for achieving its notion of comparable worth, and made appropriations each biennium until comparable worth was fully achieved in 1993. Ex. 228 at 13-33, 40-42, 331. The specific plan the Legislature ratified in the settlement agreement became the "implementation plan" of comparable worth as referenced in RCW 41.06.155. This testimony was not rebutted at trial and there is no question that DOP completed the task assigned by the Legislature and achieved comparable worth by June 1993. VRP at 527. As is clear from settlement agreement ratified by the Legislature, the Legislature intended that all statutory obligations to fully achieve comparable worth were discharged through implementation of that settlement agreement. Ex. 228 at 16 ("All obligations of the State to achieve comparable worth pursuant to RCW 28B.16.116 and RCW 41.06.155 shall be discharged as follows . . ."). *See also* Ex. 228 at 6 (Attorney General analysis to legislature noting full achievement of statutory comparable worth obligations through the settlement agreement), 41 (legislative ratification of settlement agreement). The Legislature did not intend that salaries be

continually reviewed and adjusted after the State completed the implementation of "comparable worth," as directed, in 1993. To the contrary, the statute specifically stated that comparable worth would be fully achieved by 1993, and the Legislature stopped appropriating money towards that end as of that date. Ex. 228 at 341-45.

Once comparable worth was achieved in 1993, it was ingrained in the compensation plan. When the State began collectively bargaining wages, the Legislature directed that the collective bargaining agreements not conflict with changes that were implemented from the comparable worth settlement agreement. RCW 41.56.021; RCW 41.80.020. Thus, comparable worth remains achieved to this day.

In directing DOP to make necessary adjustments in salaries to achieve comparable worth by 1993, the Legislature did not create a right judicially enforceable by individual employees. Plaintiffs, however, asked the superior court to determine that their jobs should be paid comparably to other jobs based on the comparable worth statutes. This is improper because the courts have recognized that the administration of a civil service system is not a traditional judicial function. As the Washington Supreme Court noted in *Gogerty v. Dep't of Institutions*, 71 Wn.2d 1, 5, 426 P.2d 476 (1967):

> [I]n ordinary contemplation, personnel policy and management, either with or without a legislatively prescribed merit system of civil employment, is essentially an administrative or executive function rather than a function historically or traditionally resting with the judicial branch of government.

See also Washington Fed'n of State Emp'yees v. State Personnel Bd., 29 Wn. App. 818, 820, 630 P.2d 951 (1981) (courts are ill-equipped to act as super personnel agencies).

Further, even if the judiciary were empowered to determine the relative value of civil service jobs, the trial court made this determination in a completely subjective manner. The Plaintiffs presented no systematic method to compare the value of the jobs.[19] When DOP implemented comparable worth, it did so using an established and well-regarded methodology for comparing the skills and abilities necessary for different jobs. VRP at 507. According to that methodology, it was actually determined that PSNs and PSAs were being overpaid according to the points assigned to their job classifications. VRP at 477. Thus, there was

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[19] Plaintiffs relied on the "expert" testimony of Jeffrey Kane. This testimony did not meet the standard of Evidence Rule 702 that requires specialized knowledge that will assist the trier of fact to understand the evidence. Dr. Kane himself acknowledged the lay nature of his opinions, noting that it was "not rocket science." VRP at 89. He also admitted his review was entirely subjective, and that he did not apply any established method for comparing the relevant classifications and offering his opinion. VRP at 77–85. Thus, his testimony should not have been admitted.

Further, the trial court erred in overruling the State's objection to Dr. Kane's testimony that the State acted in an arbitrary and capricious manner (VRP at 75), as experts may not give legal conclusions. *State v. Olmedo*, 112 Wn. App. 525, 532, 49 P.3d 960 (2002), *review denied*, 148 Wn.2d 1019 (2003) (improper legal conclusions include testimony that defendant's conduct violated law).

no basis to increase their salaries in the implementation of the comparable worth adjustments. As demonstrated above, and as evident by the language and history of the relevant legislative provisions,[20] the PSNs and PSAs do not have a present right to adjustment of their wages through the comparable worth statutes.

D. The Court Improperly Granted A Writ Of Certiorari And Damages Where It Had No Administrative Decision To Review That Was Arbitrary And Capricious, Or Outside Of An Agency's Authority

Although the PSNs and PSAs had no right to damages through their section 1983 claim against the State,[21] nor an independent cause of action for "comparable worth,"[22] the trial court nonetheless awarded

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[20] For a detailed history of the comparable worth legislation and implementation, see CP at 1853-69, incorporated herein by this reference, and Ex. 228.

[21] This lawsuit was filed against two State agencies and several state employees, but only in their official capacities. As such, monetary damages for the section 1983 claim are unavailable. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989); *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358 (1991); *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983); *Edgar v. State*, 92 Wn.2d 217, 595 P.2d 534 (1979). Although the superior court recognized this in its ruling, CP at 2229-30, it inappropriately conflated this issue with the state's waiver of sovereign immunity, which is not germane to this analysis.

[22] The Plaintiffs below did not plead or argue that the comparable worth statutes would provide an independent cause of action for damages. CP at 415-28, 1227-60, 1785-1815, 1926-51. In any event, there is no private right of action for comparable worth. *See Braam v. DSHS*, 150 Wn.2d 689, 711, 81 P.3d 851 (2003) (setting forth three-part test for implying cause of action in statute). The statutes were not enacted for the PSNs and PSAs' benefit, the Legislature did not intend to create a private right of action, and implying a cause of action would be inconsistent with the policy underlying the legislation. *Id.* Additionally, implying a cause of action for increased salary based on statutory comparable worth would impinge on the Legislature's authority to appropriate funds and set employee salaries. *Fed'n v. State*, 101 Wn.2d 536, 541-42, 682 P.2d 869 (1984); Wash. Const. Art. VII and VIII, § 4; *Pannell v. Thompson*, 91 Wn.2d 591, 599, 589 P.2d 1235 (1979) ("The decision to create a program as well as whether and to what extent to fund it is strictly a legislative prerogative.").

damages purportedly under its inherent authority to review State action pursuant to a constitutional writ of certiorari. CP at 2228; VRP at 1271-72. The trial court's action in that regard was in error.

1. The Court's review under a writ of certiorari is limited.

The extent of a superior court's authority to grant a writ of certiorari is a question of law, which is reviewed de novo. *Fed. Way Sch. Dist. v. Vinson*, 172 Wn.2d 756, 764 ¶ 15, 261 P.3d 145 (2011).

The constitutional writ of certiorari, embodied in Art. IV, § 6 (amend. 87) of the Washington Constitution, is a limited remedy available only in specific circumstances. *See Vinson,* 172 Wn.2d at 769 ¶ 25; *Bridle Trails Cmty. Club v. Bellevue,* 45 Wn. App. 248, 253, 724 P.2d 1110 (1986). The purpose of the writ is "to enable a court of review to determine whether the proceedings below were within the lower tribunal's jurisdiction and authority." *Bridle Trails,* 45 Wn. App. at 252-53. A court will accept review only if the petitioner can allege facts that, if verified, establish the lower tribunal's decision was arbitrary and capricious or illegal. *See Saldin Sec. Inc. v. Snohomish Cy.,* 134 Wn.2d 288, 294, 949 P.2d 370 (1998); *Pierce v. King Cy.,* 62 Wn.2d 324, 330-31, 382 P.2d 628 (1963). Review of whether an act was illegal is limited to "an examination of whether the agency has acted within its authority as defined by the constitution, statutes, and regulations." *King Cy. v. Bd. of*

Tax Appeals, 28 Wn. App. 230, 242-43, 622 P.2d 898 (1981). "[T]he illegal act requirement does not empower a court under its constitutional review power to review alleged errors of law committed by an administrative agency." *King Cy.*, 28 Wn. App. at 242. Even if a plaintiff can otherwise meet the standards for a writ, a writ should not issue where plaintiffs have an alternate avenue of relief. *Bridle Trails*, 45 Wn. App. at 254.

The relief a court may grant in certiorari is also quite limited—to vacate or prevent an agency's action that is outside of its authority. An applicant is not entitled to an order requiring the agency to exercise its discretion in his or her favor. *Wilson v. Nord*, 23 Wn. App. 366, 376, 597 P.2d 914 (1979).

2. There were no "proceedings below" implicating the Court's review.

The trial court erred in granting a writ of certiorari where it had no agency proceeding below to review in the first place. The purpose of a writ of certiorari is to review a specific decision by an administrative tribunal. *Bridle Trails*, 45 Wn. App. at 252-53. Here, the PSNs and PSAs did not identify what specific action or decision an agency made that exceeded its authority. Rather, the wages assigned to the PSNs, PSAs, LPNs, and MHTs have been determined trilaterally through negotiations

between the employees and state negotiators, and subsequent legislative approval of those agreements. Even prior to collective bargaining, the pay assigned to each classification was adjusted only when there was a reason to do so, including when the employees in a specific job class or their union advocated for an increase. Former RCW 41.06.150, .152; VRP at 518. The PSNs and PSAs did not point to any specific action or inaction the agencies acted improperly on. Rather, PSNs and PSAs never even asked to have their pay adjusted prior to filing this lawsuit. There simply was no proceeding below that invoked the court's inherent review under a constitutional writ of certiorari.

3. Certiorari is unavailable where there is an alternate forum for challenging the classification.

Additionally, a constitutional writ to direct agency action is improper where there is an established method for seeking it. Where the PSNs and PSAs are essentially claiming that they do the same work as their alleged counterparts, their remedy lies in a request for reallocation to the classification in which they believe they are performing work. *See* Exs. 219 at 95-96, 220 at 112-13, 221 at 120; *see also* WAC 357-13-050, -090. This administrative mechanism is precisely how, in the past, PSNs and PSAs were able to challenge any effort by the State to combine their classes into the LPN and MHT class series. Ex. 27. It is undisputed

that the PSNs and PSAs did not avail themselves of this administrative remedy prior to filing this lawsuit. *See, e.g.*, VRP at 132.

However, the PSNs and PSAs have made it quite clear that they are not requesting reallocation in this case, and, to the contrary, have fought efforts by the State to reclassify them as LPNs and MHTs. But if they are unhappy with the salary range assigned to their existing classifications, they must advocate for their pay through the collective bargaining process. RCW 41.80.020. If they believe the State is not paying them what they are contractually entitled to be paid, they may file a grievance through their union. *See, e.g.*, Ex. 221 at 80. Their remedy lies through the reallocation process, collective bargaining, and the grievance process they agreed to in bargaining.[23] The existence of these alternate means of relief bars the availability of a constitutional writ of certiorari. *Bridle Trails*, 45 Wn. App. at 254.

4. Even if a writ of certiorari were proper, the appropriate remedy is a remand.

Finally, even if the court found a specific agency decision that exceeded the agency's authority or is arbitrary and capricious, and even if a writ of certiorari were otherwise appropriate, the court's role is only to remand to the agency to act appropriately within its statutory authority.

[23] The fact remains, though, that Plaintiffs' exclusive bargaining representative does not agree with their contentions that they are equivalent to LPN 4s or MHT 3s. VRP at 330, 342, 648-49; Ex. 73, 224.

Wilson, 23 Wn. App. at 376. As the Court noted in *Wilson*, applicants for a constitutional writ of certiorari are not entitled to have the court exercise an agency's discretion in their favor. *Id.* They are only entitled to have the court order the agency to exercise its discretion within its lawful authority and in a non-arbitrary and capricious manner. Even if the trial court had properly found a basis to issue a writ of certiorari, it should have remanded the case to the administrative tribunal to exercise its discretion within its lawful authority.

E. The Court Erred In Holding That The State Is Collaterally Estopped By The Superior Court's Order In The 1980 Allocation Appeal

The trial court found the prior litigation between the WFSE and the State regarding the proper allocation of PSNs and PSAs within the civil service classification system collaterally estopped the State from relitigating those issues. The trial court made no findings on how the criteria of collateral estoppel are met in this case, nor indicated exactly what the impact of estoppel would be given that the parties had just gone through a multi-week trial. CP at 2229-30; VRP at 1266.

The doctrine of collateral estoppel prevents a second litigation of issues between the parties. *Rains v. State,* 100 Wn.2d at 665. The Court reviews de novo whether collateral estoppel applies. *Wash. Off-Highway Vehicle Alliance v. State*, 163 Wn. App. 722, 731, 260 P.3d 956 (2011).

The party asserting collateral estoppel must prove that (1) the identical issue was decided in the prior adjudication, (2) the prior adjudication resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730-32, 254 P.3d 818 (2011).

Collateral estoppel fails in this case with the first criterion. At issue in the earlier litigation was the appropriate classification of positions within the State's classification system. Neither party to the instant case is arguing that the positions should be reallocated. The State has only ever indicated that reallocation is a route available to employees. The issue in this case is entirely different. The Plaintiffs simply want a higher salary assigned to the classification they are in. The State's position has always been that, given that a court did find that PSNs and PSAs are appropriately allocated to those classifications, they are *per se* different from LPNs and MHTs.

Further, collateral estoppel prevents relitigation of an issue. There is no sense in making a finding of collateral estoppel at the end of litigation. If the superior court's intent was to prevent DSHS from ever reallocating PSNS or PSAs in the future, such a ruling is improper.

Should the allocation issue be raised in the future, it is at that time and in that forum that a claim of collateral estoppel is appropriately raised.

Collateral estoppel simply has no bearing on this case, as an allocation appeal is an entirely different issue from compensation.

F. Plaintiffs Are Not Entitled To Attorneys' Fees Under Both A Fee Shifting Statute And The Equitable Common Fund Doctrine

Plaintiffs sought attorneys' fees under statutory fee shifting provisions as well as the common fund doctrine. The trial court erred in awarding fees under both, offsetting the common fund amount by an amount determined using the lodestar method under statutory fee shifting authority. The American Rule provides that parties to a lawsuit bear their own costs, including attorneys' fees. There are certain exceptions to this rule that allow the burden of the prevailing party's attorneys' fees be shifted to the non-prevailing party. Fee shifting statutes provide for the prevailing party to recoup attorneys' fees from the losing party. In the absence of a statute authorizing fees to the prevailing party, there are equitable grounds that may be used. The common fund doctrine is one of those equitable exceptions to the American Rule. *Bowles v. Dep't of Retirement Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). The common fund doctrine allows a court to distribute attorneys' fees from the common

fund that is created for the satisfaction of class members' claims. *Leischner v. Alldridge,* 114 Wn.2d 753, 756–58, 790 P.2d 1234 (1990).

There is no authority for a party to recover fees under both statutory and equitable grounds. Statutory attorneys' fees and the common fund doctrine are two distinct legal bases for an award of attorneys' fees. The lodestar approach and percentage of recovery are two separate methods of calculating attorneys' fees under those two distinct rationales for fees. *Bowles*, 121 Wn.2d at 72. In *Bowles*, the court described the two approaches. "A 'percentage of recovery' approach sets attorney fees by calculating the total recovery secured by the attorneys and awarding them a reasonable percentage of that recovery, often in the range of 20 to 30 percent." *Id.* "By contrast, a 'lodestar' approach sets the fees by first determining the number of hours that were reasonably spent by the attorneys, multiplying it by a reasonable hourly compensation, and then adjusting this amount upward or downward based on additional factors." *Id.* The Court stated that the two approaches have their own areas of proper application and there is a choice between them. *Id.* The Court explained:

> The primary explanation for this distinction is that *statutory* attorney fees are separately assessed against the defendant while common fund attorney fees are taken directly from the recovery obtained by the plaintiffs. In common fund

> cases, the size of the recovery constitutes a suitable measure of the attorneys' performance.

Id.

Likewise, in *Okeson v. City of Seattle*, 130 Wn. App. 814, 828, 125 P.3d 172 (2005), the court recognized that the two methods represent a choice when it denied attorneys fees on appeal because the trial court awarded attorneys fees on a "percentage of recovery" basis under the common fund doctrine. There is no basis on which to award both statutory attorneys' fees and common fund fees. The trial court's award of attorneys' fees using both the lodestar method under statutory authority and the percentage of recovery method under the common fund doctrine was erroneous. A court must select either a statutory or an equitable method of awarding attorneys' fees.

VIII. CONCLUSION

Based on the foregoing, the State respectfully requests that the Court reverse the trial court's findings, conclusions and judgment, and remand for entry of judgment in favor of the State.

RESPECTFULLY SUBMITTED this 17th day of January, 2012.

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COURT OF APPEALS, DIVISION II
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I certify that I served a true and correct copy of the Appellants' Opening Brief and this Certificate of Service on all parties or their counsel of record on January 17, 2012 in the manner indicated below:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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CLORY A. MOORE

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