Cause 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,

Respondents

BRIEF OF RESPONDENTS

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I. Introduction

Respondents are Psychiatric Security Nurses ("PSNs") and Psychiatric Security Attendants ("PSAs")[1] seeking to correct pay inequities and the State's ongoing refusal to recognize the scope of their duties and responsibilities. The Workers are paid a substantially lower wage rates than workers performing comparable duties, without the unique burdens of working in State mental hospitals'[2] forensic wards addressing competency issues following referral from the courts.

The Workers' pay inequities violate the Equal Protection provisions of the Washington and United States Constitutions, RCW 41.06.133(10) and RCW 41.06.155 (comparable worth statutes) and are arbitrary and capricious State conduct.

Washington Public Employees Association v. State, 127 Wn.App. 254, 267, 110 P.3d 1154, 1161 (2005) ("WPEA") held that "wage disparities between state employees who performed essentially the same jobs violated federal equal protection guarantees." The Workers believe that their equal protection rights are again being violated when PSNs and PSAs on the forensic wards are paid less to do the same work as the

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[1] ("the Workers")

[2] The class was certified for the Workers at Western State Hospital and Eastern State Hospital. CP 429-432.

LPN4s and MHT3s on the non-forensic wards. The Workers also believe their statutory rights are being violated under RCW 41.06.020(5), Washington's comparable worth statute. "Comparable worth' means the provision of similar salaries for positions that require or impose similar responsibilities, judgments, skills, and working conditions." *Id.* RCW 41.06.133(10) requires "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." RCW 41.06.155 provides: "Increases in salaries and compensation solely for the purpose of achieving comparable worth shall be made at least annually."

The trial court found the State violated the Workers' rights of equal protection, acted contrary to the comparable worth requirements of RCW 41.06.133(10) and RCW 41.06.155, and acted in an arbitrary and capricious manner setting the Workers' wages lower than wages being paid to employees with the same responsibilities. Attorney fees were properly awarded on common fund doctrine and equity required the State to pay portion of attorney fees. The trial court's judgment should be affirmed.

On cross appeal, the Workers assert that the wages awarded should be doubled pursuant to RCW 49.52.070. The trial court should be affirmed and costs and attorney fees on awarded on appeal.

II. Issues Related to Assignments of Error Raised By State.

1. Did State waive the any challenge to the Workers' substantive claims of equal protection, comparable worth, or certiorari rights by failing to renew its motion to dismiss the Workers' case at the close of all the evidence?

2. Did the State waive its challenges to various findings of fact and other assignments of error by failing to properly address them in their brief or demonstrate that such findings are not supported by any substantial evidence?

3. Does the record showing the Workers' duties are essentially the same as the LPN4s and MHT3s, but are paid less establish Workers' equal protection claims?

4. Under a writ of certiorari to review arbitrary and capricious State actions, may the trial court provide a remedy?

5. Do comparable worth statutes codified at RCW 41.06.133 and RCW 41.06.155 afford the Workers a remedy?

6. Was the trial court correct in granting a prospective, injunctive remedy against a State pursuant to 42 U.S.C. §1983 to prevent an ongoing violation?

7. Do the doctrines of collateral estoppel or judicial estoppel preclude the State from asserting inconsistent position related to the basis for the Workers' level of compensation?

8. Was the trial court correct in awarding attorney fees allocating burden of attorney fees between the State and the Workers?

III. Assignments of Error on Cross Appeal

1. The trial court erred in entering Conclusion of Law 26 holding that Workers are not entitled to exemplary damages pursuant to RCW 49.52.070 and that the finding provisions of RCW 49.52 do not create any basis for liability in this case.

2. The trial court should have required the State to pay attorney fees under fee shifting statutes pursuant to RCW 49.48.030, RCW 49.52.070 and 42 U.S.C. § 1988 in addition to awarding fees under the equitable common fund doctrine.

Issues Related to Assignment of Error

1. Are the Workers entitled to double damages on the wages awarded together with costs of suit and a reasonable sum for attorney fees pursuant to RCW 49.52.050; 070; RCW 49.48.030 and 42 U.S.C. § 1988

IV. Statement of the Case

A. History of The Workers' Job Classifications and Pay

The Workers work at State mental hospitals' forensic wards. RP 2215. The Workers' environment is horrifically dangerous. RP 169-70, 339-40; 1132-34; 1146-58. Forensic ward security is similar to prison. CP 2221. Workers suffer career ending injuries at the hands of criminally insane patients. RP 1134; 1155-57. Three Workers were brutally assaulted, ending two careers, in the "Easter Sunday Massacre." RP 213-220. Review assault data at the hospitals, Ex. 85, 147, 148. Forensic patient attacks on staff are predatory. RP 941-42; Ex. 147, 148.

In 1973, Department of Social and Health Services ("DSHS") proposed, and the Department of Personnel ("DOP") adopted, the Workers' new job classes PSN and PSA. Ex. 40. Ex. 27.

DSHS' Secretary noted:

> The particular issue that's being addressed here is probably one of the most critical ones in the whole criminal justice process, and that has to do with the care and security and treatment of some of the most difficult individuals in our entire public life, the people that fail in that very vague area between sickness and sin, the mentally disturbed offender. This is probably one of the most difficult jobs that anybody in public or private service can have. It requires a degree of sensitivity and skill and exposure to danger of almost any job there is.

Ex. 40

A DSHS representative "explained that the persons now performing the work described for these classes are classified as Hospital

Attendant II and Licensed Practical Nurse III."[3] Ex. 40. The Workers were "charged with both the care and security of the residents [in the program...and] because of the added danger involved in dealing with felons and the criminally insane," the State increased the pay for these Workers above that of the LPN3s and HA2s, aligning pay with Correctional Sergeants and Correctional Officers, respectively.[4] Ex. 40. PSNs now paid at salary range 41, Ex. 191, lagging ten salary ranges behind Correctional and Custody Officer 3 at salary range 51, Ex. 8; PSAs now paid at salary range 37, Ex. 191, lagging ten salary ranges behind Correctional and Custody Officer 2 at salary range 47. Ex. 8.

PSNs were benchmarked to Corrections and Custody Officer 3, PSAs were benchmarked to Corrections and Custody Officer 2. RP 481-82. Benchmark jobs are used to base salary schedules so all jobs are not studied. RP 73-75; 462-63. When Corrections and Custody Officer pay increases, it does not increase the Workers' pay. RP 488; 516-17, 532-35. PSNs and PSAs are no longer benchmarked to Corrections and Custody

[3] Hospital Attendant was later reclassified as Mental Health Technician, Exhibit 1 RP 545; Ex. 33 (Licensed Practical Nurse 3 was later replaced by Licensed Practical Nurse 4.).

[4] Correctional Sergeant is now called Corrections and Custody Officer 3 and "Correctional Officer was revised to Corrections and Custody Officer 2" and is now called Corrections and Custody Officer 2. CP 472; 411.

Officers but to LPN2s and MHT2s because of the "comparability of the work." RP 535-38. This change effects PSNs as LPN2s. RP 540.

When special treatment programs were moved to state mental hospitals in 1977, DSHS re-classified the PSNs and PSAs back to lower-paying LPN and HA classes, respectively. Ex. 4. The Workers are regularly scheduled to work in the hospitals' forensic wards, while LPN4s and MHT3s are regularly scheduled to work on the hospitals' non-forensic, civil commitment wards. CP 2215-16.

The Workers initiated proceedings to have their classifications restored to the higher-paying PSN and PSA classes. Ex. 4. DSHS disagreed. Ex. 4. The Workers appealed to the Washington State Personnel Board, which upheld DSHS's decision. Ex. 4. The Workers sued to challenge the Board's determination. Ex. 3.

The trial court reversed the Board's decision, finding that the Board had "disregard[ed] the word 'security,' and all that the word implies," "lacked an understanding of the extra duties and responsibilities that are conferred upon anyone who cares for and controls the criminally insane and sexual psychopaths," and "acted arbitrarily and capriciously" in reallocating to the Workers to lower-paying positions, "which were which were positions generally for treatment of other [non-criminal] patients at the two hospitals." Ex. 4. Reallocation to higher classifications and back

pay was ordered. Exs. 4 & 27. This Court affirmed that decision. Ex. 5.

Finally, eleven years after improperly reallocating the Workers, the State complied with the courts' orders. Ex. 70. Class representative, Dani Kendall a LPN4 was reclassified to PSN . RP 237-38 Ex. 70.

Lyle Quasim, the Secretary of DSHS yelled at the Union Representative, Christina Peterson regarding the order to properly pay the Workers RP 630; 661-62. Quasim vowed those employees would never, ever have an adjustment in their pay RP 660-662. Peterson testified that it was the only time in many years of working with Quasim he ever raised his voice. RP 630-33; 660-62. Quasim was very angry about being ordered to give the Workers back pay. RP 633, 660-662.

During the implementation of comparable worth, the Workers' pay was not adjusted. RP 477-78. The LPNs and MHTs did receive an adjustment which pushed the compensation of LPN4s and MHT3s above the PSNs and PSAs. RP 479-80, Exs. 37, 38, 39, 189, 190. As a result, Workers who had been an LPN4 while the dispute over the reclassification was pending, found themselves paid less than LPN4s. RP 157. The Workers' duties and responsibilities are the same in 2011 as they were in 1987 while working as a PSN with the title of LPN4. RP 247. Only difference in duties between LPN4s and PSNs is that there is typically only one LPN4 on the shift. RP 564-65.

The State argues that: "According to that methodology, it was actually determined that PSNs and PSAs were being overpaid according to the points assigned to their job classification." State's Br. at 40. However, their positions were never studied. RP 503-4; Ex.228. The PSNs and PSAs perform all of the duties of LPN4s and MHT3s who received significant increases. CP 2008.

B. The Workers Are Paid Less to Perform Essentially the Same Job as the Comparator Employees.

There is difficulty recruiting PSNs and PSAs. RP 555-56. PSNs and LPN4s, and the PSAs and MHT3s, do essentially the same jobs, as set forth in the State's own class specifications Ex. 33, 34, and 35 describing the following of identical or similar work for each position:

PSN	LPN4
"Supervises and assists Psychiatric Security Attendants within mental health unit in an adult corrections institutions [sic.]; is responsible for security and practical nursing care; Supervises and instructs Psychiatric Security Attendants in carrying out specific instructions directed by the professional staff; Acts for Registered Nurse in his/her absence;"	"As shift supervisor, assists in and directs the attendant staff of a ward or treatment unit; plans, oversees, and evaluates work, trains and assists staff; May supervise lower level staff."
"Inspects housing and treatment areas, supplies, equipment, and patients for health, sanitation, safety, security, and other conditions that may be detrimental to the care and treatment of the	"Inspects housing and treatment areas, supplies, equipment, and patients for health, sanitation, safety, security, and other conditions that may be detrimental to the care and treatment of the

patients;"	patients;"
"Attends to the general care of patients, provides for their emotional and physical comfort and safety and maintains an attractive and comfortable environment; gives assistance and guidance in cleanliness, grooming, rest, activities, and nourishment"	"Attends to the general care of patients, provides for their emotional and physical comfort and safety and maintains an attractive and comfortable environment; gives assistance and guidance in cleanliness, grooming, rest, activities, and nourishment"
"Prepares and cares for patients receiving specialized treatments administered by the physician or the professional nurse; performs selected nursing procedures;"	"Prepares and cares for patients receiving specialized treatments administered by the physician or the professional nurse; performs selected nursing procedures;"
"Cares for patients with communicable diseases including necessary sterilization and observation of aseptic techniques; Prepares and administers oral, subcutaneous, and intramuscular medications, under the supervision of the professional nurse;"	"Cares for patients with communicable diseases including necessary sterilization and observation of aseptic techniques; preparation and aftercare of treatment and administration of oral, subcutaneous, and intramuscular medications, under the supervision of the professional nurse; preparation and aftercare of treatment and administration of medications, except I.V. medications;"
"Encourages and supervises patients in group or individual recreational, social, or related activities; Observes, records, ant [sic.] reports the general condition of patient;"	"Encourages and supervises patients in group or individual recreational, social, or related activities; Observes, records, and reports the general condition of patient;"
"Assists with the rehabilitation of patients according to the treatment plan;"	Assists with the rehabilitation of patients according to the treatment plan;"
"Participates in in-service education programs, staff and treatment team conferences;"	"Participates in in-service education programs and staff and treatment team conferences;"

"Participates in providing therapeutic environment through acceptance of patient behavior and guidance toward more rational behavior;"	(No similar work is described on the LPN4 class specification)
"Performs other work as required."	(No similar work is described on the LPN4 class specification)
(No similar work is described on the PSN class specification)	"Promotes better understanding of hospital policies in contacts with patients' relatives;"

Exs. 34, 35 (PSN Class Specification) and 33 (LPN4 Class Specification).[5]

PSA	MHT3
"Observes patients for unusual or significant behavior; prepares reports to supervisor;"	"Observes, records, and reports the general condition of patient;"
"Participates in directed treatment plan for patients;"	"Provides care to assigned patients utilizing the current treatment plan;"
"Provides for patient safety and comfort through attention to general health and assistance and guidance in cleanliness, grooming, rest, activity, and nourishment; maintains an attractive and comfortable ward environment;"	"Attends to the general care of patients, provides for their emotional and physical comfort and safety and maintains an attractive and comfortable environment; gives assistance and guidance in cleanliness, grooming, rest, activities and nourishment;"
"Prepares and cares for patients receiving treatments administered by the physician and orders, prepares, and cares for supplies and equipment used in treatment; Assists the nurses in the	"Prepares and cares for patients receiving specialized treatments administered by the physician or the professional nurse; performs selected nursing procedures;"

[5] One item - "Promotes better understanding of hospital policies in contacts with patients' relatives" - described on the LPN4 class specification for which there is no comparable item on the PSN class specification (and two items on the PSN spec. not on the LPN4 spec.). In fact, PSNs also perform this work, promoting better understanding of hospital policies in contacts with patients' relatives. RP 283.

administration of medications and treatments prescribed by a physician;"	
"Encourages and supervises patients in group or individual recreational, social, and related activities, and acts as patient escort;"	"Encourages, assists and supervises patients in group or individual recreational, social or related activities;"
"Participates in in-service education program;"	"Participates in in-service education program;"
"Performs other work as required."	"Performs other work as required."
"Maintains order and discipline in housing and treatment area; protects employees and patients from acts of violence from recalcitrant patients;"	(No similar work is described on the MHT3 class specification)
"Inspects patient quarters for cleanliness and order; searches quarters and persons for contraband; escorts patients on outside trips;"	(No similar work is described on the MHT3 class specification)
"Participates in providing therapeutic environment through acceptance of patient behavior and guidance toward more rational behavior;"	(No similar work is described on the MHT3 class specification)
(No similar work is described on the PSA class specification)	"Counsels non-licensed personnel in improving job performance and in understanding hospital policies and procedures relating to patient care units and patient behavior;"
(No similar work is described on the PSA class specification)	"Responsible for managing and coordinating the safety and security of patients' personal possessions; designated ward fire marshal and ward safety coordinator; responsible for patients and ward mail collection and distribution; coordinates the designation of patient room assignments; manages ward supplies, linen control and inventory, and ward forms;"

(No similar work is described on the PSA class specification)	"Monitors ward policy manuals to update and ensure current revisions;"
(No similar work is described on the PSA class specification)	"Promotes better understanding of hospital policies in contact with patients' relatives;"
(No similar work is described on the PSA class specification)	"Assists the Mental Health Technician 4 in coordinating patient appointments"

Exs. 30, 32 (PSA Class Specification) and Ex. 31 (MHT3 Class Specification)[6]

This case was tried in Pierce County Superior Court before the Honorable Brian Tollefson over ten days with a half day of argument. The court entered findings of fact and conclusions of law. RP-June 6, 2011, 1-47; CP 2214-31, based on its oral ruling. RP 1265-76.

On the Workers' motion for attorney fees CP 2094-2118; RP July11, 2011, 1-33 (hereinafter "JulyRP"), the trial court awarded fees under the common fund equitable exception to the American Rule and found in equity, ruling that the State should bear responsibility for the portion of fees that would have been due under a lodestar method. JulyRP

[6] Five items are described in the MHT3 class specification for which there are no comparable items on the PSA class specification and three items on the PSA spec. not on the MHT3 spec. Ex. 30,31. PSAs perform this work in their jobs as well. PSAs handled mail. RP 367, 389; PSAs handled supplies. RP 368,390-92; PSAs filled out work orders RP 392; PSAs serve as fire marshals. RP 366-67; 448-49; 453; PSAs are trained on all the administrative duties. RP 453. MHT3 and PSA duties are essentially the same. RP 566-67; CP 2216.

1-33. CP 2192-96. The court however, declined to rule on the appropriate amount of fees for Garold Johnson, one of the Workers' attorneys whom had recently been elevated to the position of Superior Court Judge. JulyRP 28. The State appealed, CP 2153-71 and the Workers cross appealed. CP2188-90.

V. Summary of Argument

The duties of the PSNs are the same as LPN4s. PSN positions were created out of the LPN3s, which are now known as LPN4s. The duties of the PSAs are the same as MHT3s. PSNs and PSAs have additional and more onerous and exacting duties and working conditions in addition to the same duties of their non-forensic counterparts. Yet the Workers are not paid more than their counterparts, they are paid less.

As in *WPEA,* paying the Workers at a lower rate than their counterparts denies them equal protection. The State also violated the comparable worth statute in paying them less for their duties and is the result of arbitrary, capricious and/or illegal conduct by the State. The Workers are entitled to a remedy for pay inequities.

The trial court's factually and legally supported decision should be upheld, the State waived challenges to the legal sufficiency of the underlying claims or the evidentiary support for such claims by failing to renew its motion to dismiss at the close of the case. The trial court was in

a better position to address a dismissal motion having heard ten days of testimony and reviewing thousands of pages of exhibits. Challenges to findings were waived on appeal by the State where it failed to show the absence of substantial evidence supporting the findings, as well as, the failure to address sufficiency of the evidence supporting a denial of the motion to dismiss in their brief. Attorney fees were properly awarded. The judgment should be affirmed.

Because RCW 49.50.070 applies, trial court erred where it denied double damages.

VI. Argument

A. Standard of Review

CR 50 motions for judgment as a matter of law call for the evidence and all reasonable inferences reasonably drawn the evidence to be interpreted against the moving party and in the light most favorable to the nonmoving party. *Faust v. Albertson,* 167 Wn.2d 531, 537–38, 222 P.3d 1208 (2009). Appellate courts must defer to the trier of fact on issues involving conflicting testimony, witness credibility and the persuasiveness of the evidence.. *Thompson v. Hanson,* 142 Wn.App. 53, 60, 174 P .3d 120 (2007). The same standard applies on summary judgment. *Marquis v. Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). Abuse of discretion standard applies in reviewing denial of motions for new trial. *Aluminum*

Co. of America v. Aetna Casualty & Surety Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

Where the trial court weighed the evidence and entered findings of fact, review of such findings is limited to determining whether there is a sufficient quantum of evidence in to persuade a fair-minded person of the truth of findings and, if so, whether the findings support the conclusions of law. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390–91, 583 P.2d 621(1978),

In cases such as this where the trial court reviewed an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings substantial evidence is appropriate. *Dolan v. King County,* 172 Wn.2d 299, 311, 258 P.3d 20, 27 (2011)(Class action affirming extending PERS benefits to county public defenders).

Review of an equitable decision is for an abuse of discretion by the trial court. *Willener v. Sweeting,* 107 Wn.2d 388, 397, 730 P.2d 45 (1986); the trial court's decision may be affirmed on any theory supported by the record and the legal authorities even if the trial court did not consider or mainly consider such grounds. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

A trial court's admission of evidence is reviewed under an abuse of discretion standard. *Univ. of Wash. Med. Ctr. v. Wash. Dep't of*

Health, 164 Wn.2d 95, 104, 187 P.3d 243 (2008). A trial court abuses its discretion when the ruling is "manifestly unreasonable or based upon untenable grounds or reasons. "*Salas v. Hi–Tech Erectors*, 168 Wn.2d 664, 668–69, 230 P.3d 583 (2010)(internal quotations omitted).

Whether to award costs and attorney fees is a legal issue reviewed de novo. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103–04, 117 P.3d 1117 (2005). The amount of fees is reviewed for abuse of discretion. *Sanders v. State*, 169 Wn.2d 827, 848, 240 P.3d 120, 131 (2010).

B. Reply to State's Arguments

1. The State Has Waived its Arguments.

By Failing to Renew the Motion to Dismiss at the Close of the Case or by CR 59 Motion Within Ten Days of the Judgment the State Waived its Right to Challenge the Legal or Factual Basis for the Judgment and the State Cannot Rely Upon the Motion for Summary Judgment Following a Full trial on the Merits.

The State's motion for summary judgment , CP 545-571, was denied. CP 1458-1460. The State sought discretionary review in this Court on the core legal issue it now raises on appeal. (Court of Appeals Cause No. 38970-3-II.); CP 1462-1466; 1475-78 staying proceedings; CP 1480-81. This Court denied review. See Appendix..

The State moved for judgment as a matter of law at the close of Workers' case RP 576 -598; CP 1926-1951. The trial court denied the motion. RP 609-10. But the State never renewed its motion at the close of the case. RP 1159; 1165.

In *Ortiz v. Jordan*, __ U.S. __, 131 S.Ct. 884, 178 L.Ed.2d 703 (2011) governmental officials sought to set aside a prisoner's 42 U.S.C.§ 1983 jury verdict on the basis of qualified immunity after their pre-trial motion for summary judgment had been denied. Dismissing the appeal the court held the officials' "failure to renew motion for judgment as a matter of law under Fed. R. of Civ. Pro. 50(b) left the appellate court with no warrant to reject the appraisal of the evidence by 'the judge who saw and heard the witnesses and ha[d] the feel of the case which no appellate printed transcript can impart.' " Ortiz ___ U.S. at ___, 131 S.Ct at 889. The court also held denial of summary judgment should not be reviewed, such orders are simply a step along the route to final judgment. The full record supersedes summary judgment's record. *Ortiz*, __ U.S. at ___, 131 S.Ct. at 889.

This case is no different. The State did not make a CR 50(b) motion or a motion for relief from the judgment under Rule 59(a)(7), while witnesses' testimony and thousands of explained pages of exhibits were fresh before the trial court. This Court should not review a record

incapable of capturing the intertwined factual and legal nuances of testimony explaining thousands of pages of exhibits.

This court should rule as a matter of law that the State has waived any further appellate review of the equal protection claim, comparable worth claim or determination the pay inequities were the product of arbitrary and capricious conduct by the State because of the State's failure to bring a timely post trial motion under CR 50 or 59. As factual issues are sufficiently intertwined with the legal determinations, the trial court should not be second guessed.

2. The State Waived Arguments It Failed to Properly Raise in Its Brief.

The State's shotgun approach to this appeal compounds the inadequacy of its post trial procedures. Clumping numerous findings of fact together in the assignments of error in its brief, but never untangling or arguing them waived any challenge to the sufficiency of the evidence supporting the findings. RAP 10.3(g) requires each allegedly improper finding of fact to be set out separately. By not complying with RAP 10.4(c), requiring challenged finding to be addressed in the brief, the State has waived challenges to the sufficiency of the evidence. Such rules "add order to and expedite appellate procedure by eliminating the laborious task of searching through the record for such matters as findings claimed to

have been made in error." *In re Marriage of Stern,* 57 Wn.App. 707, 710, 789 P.2d 807 (1990). By failing to address findings the State improperly asks this Court to engage in a fact finding expedition. The unchallenged findings must be accepted as verities on appeal. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

An additional problem is that the State raised three claimed errors only in a footnote. Placing an argument in a footnote is, "at best, ambiguous or equivocal as to whether the issue is truly intended to be part of the appeal." *St. Joseph Gen. Hosp. v. Dep't of Revenue,* 158 Wn.App. 450, 473, 242 P.3d 897 (2010).

The State has waived any challenge to the following findings of fact: FF 6, FF 7, FF 17, FF 18, FF 19, FF 20, FF 21, FF 26, FF 29, FF 30, FF 32, and FF 34 which State lumped into Assignment of Error 1; FF 15, the alleged mischaracterization of the prior litigation stated in FF 15; FF 27, regarding pay of PSNs and PSAs lagging behind LPN4s and MHT3s; or the that the current pay inversion was contrary to the original basis for creating the positions of PSN and PSA thwarting the result of the prior litigation; FF, 28, 46, and 47 which State lumped into Assignment of Error 4; FF 36, 37, 38, 39, 40 and 45 which State lumped into Assignment of Error 5; FF 43 and 44 which State lumped into Assignment of Error 6; FF

48 determining the Workers had no meaningful avenue of review or that such efforts would be futile.

The State made no effort to address the appropriateness of setting the start date for any remedy at May 16, 2004, three years prior to suit, CP 4, or allowing the relief to continue prospectively; the State took no effort to address apparent concerns retroactive pay should be accomplished by placing the employees at the same step in the multi-step pay range to which they were assigned in the lower salary range or that wages include any premium pay, including but not limited to overtime; the State's brief makes no mention of why any remedy should exclude PERS contributions on any pay award. The State's brief makes no mention of post judgment interest on any award or why that remedy is not appropriate. Those issues are waived.

The State objects to the trial court's order of prospective injunctive relief under 42 U.S.C. § 1983 of salary adjustments going forward after the trial only in a passing reference to 42 U.S.C. §1983 in a footnote discussing Workers' rights regarding writs of certiorari to seek redress for arbitrary and capricious state action. That issue is waived.

The State assigned error to the court's denial of motion *in limine* to exclude Dr. Kane's testimony was waived by making just a passing reference to this witness's testimony in a footnote discussing the doctrine

of comparable worth without addressing why the trial court abused its discretion by admitting the testimony.

The State asserts the trial court improperly denied its motions for summary judgment or directed verdict at the close of the Workers' case, but did not address the standard of review for denial or otherwise address the motions in their brief.

This Court should not be obliged to tease out from the State's claims of error its precise argument. Nor is it fair for the Workers to be compelled to do so should the State try to make amends on reply. The State has waived these errors.

3 Substantial Evidence Supports Workers' Equal Protection Claims.

a) Equal Protection Rights and Remedies Under State and Federal Constitutions.

The trial court held that the PSNs' jobs were essentially the same as the LPN4s and that the PSAs' jobs were essentially the same as the MHT3s. CP 2216. This assessment was concurred with by the psychiatric nurse executive at Western State. RP 548, 564-67.

In *WPEA*, this Court held that "wage disparities between state employees who performed essentially the same jobs violated federal equal protection guarantees" in a case involving pay disparities between classes of employees in the state general government and higher education who

performed substantially similar work. *WPEA*, 127 Wn. App. at 257. Challenging the failure of the responsible state agencies to equalize the basic salary ranges for the affected common class employees the employees established such failure violated state civil service laws and the state and federal equal protection guarantees. *Id.*

This Court concluded the State's failure to equalize basic salaries among State employees who do essentially the same work, *id.*, and "that the State's failure to equalize basic salary levels bears no rational relationship to the purposes of Washington's Civil Service Laws." *Id.* at 268 violated employees' rights.

In a similar case, *Peterson v. Hanson*, 565 F.Supp. 87 (E.D. Wisc. 1983), reconsideration granted, 569 F.Supp. 694 (1983)(decision unchanged), the plaintiffs obtained declaratory and injunctive relief that their salaries as court reporters violated Equal Protection clause of the Fourteenth Amendment. The differences were not based on individual reporter skill, experience, or any other identifiable reasonable ground and the court determined that the court reporters, having the same job duties, were similarly situated and there was no rational basis for their disparate salary classifications. *Id.* at 88-89.

The State argues that the rational basis for paying the Worker's less is because they have more difficult duties in addition to the overlap in

the duties with LPN4s and MHT3s. That is not a rational basis to pay them less for their equal duties.

b) No Rational Basis Supports Paying the Workers Less Because the Workers' Duties Include More Difficult and Onerous Aspects Beyond the Overlap in Their Duties.

Under the rational basis test, a court will uphold the government action if (1) the government action in question applies alike to all members of the designated class, (2) there are reasonable grounds to distinguish between those within and without the class, and (3) the classification has a rational relationship to the legislative purpose. *WPEA*, 127 Wn. App. at 263 (citations omitted). In other words, state action does not violate the equal protection clause if there is a rational relationship between the classification and a legitimate state interest. *State v. Osman*, 157 Wn.2d 474, 486, 139 P.3d 334 (2006) (citing *Simpson v. State*, 26 Wn.App. 687, 693, 615 P.2d 1297 (1980)). Courts will uphold State action unless "it rests on grounds wholly irrelevant to the achievement of legitimate state objective." *Osman*, 157 Wn.2d at 486 (citations omitted). Paying the Workers less is lawful only if there is *some basis in reality* for the distinction between the two classes and the distinction serves the purpose intended by the legislature. *Id.* (italics in original). The State did not demonstrate a basis in reality for the disparity in pay.

c) The Proper Designated Class is PSNs and PSAs Who do the Same Work But Are Paid Less.

The State misconstrue the designated class in this case, arguing that each of the State's own job classifications (for PSN, PSA, LPN4, and MHT3) would constitute a designated class' for equal protection purposes, that all PSNs are treated equally and all PSAs are treated equally, and that there is no 'designated class' from which the Workers are being treated differently because "the State does not maintain multiple job classifications for positions with identical duties and responsibilities." State's Br. at 18, 21. The Workers' assertion is that the overlap in duties triggers the Workers' equal protection violation.

In *WPEA,* this Court determined that the state workers' identity of duties defines the designated class, 127 Wn. App. at 267, and found the appropriate class designation was workers paid less than other state employees doing the same work. *Id.* at 264. Accordingly, the designated class for purposes of the rational basis test in this case is the PSNs and PSAs on the forensic wards who do the same work as the LPN4s and MHT3s on the non-forensic wards, but are paid less. The government action at issue is the State's failure to equalize basic salaries of those employees.

d) There Are No Reasonable Grounds for Paying the Workers Less for Performing the Same Duties.

The analysis turns to whether reasonable grounds in reality to justifying paying the PSNs and PSAs less than the LPN4s and MHT3s. *See WPEA*, *id.* at 267 (determining the proper comparison was "lower paid employees in both systems against higher paid employees in both systems doing the same work"). *Some basis in reality* must exist for distinguishing between the two classes. *Osman*, 157 Wn.2d at 486 (italics in original). Instead of demonstrating a *basis in reality* to pay the Workers less than their non-forensic counterparts, the State argues that the Workers have more onerous and exacting duties beyond those assigned to LPN4s and MHT3, despite the overlap in their duties. State's Br. at 22.

The trial court properly concluded, after hearing substantial testimony, that the class members were performing the same duties, but were being paid less, even though they had more onerous and exacting duties in addition to the overlapping duties. That court found there was no rational basis in reality justifying paying the class members less. CP 2220-23.

In a footnote, the State asserts collective bargaining process gives rise to a safe harbor for arbitrary actions citing to *Danese v. Knox*, 827 F.Supp. 185 (S.D.N.Y. 1993). *Danese* is inapplicable because it dealt

[8] RCW 41.06.155 has been amended several times since this lawsuit was filed. In 2009 RCW 41.06.155(10) was re-codified as RCW 41.06.155(j) 2009 Wash. Legis. Serv. Ch. 534 (S.H.B. 2049).

with a work rule on attendance and the comparator groups proposed were management employees not in the union and union members in the other group. This court's own holding in *WPEA* that "wage disparities between state employees who performed essentially the same jobs violated federal equal protection guarantees" still controls. *WPEA* 127 Wn.App. 254, 110 P.3d 1154 (2005).

e) Paying the Workers Less Has No Rational Basis in Reality.

The final inquiry under the rational basis test is whether the distinction between the two classes serves the purpose intended by the Legislature. *See WPEA*, 127 Wn. App. at 263; *Osman*, 157 Wn.2d at 486. The State argues that the Workers' lower salaries rational relationship is simply because they are in a different job classification. State's Br. at 30. In footnote 13, the State asserts that by definition there can only be one LPN4 for each ward and that not all PSAs would be MHT3s. That ignores that the PSNs and PSAs have to step in across the board do the full range of duties embraced by LPN4s and MHT3s respectively.

PSNs and LPN4s work under the general supervision of registered nurses. RP 1024-25. RNs were frequently absent from the forensic wards. RP 369. The State argues that there is not just one PSN assigned to be responsible on a ward and therefore they are different than LPN4s.

However, the corollary is true. There is not a bevy of persons to whom PSNs may delegate responsibility, each PSN must step in and perform the role of an LPN4. All the PSNs were "ward charged" as lead workers. RP 157; CP 2222. LPN4s are not supervisors, but lead workers. RP 708

Here, as in the *WPEA* case, "the State's failure to equalize basic salary levels bears no rational relationship to the purpose of Washington's Civil Service Laws." 127 Wn. App. at 268. The Workers share the same patient care duties as their non-forensic counterparts, but are paid less. The State's argument the Workers have additional duties beyond the duties in common does not provide a rational basis to pay the Workers less where their duties are otherwise the same..

4. Court has Authority to Grant Prospective Relief Under 42 U.S.C. § 1983 Against A State Defendant and Substantial Evidence Supports the Court's Decision.

A state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham,* 473 U.S. 159, 167, n. 14, 105 S.Ct. 3099, 3106, n. 14, 87 L.Ed.2d 114 (1985). This distinction is "commonplace in sovereign immunity doctrine," L. Tribe, American Constitutional Law § 3-27, p. 190, n. 3 (2d ed. 1988), and would not have been foreign to the

19th-century Congress that enacted § 1983, see, *e.g., United States v. Lee,* 106 U.S. 196, 219-222, 1 S.Ct. 240, 259-262, 27 L.Ed. 171 (1882).

Accordingly, the trial court had the authority to enter CL 29, 30, CP 2230, absent a significant change in circumstances the Workers' pay should not be reduced below their counterparts to prevent the State through its agents from renewing equal protection violations against the Workers following the trial.

5 The Comparable Worth Statutes RCW 41.06.133 and RCW 41.06.155 Have Not Been Repealed and Substantial Evidence Supports Workers' Claims They Were Not Being Properly Compensated Under Doctrines of Comparable Worth and Are Entitled to a Remedy.

"'Comparable worth' means the provision of similar salaries for positions that require or impose similar responsibilities, judgments, skills, and working conditions." RCW 41.06.020(5). RCW 41.06.133(10)[8] requires "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." "Increases in salaries and compensation solely for the purpose of achieving comparable worth shall be made at least annually." Under RCW 41.06.155. The comparable worth statute has not been repealed, despite the State's assertion it achieved comparable worth by 1993. States' Br. at 38.

Construction of a statute is a question of law reviewed *de novo*. *State v. Wentz,* 149 Wn.2d 342, 346, 68 P.3d 282 (2003). Interpreting a statute discerns and implements the legislature's intent. *State v. J.P.,* 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Where the plain language of a statute is unambiguous and legislative intent is apparent, Courts will not construe the statute otherwise. *Id.* Plain meaning may be gleaned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 11, 43 P.3d 4 (2002) If still "susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in determining legislative intent." *Christensen v. Ellsworth,* 162 Wn.2d 365, 373, 173 P.3d 228 (2007) Comparable worth statutes are remedial statutes entitled to liberal construction, with any exception narrowly confined. *Hearst Corp. v. Hoppe,* 90 Wn.2d 123, 138, 580 P.2d 246 (1978).

Because of overlap in job duties, the tide of comparable worth that lifted the LPNs and the MHTs should have similarly lifted the Workers. Disregarding and undervaluing the nursing and care responsibilities of Workers from comparable worth adjustment created the pay inequities RP 479-89 effectively carrying out Secretary Quasim's threat.

The judiciary has final say on the interpretation of laws and our Constitution and serves as a check on the activities of another branch even when contrary to the view of the Constitution taken by another branch. *McCleary v. State*, ____Wn.2d ___, 269 P.3d 227 (2012).

Where the Legislature enacts a statute that grants rights to an identifiable class, there is an assumption those rights are enforceable. *Washington State Coalition for the Homeless v. Department of Social and Health Services*, 133 Wn.2d 894, 913, 949 P.2d 1291, 1301 (1997). Evaluating if a statute grants a cause of action the court considers: (1) whether the plaintiffs are within the class of persons for whose benefit the statute was enacted; (2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and (3) whether implying a remedy is consistent with the underlying purpose of the legislation. *Bennett v. Hardy,* 113 Wn.2d 912, 919–21, 784 P.2d 1258 (1990).

The comparable worth statute was adopted to address historical pay inequities in State employment where employees are not fully compensated for the full value of the employee's job duties resulting in less pay than employees with similar responsibilities requiring comparable knowledge, skill and working conditions.

Under *Bennett,* it is presumed the rights are enforceable. Aligning pay for the Workers is consistent with the underlying purpose of

RCW 41.06.020(5) that employees receive similar salaries for positions with similar responsibilities, judgments, skills, and working conditions. Implied causes of action are based upon the assumption that " 'the legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce those rights.' " *Bennett,* 113 Wn.2d at 919–20, (quoting *McNeal v. Allen,* 95 Wn.2d 265, 277, 621 P.2d 1285 (1980)). Although the remedy is implicit, the Workers' right and the Workers' identity as recipients of the right are explicit. Thus, the *Bennett* test asks whether a remedy can be implied from legislative intent and whether implying a remedy is consistent with the purpose of the legislation, but, when determining standing, asks "whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted." *Id.* at 920. Courts may imply a remedy from the language of the statute and determine to whom the remedy is available. *Id.* at 920–21.

The comparable worth does not explicitly or implicitly deny the Workers a remedy to enforce their rights under the statute, nor has the comparable worth legislation been repealed.

The State argues that the reference in RCW 41.06.133 to RCW 43.88 for approval by financial administration deprives the Workers of a right of private enforcement. However, the provisions of RCW 43.88.030(2)(b) includes: "Payments of all reliefs, judgments, and

claims." This indicates that the private rights of action are not foreclosed by a generic reference to RCW 43.88.

When the Legislature intends that its legislation does not give rise to a private right of action the legislature often will insert a direct statement into the adopting legislation.[9] No limiting direction is present in the comparable worth statutes.

Under comparable worth, the Workers' positions which have similar skills responsibilities, judgments, and working conditions therefore require similar salaries and the State was required to increase salaries and compensation annually to achieve comparable worth.

The trial court correctly found a violation of comparable worth justified a remedy for the Workers. The State asserts that the methodology determined the Workers were overpaid according to the points assigned to their job under the Willis method. The record reflects their positions were not studied. PSAs were not evaluated for increase because they were

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[9] For example in adopting RCW 13.34.350 regarding information sharing guidelines for dependent children a provision was included in the adopting legislation stating: "Nothing in this act shall be construed to create a private right of action or claim against the department of social and health services on the part of any individual or organization." 2009 Wn. Legis. Serv. Ch. 520 (S.S.H.B. 2106). When enacting RCW 28A.210.080 regarding school children immunization, the Legislature put into the body of the statute itself the statement "(d) This subsection does not create a private right of action." RCW 28A.210.080(3)(d). In RCW 43.43.754(7) the Legislature expressly stated that no cause of action may be brought on the failure to collect or analyze DNA evidence.

already making more than MHTs. RP 480-81; 489. The PSNs also did not get an increase for the value of their nursing duties. RP 480. PSN positions were created out of the LPN3s. RP 508-9. The PSN position was not evaluated in the comparable worth study. RP 481, 503-4, 506. MHT2s recieved parity with PSAs through comparable worth implementation. RP 484.

Theresa Thompson, the State's compensation manager, testified that the reason PSAs are paid less than MHT3s is: "...I guess the fact that they've ended up this way is a fact of the system and how, um, it works." RP 491-93. PSNs are paid the same as LPN2s, also because that's just the way the system works, but Thompson could not provide another rationale. RP 496-97. LPN2s are entry level positions at Western State RP 740, but two years experience is necessary to be a PSN. Ex. 34, RP 157, 223. When asked to state the rationale for paying the PSNs the same as the LPN2s, Ms. Thompson finally admitted: "Because that's what they're paid. That's -- the work is –That's how they ended up is what it is. RP 496-98. Her comment epitomizes arbitrary and capricious conduct.

6 The Workers' Have the Right of Certiorari to Permit Review of Arbitrary and Capricious State Action and Substantial Evidence Supports the Courts Decision the State Action was Arbitrary and Capricious.

The State claims that affording the Workers a remedy would violate the principles of separation of powers and the trial court acted as a "super personnel agency." Asserting courts are powerless to review anything but discrete decisions, the State asserts "the court's role is only to remand to the agency to act appropriately." State's Br. at 43,45. This obviously flies in the face of this Court's holdings in *WPEA*.

Superior courts have inherent power under article IV of the Washington Constitution to review administrative decisions for illegal or arbitrary acts. *State ex rel. Dupont Fort Lewis Sch. Dist. No. 7 v. Bruno,* 62 Wn.2d 790, 794, 384 P.2d 608 (1963); *Williams v. Seattle Sch. Dist. No. 1*, 97 Wn.2d 215, 221, 643 P.2d 426 (1982); *Pierce County Sheriff v. Civil Service Commission,* 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983); *Bridle Trails Community Club v. Bellevue,* 45 Wn.App. 248, 251, 724 P.2d 1110 (1986). An agency's violation of the rules that govern its exercise of discretion is considered contrary to law and is as fundamental as the right to be free from arbitrary and capricious action. *Pierce County Sheriff,* 98 Wn.2d at 693. Thus, as in *WPEA,* 127 Wn.App. 254, 110 P.3d 1154 (2005), where this Court exercised its authority to check arbitrary, capricious and unconstitutional State conduct, the courts have authority to do so for this case for the Workers.

Citing *Wilson v. Nord*, 23 Wn. App. 366, 376, 597 P.2d 914, 920 (1979) the State claims a writ's reach is limited solely to remand. States' Br. at 42. *Nord* does not so hold. In *Nord,* Wilson successfully challenged a practice elevating employees to higher job classes without competing for such positions. Wilson asserted that it was improper and he should be appointed to one of the vacated positions that had been improperly filled. Agreeing the promotions were improper but denying relief of automatic placement into the now vacant positions, the court remanded for competition on a level playing field. *Nord* does not support the State's assertion that courts are powerless to fashion a remedy for arbitrary and capricious action.

The State claims class members had an adequate avenue of relief by petitioning to have their positions reclassified as LPN4s and MHT3s which denies them the right to review by certiorari. State's Br. at 44. Reclassification as a LPN4 or MHT3 is not an adequate remedy. The PSN positions were created from LPN3s RP 508-9 and LPN3s were abolished and became LPN4s. Ex. 33. The Workers perform all of the duties of LPN4s and MHT3s, but have additional security responsibilities over and above the common duties the positions share. Exs. 43, 44, 45, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 70, 77, 78,

79, 80, 81, 82, 83. There may be appropriate justification for paying the Workers more, but not less.

The Workers have no adequate administrative remedy to address the constitutional and statutory violations here. Reclassification of their position is not an adequate administrative remedy. The State triggered the reallocation process in the prior suit. Ex. 27. The Workers petitioned to address this disparity without result. Ex. 73. RP 340-43, 402-3. PERC has no jurisdiction over constitutional issues, nor could it remedy a comparable worth violation. The State locked the wage negotiations into existing salary ranges at the outset of collective bargaining. RP 617. Formerly, there was a right of review under the so called 6767 process, but that went aware early in the last decade. RP 519. There is no administrative review mechanism for the Workers properly classified in their job but assigned an improper salary range. RP 657-658.

Only where "an opportunity for full and complete relief is available, [does] the general rule that the existence of a statutory appeals process bar a court from exercising discretion and issuing a constitutional writ of certiorari..." *Torrance v. King Cnty.*, 136 Wn.2d 783, 791, 966 P.2d 891 (1998). "There must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress afforded without issuance of the writ." *City of Olympia v.*

Thurston Cnty. Bd. of Comm'rs, 131 Wn.App. 85, 96, 125 P.3d 997 (2005). The writ provides "security against administrative injustice." *Washington Pub. Employees Ass'n v. Pers. Res. Bd.,* 91 Wn.App. 640, 652, 959 P.2d 143 (1998).

The trial court found administrative injustice and no meaningful avenue of review. "That at all times relevant, the State did not provide the Workers a meaningful and effective method to challenge the Pay Range to which the duties of their position were assigned and that any administrative remedy would have been either non-existent or futile." CP 2225. The State's proposed remedy is ineffective.

Equity includes the power to prevent the enforcement of a legal right when to do so would be inequitable under the circumstances. *Thisius v. Sealander,* 26 Wn.2d 810, 818, 175 P.2d 619 (1946). When proper "conditions and circumstances" warrant equity, "equity will assume jurisdiction for all purposes, and give such relief as may be required." *Income Prop. Inv. Corp. v. Trefethen,* 155 Wn. 493, 506, 284 P. 782 (1930). The goal of equity is to do substantial justice for the parties. *Shoemaker v. Shaug,* 5 Wn.App. 700, 704, 490 P.2d 439 (1971). This case demands an equitable remedy. JulyRP 27-29.

7. Collateral Estoppel and Judicial Estoppel Effect May Be Given To Issues Decided in Prior Litigation.

Collateral estoppel is an equitable doctrine. *Hadley v. Maxwell*, 144 Wn.2d 306, 315, 27 P.3d 600 (2001). The doctrine may be used offensively to "estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Id.* at 312 (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). The party asserting collateral estoppel must prove: (1) the issue decided in the prior adjudication is identical to the one presented in the current action, (2) the prior adjudication must have 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 on the party against whom collateral estoppel is to be applied. *Clark v. Baines*, 150 Wn.2d 905, 913, 84 P.3d 245 (2004) (citations omitted). Collateral estoppel is distinct from *res judicata* which is a related doctrine involving "claim preclusion." The State has confused the two doctrines in its discussion. The individual findings of fact and conclusions of law set forth in Exs. 4, 27 were established by collateral estoppel. The Workers' duties have not changed in the intervening years. RP 384. Ignoring the trial court's findings, CP 2218-19, the State asserts no findings address the elements of collateral estoppel. State's Br. at 46.

Collateral estoppel's first three requirements are met by the prior litigation regarding the Workers against the State. The State fails to show estoppel will work an injustice by precluding re-litigating the issues which Workers' spent eleven years fighting for a remedy. Ex. 3, 4, 27, 70. The State should be estopped from asserting that PSNs and PSAs have lesser duties and should be paid less than LPN4s and MHT3s, respectively. [10]

Equitable estoppel or judicial estoppel, as opposed to collateral estoppel, is based upon the reasoning that a party should be held to a representation made or a position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975). Three elements must be established before equitable estoppel may arise: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; (3) injury to such other party resulting from permitting the first party to contradict or repudiate such admission, statement, or act. *Id.* (citations omitted).

Here, the State previously asserted that the jobs were the same by reclassifying the PSNs and PSAs as LPNs and HAs (now MHTs) when the

[10] In any event, any error would be harmless as the trial court found it would have reached the same result even without resort to the prior litigation. CP 2229-31.

special treatment programs were moved to the hospitals in 1976, and maintaining that position in the subsequent lawsuit. The Workers here filed this action based on the State's prior position, and the Workers would be injured if the State is now allowed to contradict its prior position by denying the overlap in duties. The Workers' positions were created from HA2 and LPN3. Ex, 40. When LPN3 class was eliminated, it was replaced with LPN4 class. Ex.33 Dani Kendall was a LPN4 before the restoration of the PSN class in 1987 RP 240, she earned a substantial back pay award (Ex 70) when her class was restored and now she is paid less than an LPN4. CP 2214-2231.

8. The Court Properly Admitted Dr. Kane's Testimony Regarding Job Comparisons.

The trial court's decision to allow Dr. Kane to testify is entrusted to its discretion. *Harris v. Groth, M.D., Inc.*, 99 Wn.2d 438, 450, 663 P.2d 113 (1983).

The State waived any error regarding Dr. Kane's testimony by failing to address any claimed error in their brief. Dr. Kane has a Master of Arts degree in Industrial Relations and a Ph.D. in Organizational Psychology. RP 36. His experience includes analyzing positions, the responsibility of positions and appraisal measures for employment positions on behalf of state governments, law enforcement agencies and

private industry. RP 36-40. He is experienced in job analysis methods. Id. Dr. Kane's testimony is found at RP 35-91.

Dr. Kane evaluated the Workers' jobs and the LPN4s and MHT3s. RP 40-75. He visited the work sites. RP 45-48. ER 702 allows Dr. Kane to present his specialized knowledge to permit the trier of fact to understand evidence or determine a fact at issue. "The admissibility of expert testimony under Rule 702 will depend upon whether the witness qualifies as an expert and upon whether an expert opinion would be helpful to the trier of fact." 5A K. Tegland, Wash. Prac., *Evidence* § 288, at 380 (3d ed. 1989); *see In re Young;* 122 Wn.2d 1, 57, 857 P.2d 989 (1993). "Trial courts retain broad discretion in determining whether an expert is qualified and will be reversed only for manifest abuse." *Harris,* 99 Wn.2d at 450.

Dr. Kane is qualified as an expert. In *Perez v. Pavex Corp.,* 510 F.Supp.2d 755, 759 (M.D. Fla. 2007) the court ruled that Dr. Kane was qualified to express opinions regarding different classifications of jobs.

In *Price Waterhouse v. Hopkins,* 490 U.S. 228, 255-56, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), the Court "recognized the utility" of expert testimony concerning gender stereotyping. *E.E.O.C. v. Morgan Stanley & Co.,* 324 F.Supp.2d 451, 462 (S.D.N.Y.2004) (permitting social

scientist to "testify about gender stereotypes and about how these stereotypes may have affected decisions at Morgan Stanley").

The essential question is whether the specialized testimony will help the trier of fact "understand the evidence or to determine a fact in issue". While courts consider the danger that the jury may be overly impressed with a witness possessing the aura of an expert, *Davidson v. Metropolitan Seattle,* 43 Wn.App. 569, 571-572, 719 P.2d 569 (1986), that is not a concern in a bench trial. The State asserts Dr. Kane's determination that the State's actions are arbitrary and capricious was improper. State's Br. at 40, n.19. That determination is both a factual determination as well as a legal conclusion. ER 704 states "...opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The trial court did not abuse its discretion and Dr. Kane's testimony was properly admitted.

9. The Trial Court Properly Awarded Fees to the Workers.

The State asserts that fees should have been awarded under either the common fund doctrine or fee shifting statutes, but not both. State's Br. at 48. Washington follows the American rule, attorney fees are not awarded unless authorized by contract, statute, or a recognized equitable principal. *City of Seattle v. McCready,* 131 Wn.2d 266, 273-74, 931 P.2d

156 (1997). Whether an award of attorney fees is authorized by a recognized equitable exception is a legal question. *Tradewell Group, Inc. v. Mavis,* 71 Wn.App. 120, 126, 857 P.2d 1053 (1993). In *McCready,* our Supreme Court held "the common fund doctrine" is a recognized equitable exception to the American rule. *McCready,* 131 Wn.2d at 274.

The common fund doctrine authorizes attorney fee awards when a litigant brings an action that preserves or creates a common fund for the benefit of the litigant and others. *Bowles v. Dep't of Retirement Sys.,* 121 Wn.2d 52, 70-71, 847 P.2d 440 (1993). Unlike a lodestar approach, fees awarded under the common fund doctrine are borne by the prevailing party and are taken as a percentage of the recovery. *Id.* at 71. The *Bowles* court acknowledged the doctrine furthers the important policy of encouraging access by class plaintiffs to the legal system. *Id.* at 71.

In *Bowles,* the trial court awarded $1.5 million in attorney fees and $17,000.00 costs for bringing a class action on behalf of members of the Public Employee Retirement System denied credit for payouts on accumulated leave balances when calculating retirement benefits. *Bowles* trial court required the State to pay the attorney fees up front and then take *pro rata* credit for fees paid from members' payout on their retirement benefits. Noting common fund fee awards enhance access to justice the court observed: "We note in passing that this holding also furthers

important policy interests. When attorney fees are available to prevailing class action plaintiffs, plaintiffs will have less difficulty obtaining counsel and greater access to the judicial system. Little good comes from a system where justice is available only to those who can afford its price." *Id.* at 52.

The trial court found here that following a strict common fund approach here requiring the Workers to bear the entire fee would give a windfall to the State and instead took a blended approach. If the entirety of the fees would be bourne by the Workers and the State would escape any fee liability, despite its wrongful actions. The trial court's blended approach awarded attorney fees under the common fund doctrine, but assigned the State responsibility for that portion of fees that it would have been responsible for under the lodestar method . JulyRP 27-29. This was within the trial court's discretionary authority as under the proper "conditions and circumstances" warranting equity, "equity will assume jurisdiction for all purposes, and give such relief as may be required." *Income Prop. Inv. Corp. v. Trefethen,* 155 Wn. 493, 506, 284 P. 782 (1930). The trial court specifically stated it was allocating fees between the State and the Workers using its powers of equity. JulyRP 27-28. *Bowles* acknowledges great discretion is afforded in the fees award. *Bowles,* 121 Wn. 2d at 72.

The trial court's assignment of a portion of attorney fees to the State related to its wrongful conduct should be affirmed.

C. The Workers' Claims on Cross Appeal

1. The Trial Court Erred In Failing to Award Double Damages on Unpaid Wages Pursuant RCW 49.52.070.

An employer under RCW 49.52.050 is liable for double damages under RCW 49.52.070 if the employer willfully and with intent to deprive withholds wages the employer is obligated to pay. Whether an employer's withholding is willful is ordinarily a question of fact. *Lillig v. Becton-Dickinson,* 105 Wn.2d 653, 660, 717 P.2d 1371 (1986); *Duncan v. Alaska USA Fed. Credit Union, Inc.,* 148 Wn.App. 52, 78-79, 199 P.3d 991 (2008). If there is a bona fide dispute regarding the payment of wages, the failure to pay them is not willful. *Schilling v. Radio Holdings, Inc.,* 136 Wn.2d 152, 160, 961 P.2d 371 (1998). An employer's failure to pay wages is willful if it is volitional, i.e., not a matter of mere carelessness but the result of knowing and intentional action. *Schilling,* 136 Wn.2d at 159-60.

The Workers fought for years to receive their proper pay for their unique and hazardous job looking after persons sent to our state mental hospitals as part of the criminal justice system. Ex. 3,4,5,27,70.

When comparable worth recognized the value of nursing services and pay for nurses was increased, the Workers were excluded. PSAs were

not evaluated for a compensation increase because they were already making more than MHTs. RP 480-81; 489. The PSNs also did not get an increase for the value of their nursing duties. RP 480 The PSNs were not evaluated in the comparable worth study. RP 481, 503-4, 506. These actions were deliberate and should be met with the application of the penalty of double damages on all back pay awarded based on the ongoing equal protection violations and failure to pay comparable worth.

2. The State Should be Obligated to Pay Attorney Fees Under Fee Shifting Statutes.

The Workers should have been awarded damages and attorney fees for unlawfully withheld wages, either under RCW 49.48 or RCW 49.52. *Dice v. City of Montesano*, 131 Wn. App 675, 128 P. 3d 1253 (2006), (wherein the court upheld the award of double damages pursuant to RCW 49.52 when the employer failed to pay a former employee three month's of severance pay he was entitled to under the terms of his contract). *Bates v. City of Richland*, 112 Wn. App 919, 521 P.3d 816 (2002), upholding an award of attorney fees through its RCW 49.48.030 by former employees who sued due to miscalculation of their pension benefits. *Walsiuki v. Whirlpool Corp.*, 76 Wn. App 250, 884 P.2d 113 (1994); *Natches Valley School District v. Cruzen*, 54 Wn. App 388, 775 P.2d 960 (1989) (attorney fees awarded for recovery of unlawfully withheld reimbursement for sick

leave); *Hayes v. Truelock*, 51 Wn. App 795, 755 P.2d 830 (1988) (former employee awarded attorney fees for wrongful discharge, and received back pay and front pay awards),*Brown v. Suburban Obstetric and Gynocology*, 35 Wn. App 880, 670 P.2d 1077 (1983) (physician entitled to attorney's fees when he was denied compensation in the form of a percentage of the gross receipt of a medical services that he generated, i.e. bonus).

The trial court has determined the Workers were paid less than they should have been paid pursuant to Washington's comparable worth Statute. RCW 41.06.020(5) et. seq. The Workers asserts that the term "statute" as used in RCW 49.52.050 should also be read to include the Washington and United States Constitutions as well. These statutes must be liberally construed to advance the legislature's intent to protect employee wages and assure payment. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998). RCW 49.52.070 provides for reasonable attorney fees and costs to employees who prevail in wage claim litigation.

42 U.S.C. § 1988 is a statute designed "to encourage the vindication of civil rights through the mechanism of private lawsuits." *Duranceau v. City of Tacoma,* 37 Wn.App. 846, 849, 684 P.2d 1311 (1984). *Parmelee v. O'Neel* 168 Wn.2d 515, 522-524, 229 P.3d 723, 726 -

727 (2010) established that full attorney fees may be awarded for obtaining an injunction protecting constitutional rights even where no damages are awarded. The Workers got such relief, C.P. 2230.

Congress specifically intended the provisions of 42 U.S.C. § 1988 to encourage "private attorneys general." See Senate Report Number 1011, 94th Congress, Second Session at 3, reprinted in 1976 U.S. Code of Congress and Administrative News 5908, 5910. *Hensley v. Eckerhart*, 461 U.S. 424, 433-37, 103 S.Ct. 1933, 1939-41, 76 L.Ed.2d 40 (1983). See *Riverside v. Rivera*, 477 U.S. 561, 574, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466 (1986), ("A successful civil rights plaintiff important secures important social benefits that are not reflected in nominal or relatively small damage awards.") The State should have been ordered to pay fees under the fee shifting statutes.

3. The Workers' Should be Awarded Fees on Appeal under RAP 18.1 and the Fee Shifting Statutes.

The Workers fees on appeal pursuant to RAP 18.1. Under RCW 49.48.030; RCW 49.52.070 and 42 U.S.C. §1988, the Workers are entitled to an award of attorney fees for defending their judgment.

VII. Conclusion

The judgment should be affirmed. As in *WPEA*, the commonality between the duties of the Workers and the employees on the non-forensic

wards is essentially the same entitling them to paid equally with those employees that have the same duties and responsibilities. Failing to pay the Workers equally violates their right of equal protection, their rights under Washington's comparable worth statutes, and is arbitrary, capricious and contrary to law. The trial court properly exercised its authority and awarded appropriate relief, including attorney fees.

The trial court's judgment should be affirmed and the case should be remanded to the trial court for an entry of an award of double damages under RCW 49.52.070. Costs on appeal, including reasonable attorney fees, should be awarded to the Workers.

Respectfully submitted this 20 day of March 2012.

Richard H. Wooster, WSBA 13752
Attorney for Respondents

Philip Albert Talmadge, WSBA 6973
Attorney for Respondents

VII. Appendix

Ruling denying review May, 2009
RCW 41.06.010
RCW 41.06.133
RCW 41.06.155
RCW 49.48.030
RCW 49.52.050
RCW 49.52.070

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL SCHATZ, DANI KENDALL, and JOSEPH MINOR, as Individuals and as Class Representatives for All Others Similarly Situated, Respondents, v. STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES AND DEPARTMENT OF PERSONNEL, Petitioner.	No. 38970-3-II RULING DENYING REVIEW

Michael Schatz and a class of approximately 700 individuals working in the forensic wards at Eastern State Hospital and Western State Hospital as psychiatric security nurses (PSN) and psychiatric security attendants (PSA) filed

this lawsuit, alleging breach of contract, violation of equal protection, and failure to take action to achieve comparable worth as required by RCW 41.06133(10) and RCW 41.06.155. Essentially, they assert that they are being paid lower wages than other employees who perform similar jobs.

The Department of Social and Health Services (DSHS) and the Department of Personnel (DOP) moved for summary judgment dismissing all claims, asserting that: (1) plaintiffs could not prevail under the equal protection claim because there was a rational process for setting salaries; (2) the court was barred by the doctrine of separation of powers from considering the claims; and (3) plaintiffs could not prevail with regard to the comparable worth requirements in Chapter 41.06, RCW, because those provisions apply only to gender-based differences in pay. The trial court denied their motion, and they seek interlocutory review, contending that the court obviously or probably erred. RAP 2.3(b)(1) and (2).

FACTUAL BACKGROUND

The employment classifications for the plaintiffs' jobs were created in 1973 when DSHS established special treatment programs for mentally ill offenders at correctional institutions. At that time, the salaries for the new classifications were set higher than classifications involving comparable duties and responsibilities at Eastern State and Western State Hospitals (LPN and HA). The basis for the difference was the added danger involved in dealing with felons and the criminally insane. Subsequently, the treatment programs for these groups were

relocated at Eastern State and Western State Hospitals, and the PSN and PSA classifications were redesignated as LPN and HA, subject to the lower salary ranges.

Some of the forensic employees challenged the redesignation, and in 1986, this court affirmed a decision by the Thurston County Superior Court ordering that the positions in the forensic wards be reclassified as PSN and PSA and awarding back pay. Since 1986, the PSNs and PSAs have been treated as correctional employees, rather than mental health employees, for the purposes of wage evaluations and collective bargaining. Their salaries are now lower than those of LPN4s and MHT3s, the employees they argue perform comparable work in the nonforensic wards at the state hospitals.

ANALYSIS

There is certainly adequate evidence in the record to raise a question of fact regarding the comparability of the PSN-LPN4 and PSA-MHT3 positions. However petitioners assert that the procedures used to establish those salaries are rational, and thus there is no violation of equal protection. Essentially, they argue that the procedures are the same for all classifications, but because the PSNs and PSAs are grouped with and compared to correctional workers, rather than other mental health workers, some of the factors considered (e.g., recruitment/retention difficulties) carry different weight.

That argument appears to be inconsistent with *Public Emp. Ass'n v. Personnel Res. Bd.*, 127 Wn. App. 254, 110 P.3d 1154 (2005), which held that

there was no rational basis for setting different salary schedules for employees in different governmental systems (general government and higher education) who were doing essentially the same work. *Public Emp. Ass'n*, 127 Wn. App. at 268. Under *Public Emp. Ass'n*, it is the comparability of the job, not the salary-setting process used, that is determinative.

Petitioners also argue that the equal protection claim cannot apply to salaries set after July 2004 because after that date, the employees involved here were represented by a union, which negotiated the salaries. The case petitioners rely on, *McGovern v. Local 456, Intern. Broth. Teamsters,* 107 F. Supp. 2d 311 (S.D.N.Y. 2000), involved a 1983 action against a union for allegedly unequal treatment of some members. All that decision says is that a *union's* conduct in negotiating a contract is not state action. While it may ultimately be determined that the existence of the collective bargaining process precludes an equal protection claim, the authority presented by petitioners does not require such a determination or demonstrate that the court's refusal to dismiss claims arising after July 2004 was obviously or probably wrong. In any case, dismissal of those claims would not make further proceedings useless.

Petitioners next contend that the trial court should have dismissed the claims as barred by the doctrine of separation of powers. They are clearly wrong. Courts may interfere with the work and decisions of an agency of the state if questions of law are involved, if there is a question whether the agency is complying with statutory requirements, if the action taken is arbitrary and

capricious, or if the action violates fundamental rights. *See Washington State Coalition for the Homeless v. Department of Soc. And Health Servcs.*, 133 Wn.2d 894, 913, 949 P.2d 1291 (1997); *Pierce County Sheriff v. Civil Service Comm'n*; 98 Wn.2d 690, 693, 658 P.2d 648 (1983); *Leonard v. Civil Service Comm'n*, 25 Wn. App. 699, 702, 611 P.2d 1290, *review denied*, 94 Wn.2d 1009 (1980).

Finally, petitioners claim that the trial court obviously or probably erred in refusing to find that the comparable worth requirement applies only to gender-based differences in pay. The complaint cited RCW 41.06.133(10) and RCW 41.06.155. Those provisions set timetables for the implementation of "comparable worth." RCW 41.06.020(5) defines "comparable worth" as "the provision of similar salaries for positions that require or impose similar responsibilities, judgments, knowledge, skills, and working conditions." There is no reference to gender-based disparities in any of these provisions. In fact, RCW 41.06.155 requires that comparable worth be achieved "for the jobs of all employees under this chapter." The chapter is the state civil service law, and it applies to public employees in general, its stated purpose being:

> [T]o establish for the state a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, recruitment, retention, classification and pay plan, removal, discipline, training and career development, and welfare of its civil employees. . . .

RCW 41.06.010. The legislature could easily have limited subsections 41.06.133(10) and 155 to positions in which there was gender discrimination. It

did not do so. And petitioners have cited no authority that clearly required the trial court to infer such a limitation.[1]

Petitioners have shown neither obvious nor probable error. Accordingly, it is hereby

ORDERED that review is denied.

DATED this 26th day of May, 2009.

Ernetta G. Skerlec
Court Commissioner

cc: Kara A. Larsen
Richard H. Wooster
Andrew Green
Garold E. Johnson
Hon. Brian Tollefson

[1] Petitioners cite various references and treatises discussing comparable worth and one federal case. That case, *American Fed. Of State, County , and Mun. Emp. v. State of WA.*, 770 F.2d 1401, 1409 (9th Cir. 1986) involved a gender-based complaint. Petitioners point to language that

> The comparable worth theory, *as developed in the case before us*, postulates that sex-based wage discrimination exists if employees in job classifications occupied primarily by women are paid less than employees in job classifications filled primarily by men, if the jobs are of equal value to the employer, though otherwise dissimilar.

770 F.2d at 1404 (emphasis added).

Qualifications for persons assessing real property—Examination: RCW 36.21.015.

Sexual misconduct by state employees: RCW 13.40.570 and 72.09.225.

41.06.010 Declaration of purpose. The general purpose of this chapter is to establish for the state a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, recruitment, retention, classification and pay plan, removal, discipline, training and career development, and welfare of its civil employees, and other incidents of state employment. All appointments and promotions to positions, and retention therein, in the state service, shall be made on the basis of policies hereinafter specified. [1980 c 118 § 1; 1961 c 1 § 1 (Initiative Measure No. 207, approved November 8, 1960).]

Severability—1980 c 118: "If any provision of this 1980 act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1980 c 118 § 10.]

41.06.020 Definitions. Unless the context clearly indicates otherwise, the words used in this chapter have the meaning given in this section.

(1) "Agency" means an office, department, board, commission, or other separate unit or division, however designated, of the state government and all personnel thereof; it includes any unit of state government established by law, the executive officer or members of which are either elected or appointed, upon which the statutes confer powers and impose duties in connection with operations of either a governmental or proprietary nature.

(2) "Board" means the Washington personnel resources board established under the provisions of RCW 41.06.110, except that this definition does not apply to the words "board" or "boards" when used in RCW 41.06.070.

(3) "Classified service" means all positions in the state service subject to the provisions of this chapter.

(4) "Competitive service" means all positions in the classified service for which a competitive examination is required as a condition precedent to appointment.

(5) "Comparable worth" means the provision of similar salaries for positions that require or impose similar responsibilities, judgments, knowledge, skills, and working conditions.

(6) "Noncompetitive service" means all positions in the classified service for which a competitive examination is not required.

(7) "Department" means an agency of government that has as its governing officer a person, or combination of persons such as a commission, board, or council, by law empowered to operate the agency responsible either to (a) no other public officer or (b) the governor.

(8) "Career development" means the progressive development of employee capabilities to facilitate productivity, job satisfaction, and upward mobility through work assignments as well as education and training that are both state-sponsored and are achieved by individual employee efforts, all of which shall be consistent with the needs and obligations of the state and its agencies.

(9) "Training" means activities designed to develop job-related knowledge and skills of employees.

(10) "Director" means the director of personnel appointed under the provisions of RCW 41.06.130.

(11) "Affirmative action" means a procedure by which racial minorities, women, persons in the protected age category, persons with disabilities, Vietnam-era veterans, and disabled veterans are provided with increased employment opportunities. It shall not mean any sort of quota system.

(12) "Institutions of higher education" means the University of Washington, Washington State University, Central Washington University, Eastern Washington University, Western Washington University, The Evergreen State College, and the various state community colleges.

(13) "Related boards" means the state board for community and technical colleges; and such other boards, councils, and commissions related to higher education as may be established. [1993 c 281 § 19. Prior: 1985 c 461 § 1; 1985 c 365 § 3; 1983 1st ex.s. c 75 § 4; 1982 1st ex.s. c 53 § 1; 1980 c 118 § 2; 1970 ex.s. c 12 § 1; prior: 1969 ex.s. c 36 § 21; 1969 c 45 § 6; 1967 ex.s. c 8 § 48; 1961 c 1 § 2 (Initiative Measure No. 207, approved November 8, 1960).]

Effective date—1993 c 281: See note following RCW 41.06.022.

Severability—1985 c 461: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1985 c 461 § 17.]

Severability—1982 1st ex.s. c 53: "If any provision of this amendatory act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1982 1st ex.s. c 53 § 32.]

Severability—1980 c 118: See note following RCW 41.06.010.

Severability—1982 c 10: See note following RCW 6.13.080.

Effective date—Severability—1975-'76 2nd ex.s. c 34: See notes following RCW 2.08.115.

Leave sharing program: RCW 41.04.670.

Adoption of rules for leave sharing program: RCW 41.04.670.

Establishment and compensation of institutional chaplains: RCW 72.01.210.

41.06.111 Personnel appeals board abolished—Powers, duties, and functions transferred to the Washington personnel resources board. (1) The personnel appeals board is hereby abolished and its powers, duties, and functions are hereby transferred to the Washington personnel resources board. All references to the executive secretary or the personnel appeals board in the Revised Code of Washington shall be construed to mean the director of the department of personnel or the Washington personnel resources board.

(2)(a) All reports, documents, surveys, books, records, files, papers, or written material in the possession of the personnel appeals board shall be delivered to the custody of the department of personnel. All cabinets, furniture, office equipment, motor vehicles, and other tangible property employed by the personnel appeals board shall be made available to the department of personnel. All funds, credits, leases, or other assets held by the personnel appeals board shall be assigned to the department of personnel.

(b) Any appropriations made to the personnel appeals board shall, on July 1, 2006, be transferred and credited to the department of personnel.

(c) If any question arises as to the transfer of any personnel, funds, books, documents, records, papers, files, equipment, or other tangible property used or held in the exercise of the powers and the performance of the duties and functions transferred, the director of financial management shall make a determination as to the proper allocation and certify the same to the state agencies concerned.

(3) All employees of the personnel appeals board are transferred to the jurisdiction of the department of personnel. All employees classified under chapter 41.06 RCW, the state civil service law, are assigned to the department of personnel to perform their usual duties upon the same terms as formerly, without any loss of rights, subject to any action that may be appropriate thereafter in accordance with the laws and rules governing state civil service.

(4) All rules and all pending business before the personnel appeals board shall be continued and acted upon by the Washington personnel resources board. All existing contracts and obligations shall remain in full force and shall be performed by the department of personnel.

(5) The transfer of the powers, duties, functions, and personnel of the personnel appeals board shall not affect the validity of any act performed before July 1, 2006.

(6) If apportionments of budgeted funds are required because of the transfers directed by this section, the director of financial management shall certify the apportionments to the agencies affected, the state auditor, and the state treasurer. Each of these shall make the appropriate transfer and adjustments in funds and appropriation accounts and equipment records in accordance with the certification. [2002 c 354 § 233.]

Short title—Headings, captions not law—Severability—Effective dates—2002 c 354: See RCW 41.80.907 through 41.80.910.

41.06.120 Meetings of board—Hearings authorized, notice—Majority to approve release of findings—Administration of oaths. (1) In the necessary conduct of its work, the board shall meet monthly unless there is no pending business requiring board action and may hold hearings, such hearings to be called by (a) the chairman of the board, or (b) a majority of the members of the board. An official notice of the calling of the hearing shall be filed with the secretary, and all members shall be notified of the hearing within a reasonable period of time prior to its convening.

(2) No release of material or statement of findings shall be made except with the approval of a majority of the board;

(3) In the conduct of hearings or investigations, a member of the board or the director of personnel, or the hearing officer, may administer oaths. [1981 c 311 § 17; 1975-'76 2nd ex.s. c 43 § 2; 1961 c 1 § 12 (Initiative Measure No. 207, approved November 8, 1960).]

41.06.130 Director of personnel—Appointment—Rules—Powers and duties—Delegation of authority. The office of director of personnel is hereby established.

(1) The director of personnel shall be appointed by the governor. The governor shall consult with, but shall not be obligated by recommendations of the board. The director's appointment shall be subject to confirmation by the senate.

(2) The director of personnel shall serve at the pleasure of the governor.

(3) The director of personnel shall direct and supervise all the department of personnel's administrative and technical activities in accordance with the provisions of this chapter and the rules adopted under it. The director shall prepare for consideration by the board proposed rules required by this chapter. The director's salary shall be fixed by the governor.

(4) The director of personnel may delegate to any agency the authority to perform administrative and technical personnel activities if the agency requests such authority and the director of personnel is satisfied that the agency has the personnel management capabilities to effectively perform the delegated activities. The director of personnel shall prescribe standards and guidelines for the performance of delegated activities. If the director of personnel determines that an agency is not performing delegated activities within the prescribed standards and guidelines, the director shall withdraw the authority from the agency to perform such activities. [1993 c 281 § 26; 1982 1st ex.s. c 53 § 3; 1961 c 1 § 13 (Initiative Measure No. 207, approved November 8, 1960).]

Effective date—1993 c 281: See note following RCW 41.06.022.

Severability—1982 1st ex.s. c 53: See note following RCW 41.06.020.

Requests for nonconviction criminal history fingerprint record checks for agency heads: RCW 43.06.013.

41.06.133 Rules of director—Mandatory subjects—Personnel administration. 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:

(1) The reduction, dismissal, suspension, or demotion of an employee;

(2) Training and career development;

(3) Probationary periods of six to twelve months and rejections of probationary employees, depending on the job

requirements of the class, except that entry level state park rangers shall serve a probationary period of twelve months;

(4) Transfers;

(5) Promotional preferences;

(6) Sick leaves and vacations;

(7) Hours of work;

(8) Layoffs when necessary and subsequent reemployment, except for the financial basis for layoffs;

(9) The number of names to be certified for vacancies;

(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;

(11) Increment increases within the series of steps for each pay grade based on length of service for all employees whose standards of performance are such as to permit them to retain job status in the classified service;

(12) Optional lump sum relocation compensation approved by the agency director, whenever it is reasonably necessary that a person make a domiciliary move in accepting a transfer or other employment with the state. An agency must provide lump sum compensation within existing resources. If the person receiving the relocation payment terminates or causes termination with the state, for reasons other than layoff, disability separation, or other good cause as determined by an agency director, within one year of the date of the employment, the state is entitled to reimbursement of the lump sum compensation from the person;

(13) Providing for veteran's preference as required by existing statutes, with recognition of preference in regard to layoffs and subsequent reemployment for veterans and their surviving spouses by giving such eligible veterans and their surviving spouses additional credit in computing their seniority by adding to their unbroken state service, as defined by the director, the veteran's service in the military not to exceed five years. For the purposes of this section, "veteran" means any person who has one or more years of active military service in any branch of the armed forces of the United States or who has less than one year's service and is discharged with a disability incurred in the line of duty or is discharged at the convenience of the government and who, upon termination of such service, has received an honorable discharge, a discharge for physical reasons with an honorable record, or a release from active military service with evidence of service other than that for which an undesirable, bad conduct, or dishonorable discharge shall be given. However, the surviving spouse of a veteran is entitled to the benefits of this section regardless of the veteran's length of active military service. For the purposes of this section, "veteran" does not include any person who has voluntarily retired with twenty or more years of active military service and whose military retirement pay is in excess of five hundred dollars per month.

Rules adopted under this section by the director shall provide for local administration and management by the institutions of higher education and related boards, subject to periodic audit and review by the director.

Rules adopted by the director under this section may be superseded by the provisions of a collective bargaining agreement negotiated under RCW 41.80.001 and 41.80.010 through 41.80.130. The supersession of such rules shall only affect employees in the respective collective bargaining units. [2002 c 354 § 204.]

Short title—Headings, captions not law—Severability—Effective dates—2002 c 354: See RCW 41.80.907 through 41.80.910.

41.06.136 Board review of rules affecting classified service—Rules to be developed—Goals. (1) The board shall conduct a comprehensive review of all rules in effect on June 13, 2002, governing the classification, allocation, and reallocation of positions within the classified service. In conducting this review, the board shall consult with state agencies, institutions of higher education, employee organizations, and members of the general public. The department shall assist the board in the conduct of this review, which shall be completed by the board no later than July 1, 2003.

(2) By March 15, 2004, the board shall adopt new rules governing the classification, allocation, and reallocation of positions in the classified service. In adopting such rules, the board shall adhere to the following goals:

(a) To improve the effectiveness and efficiency of the delivery of services to the citizens of the state through the use of current personnel management processes and to promote a workplace where the overall focus is on the recipient of governmental services;

(b) To develop a simplified classification system that will substantially reduce the number of job classifications in the classified service and facilitate the most effective use of the state personnel resources;

(c) To develop a classification system to permit state agencies to respond flexibly to changing technologies, economic and social conditions, and the needs of its citizens;

(d) To value workplace diversity;

(e) To facilitate the reorganization and decentralization of governmental services; and

(f) To enhance mobility and career advancement opportunities.

(3) Rules adopted by the board under subsection (2) of this section shall permit an appointing authority and an employee organization representing classified employees of the appointing authority for collective bargaining purposes to make a joint request for the initiation of a classification study. [2002 c 354 § 205.]

Short title—Headings, captions not law—Severability—2002 c 354: See RCW 41.80.907 through 41.80.909.

41.06.139 Classification system for classified service—Director implements—Rules of the board—Appeals. In accordance with rules adopted by the board under RCW 41.06.136, the director shall, by January 1, 2005, begin to implement a new classification system for positions in the classified service. Any employee who believes that the director has incorrectly applied the rules of the board in determining a job classification for a job held by that employee may appeal the director's decision to the board by filing a notice in writing within thirty days of the action from which

increases to recognize increased duties and responsibilities. When the board submits its prioritized list for the 2001-2003 biennium, the board shall also provide: A comparison of any differences between the salary increases recommended by the department of personnel staff and those adopted by the board; a review of any salary compression, inversion, or inequities that would result from implementing a recommended increase; and a complete description of the information relied upon by the board in adopting its proposals and priorities.

(4) This section does not apply to the higher education hospital special pay plan or to any adjustments to the classification plan under RCW 41.06.150(4) that are due to emergent conditions. Emergent conditions are defined as emergency conditions requiring the establishment of positions necessary for the preservation of the public health, safety, or general welfare. [2002 c 354 § 241; 2002 c 354 § 240; 1999 c 309 § 914; 1996 c 319 § 1.]

Short title—Headings, captions not law—Severability—Effective dates—2002 c 354: See RCW 41.80.907 through 41.80.910.

Severability—1999 c 309: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1999 c 309 § 2001.]

Effective date—1999 c 309: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 1999, except as provided in section 2002 of this act." [1999 c 309 § 2003.]

41.06.155 Salaries—Implementation of changes to achieve comparable worth. 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. [1993 c 281 § 28; 1983 1st ex.s. c 75 § 6.]

Effective date—1993 c 281: See note following RCW 41.06.022.

41.06.160 Classification and salary schedules to consider rates in other public and private employment—Wage and fringe benefits surveys—Limited public disclosure exemption. In preparing classification and salary schedules as set forth in RCW 41.06.150 the department of personnel shall give full consideration to prevailing rates in other public employment and in private employment in this state. For this purpose the department shall undertake comprehensive salary and fringe benefit surveys.

Salary and fringe benefit survey information collected from private employers which identifies a specific employer with the salary and fringe benefit rates which that employer pays to its employees shall not be subject to public disclosure under chapter 42.56 RCW. [2005 c 274 § 278; 2002 c 354 § 211; 1993 c 281 § 29; 1985 c 94 § 2; 1980 c 11 § 1; 1979 c 151 § 58; 1977 ex.s. c 152 § 2; 1961 c 1 § 16 (Initiative Measure No. 207, approved November 8, 1960).]

Part headings not law—Effective date—2005 c 274: See RCW 42.56.901 and 42.56.902.

Short title—Headings, captions not law—Severability—2002 c 354: See RCW 41.80.907 through 41.80.909.

Effective date—1993 c 281: See note following RCW 41.06.022.

Severability—1977 ex.s. c 152: See note following RCW 41.06.150.

41.06.167 Compensation surveys required for officers and officer candidates of the Washington state patrol—Limited public disclosure exemption. The department of personnel shall undertake comprehensive compensation surveys for officers and entry-level officer candidates of the Washington state patrol, with such surveys to be conducted in the year prior to the convening of every other one hundred five day regular session of the state legislature. Salary and fringe benefit survey information collected from private employers which identifies a specific employer with the salary and fringe benefit rates which that employer pays to its employees shall not be subject to public disclosure under chapter 42.56 RCW. [2005 c 274 § 279; 2002 c 354 § 212; 1991 c 196 § 1; 1986 c 158 § 7; 1985 c 94 § 3; 1980 c 11 § 2; 1979 c 151 § 60; 1977 ex.s. c 152 § 5.]

Part headings not law—Effective date—2005 c 274: See RCW 42.56.901 and 42.56.902.

Short title—Headings, captions not law—Severability—2002 c 354: See RCW 41.80.907 through 41.80.909.

Severability—1977 ex.s. c 152: See note following RCW 41.06.150.

41.06.169 Employee performance evaluations—Standardized procedures and forms required to be developed. After consultation with state agency heads, employee organizations, and other interested parties, the state personnel director shall develop standardized employee performance evaluation procedures and forms which shall be used by state agencies for the appraisal of employee job performance at least annually. These procedures shall include means whereby individual agencies may supplement the standardized evaluation process with special performance factors peculiar to specific organizational needs. Performance evaluation procedures shall place primary emphasis on recording how well the employee has contributed to efficiency, effectiveness, and economy in fulfilling state agency and job objectives. [1985 c 461 § 3; 1982 1st ex.s. c 53 § 5; 1977 ex.s. c 152 § 6.]

Severability—1985 c 461: See note following RCW 41.06.020.

Severability—1982 1st ex.s. c 53: See note following RCW 41.06.020.

Severability—1977 ex.s. c 152: See note following RCW 41.06.150.

41.06.170 Reduction, suspension, dismissal, demotion of employee—Right to appeal. (1) The director, in the adoption of rules governing suspensions for cause, shall not authorize an appointing authority to suspend an employee for more than fifteen calendar days as a single penalty or more than thirty calendar days in any one calendar year as an accumulation of several penalties. The director shall require that the appointing authority give written notice to the employee not later than one day after the suspension takes effect, stating the reasons for and the duration thereof.

(2) Any employee who is reduced, dismissed, suspended, or demoted, after completing his or her probationary period of service as provided by the rules of the director, or any employee who is adversely affected by a violation of the state civil service law, chapter 41.06 RCW, or rules adopted under it, shall have the right to appeal, either individually or through his or her authorized representative, not later than thirty days after the effective date of such action to the personnel appeals board through June 30, 2005, and to the Washington personnel resources board after June 30, 2005.

*Reviser's note: The reference to paragraph three of this section appears to be erroneous. An amendment to Engrossed Senate Bill No. 137 [1971 ex.s. c 55] deleted the first paragraph of the section without making a corresponding change in the reference to "paragraph three." It was apparently intended that the phrase "paragraph three of this section" refer to the paragraph beginning "It shall be unlawful . . .," which now appears as the second paragraph of the section.

Saving—1888 c 128: "This act is not to be construed as affecting any bona fide contract heretofore entered into contrary to its provisions and existing at the date of the passage hereof, and continuing by reason of limitation of said contract being still in force." [1888 c 128 § 4; no RRS.]

Effective date—1888 c 128: "This act is to take effect on and after its approval." [1888 c 128 § 5; no RRS.]

General repealer—1888 c 128: "All laws or parts of laws in conflict with this act be and the same are hereby repealed." [1888 c 128 § 6; no RRS.]

The foregoing annotations apply to RCW 49.48.010 through 49.48.030.

49.48.020 Penalty for noncompliance with RCW 49.48.010 through 49.48.030 and 49.48.060. Any person, firm, or corporation which violates any of the provisions of RCW 49.48.010 through 49.48.030 and 49.48.060 shall be guilty of a misdemeanor. [1971 ex.s. c 55 § 2; 1933 ex.s. c 20 § 1; 1888 c 128 § 2; RRS § 7595.]

Wages—Deductions—Rebates, authorized withholding: RCW 49.52.060.

49.48.030 Attorney's fee in action on wages—Exception. In any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary. [1971 ex.s. c 55 § 3; 1888 c 128 § 3; RRS § 7596.]

49.48.040 Enforcement of wage claims—Issuance of subpoenas—Compliance. (1) The department of labor and industries may:

(a) Upon obtaining information indicating an employer may be committing a violation under chapters 39.12, 49.46, and 49.48 RCW, conduct investigations to ensure compliance with chapters 39.12, 49.46, and 49.48 RCW;

(b) Order the payment of all wages owed the workers and institute actions necessary for the collection of the sums determined owed; and

(c) Take assignments of wage claims and prosecute actions for the collection of wages of persons who are financially unable to employ counsel when in the judgment of the director of the department the claims are valid and enforceable in the courts.

(2) The director of the department or any authorized representative may, for the purpose of carrying out RCW 49.48.040 through 49.48.080: (a) Issue subpoenas to compel the attendance of witnesses or parties and the production of books, papers, or records; (b) administer oaths and examine witnesses under oath; (c) take the verification of proof of instruments of writing; and (d) take depositions and affidavits. If assignments for wage claims are taken, court costs shall not be payable by the department for prosecuting such suits.

(3) The director shall have a seal inscribed "Department of Labor and Industries—State of Washington" and all courts shall take judicial notice of such seal. Obedience to subpoenas issued by the director or authorized representative shall be enforced by the courts in any county.

(4) The director or authorized representative shall have free access to all places and works of labor. Any employer or any agent or employee of such employer who refuses the director or authorized representative admission therein, or who, when requested by the director or authorized representative, wilfully neglects or refuses to furnish the director or authorized representative any statistics or information pertaining to his or her lawful duties, which statistics or information may be in his or her possession or under the control of the employer or agent, shall be guilty of a misdemeanor. [1987 c 172 § 1; 1935 c 96 § 1; RRS § 7596-1.]

49.48.050 Remedy cumulative. Nothing herein contained shall be construed to limit the authority of the prosecuting attorney of any county to prosecute actions, both civil and criminal, for such violations of RCW 49.48.040 through 49.48.080 as may come to his knowledge, or to enforce the provisions hereof independently and without specific direction of the director of labor and industries. [1935 c 96 § 2; RRS § 7596-2.]

49.48.060 Director may require bond after assignment of wage claims—Court action—Penalty for failure to pay wage claim. (1) If upon investigation by the director, after taking assignments of any wage claim under RCW 49.48.040, it appears to the director that the employer is representing to his employees that he is able to pay wages for their services and that the employees are not being paid for their services, the director may require the employer to give a bond in such sum as the director deems reasonable and adequate in the circumstances, with sufficient surety, conditioned that the employer will for a definite future period not exceeding six months conduct his business and pay his employees in accordance with the laws of the state of Washington.

(2) If within ten days after demand for such bond the employer fails to provide the same, the director may commence a suit against the employer in the superior court of appropriate jurisdiction to compel him to furnish such bond or cease doing business until he has done so. The employer shall have the burden of proving the amount thereof to be excessive.

(3) If the court finds that there is just cause for requiring such bond and that the same is reasonable, necessary or appropriate to secure the prompt payment of the wages of the employees of such employer and his compliance with RCW 49.48.010 through 49.48.080, the court shall enjoin such employer from doing business in this state until the requirement is met, or shall make other, and may make further, orders appropriate to compel compliance with the requirement.

Upon being informed of a wage claim against an employer or former employer, the director shall, if such claim appears to be just, immediately notify the employer or former employer, of such claim by mail. If the employer or former employer fails to pay the claim or make satisfactory explanation to the director of his failure to do so, within thirty days

51.16.170], and acts amendatory thereto, which priority and lien rights shall be enforced in the same manner and under the same conditions as provided in said section 7682 [RCW 51.16.150 through 51.16.170]: PROVIDED, HOWEVER, That the said claims for physicians, surgeons, hospitals and hospital associations and others shall be secondary and inferior to any claims of the state and to any claims for labor. Such right of action shall be in addition to any other right of action or remedy. [1929 c 136 § 2; RRS § 7713-2.]

49.52.050 Rebates of wages—False records—Penalty. Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

(1) Shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or

(2) Wilfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or

(3) Shall wilfully make or cause another to make any false entry in any employer's books or records purporting to show the payment of more wages to an employee than such employee received; or

(4) Being an employer or a person charged with the duty of keeping any employer's books or records shall wilfully fail or cause another to fail to show openly and clearly in due course in such employer's books and records any rebate of or deduction from any employee's wages; or

(5) Shall wilfully receive or accept from any employee any false receipt for wages;

Shall be guilty of a misdemeanor. [1941 c 72 § 1; 1939 c 195 § 1; Rem. Supp. 1941 § 7612-21.]

Severability—1939 c 195: "If any section, subsection, sentence or clause of this act shall be adjudged unconstitutional, such adjudication shall not affect the validity of the act as a whole or of any section, subsection, sentence or clause thereof not adjudged unconstitutional." [1939 c 195 § 5; RRS § 7612-25.] This applies to RCW 49.52.050 through 49.52.080.

49.52.060 Authorized withholding. The provisions of RCW 49.52.050 shall not make it unlawful for an employer to withhold or divert any portion of an employee's wages when required or empowered so to do by state or federal law or when a deduction has been expressly authorized in writing in advance by the employee for a lawful purpose accruing to the benefit of such employee nor shall the provisions of RCW 49.52.050 make it unlawful for an employer to withhold deductions for medical, surgical, or hospital care or service, pursuant to any rule or regulation: PROVIDED, That the employer derives no financial benefit from such deduction and the same is openly, clearly and in due course recorded in the employer's books. [1939 c 195 § 2; RRS § 7612-22.]

Penalty for coercion as to purchase of goods, meals, etc.: RCW 49.48.020.

Public employment, payroll deductions: RCW 41.04.020, 41.04.030, 41.04.035, and 41.04.036.

Wages to be paid in lawful money or negotiable order, penalty: RCW 49.48.010.

49.52.070 Civil liability for double damages. Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 shall be liable in a civil action by the aggrieved employee or his assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations. [1939 c 195 § 3; RRS § 7612-23.]

49.52.080 Presumption as to intent. The violations by an employer or any officer, vice principal, or agent of any employer of any of the provisions of subdivisions (3), (4), and (5) of RCW 49.52.050 shall raise a presumption that any deduction from or underpayment of any employee's wages connected with such violation was wilful. [1939 c 195 § 4; RRS § 7612-24.]

49.52.090 Rebates of wages on public works—Penalty. Every person, whether as a representative of an awarding or public body or officer, or as a contractor or subcontractor doing public work, or agent or officer thereof, who takes or receives, or conspires with another to take or receive, for his own use or the use of any other person acting with him any part or portion of the wages paid to any laborer, workman or mechanic, including a piece worker and working subcontractor, in connection with services rendered upon any public work within this state, whether such work is done directly for the state, or public body or officer thereof, or county, city and county, city, town, township, district or other political subdivision of the said state or for any contractor or subcontractor engaged in such public work for such an awarding or public body or officer, shall be guilty of a gross misdemeanor. [1935 c 29 § 1; RRS § 10320-1.]

Prevailing wages must be paid on public works: RCW 39.12.020.

Chapter 49.56 RCW
WAGES—PRIORITIES—PREFERENCES

Sections

Chattel liens: Chapter 60.08 RCW.

Mechanics' and materialmen's liens: Chapter 60.04 RCW.

49.56.010 Priority of wages in insolvency. In all assignments of property made by any person to trustees or assignees on account of the inability of the person at the time of the assignment to pay his debts, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks or laborers employed by such persons to the amount of one hundred dollars, each, and for services rendered within sixty days previously, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor. [Code 1881 § 1972; 1877 p 223 § 34; RRS § 1204.]

Construction—1877 p 224: "In construing the provisions of this act, words used in the masculine gender include the feminine and neuter, the singular number includes the plural and the plural the singular; the word person

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, DEPARTMENT OF PERSONNEL, and EVA SANTOS and CARY RANDOW and LISA SKRILETZ and ARTHUR STRATTON and JOHN BLACK and LYNNE GLAD and PAM PELTON and ROBERT SWANSON and LLOYD HOAGE and ELLEN ANDREWS, in Their Official Capacities, Appellants, v. MICHAEL SCHATZ, DANI KENDALL, and JOSEPH MINOR as Individuals and as Class Representatives for All Others Similarly Situated, Respondents.	Cause No. 42332-4-II **DECLARATION OF SERVICE**

KNOW ALL PERSONS BY THESE PRESENTS: That I, Connie DeChaux, the undersigned, of Bonney Lake, in the County of Pierce and State of Washington, have declared and do hereby declare:

That I am not a party to the above-entitled action, am over the age required and competent to be a witness;

That on the 20th day of March, 2012 I sent via electronic mail and via ABC Legal Messenger a copy of the following documents:

1. Brief of Respondents;

3. This Declaration of Service;

properly addressed to the following person:

Kara A. Larsen
Alicia O. Young
Assistant Attorney General
Labor & Personnel Division
7141 Cleanwater Drive SW
Olympia WA 98504

Philip A. Talmadge
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwilla, WA 98188-4630

ORIGINALS to the following:

Court of Appeals Division II
950 Broadway Ste 300
Tacoma WA 98402

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

Signed at Tacoma, Pierce County, Washington this 20th day of March, 2012.

Connie DeChaux

Connie DeChaux

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