

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

STEPHANIE MERCIER,)	
AUDRICIA BROOKS,)	
DEBORAH PLAGEMAN,)	
JENNIFER ALLRED,)	
MICHELE GAVIN,)	Case No. 12-920 C
STEPHEN DOYLE on behalf of)	
themselves and all others similarly)	Judge Elaine D. Kaplan
situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

SECOND AMENDED COMPLAINT

Plaintiffs, individually and on behalf of all similarly situated persons, for their Complaint against Defendant, allege, upon personal knowledge as to the allegations concerning themselves and upon information and belief based on investigation of counsel as to all other matters, as follows:

INTRODUCTION

1. This is a class action brought by Plaintiffs, on behalf of themselves, and all other similarly situated current and former advanced practice registered nurses and physician assistants employed by the United States Department of Veterans Affairs (“VA”), who have not received overtime pay or compensatory time off to which they are entitled under 38 U.S.C §§ 7453 and 7454 and under VA regulations and policies for all hours of work that they performed on a recurring and involuntary basis and significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight

(8) consecutive hours in a workday, or in excess of their daily work requirement. Plaintiffs also claim interest on the above amounts pursuant to the provisions of 5 U.S.C. § 5596(b), along with attorneys' fees and costs.

JURISDICTION AND VENUE

2. Jurisdiction over this action is conferred by 28 U.S.C. §1491(a)(1) (Tucker Act).
3. Venue is proper in this Court pursuant to 28 U.S.C. §1491(a)(1).

FACTUAL ALLEGATIONS

4. Plaintiff Stephanie Mercier is an adult citizen of the United States, residing in Nicholasville, Kentucky. Since 2009, Ms. Mercier has been employed by the VA at the Lexington VA Medical Center in Lexington, Kentucky as a nurse practitioner at all times relevant to this action.

5. Plaintiff Audricia Brooks is an adult citizen of the United States, residing in Cincinnati, Ohio. Since 1993, Ms. Brooks has been employed by the VA at the Cincinnati VA Medical Center in Cincinnati, Ohio as a nurse practitioner at all times relevant to this action.

6. Plaintiff Deborah Plageman is an adult citizen of the United States, residing in Guttenberg, New Jersey. Since 2006, Ms. Plageman has been employed by the VA at the VA NY Harbor Healthcare System – Manhattan Campus in New York, New York as a nurse practitioner at all times relevant to this action.

7. Plaintiff Jennifer Allred is an adult citizen of the United States, residing in Coos Bay, Oregon. From 1994 to September 2015, Ms. Allred was employed by the VA as a nurse practitioner. During her VA employment, Ms. Allred has worked at the VA Portland Health Care System, Bay Pines VA Healthcare System (Bay Pines, Florida), VA Montana Health Care System (Fort Harrison, Montana), Alaska VA Healthcare System, Roseburg VA Medical Center

(Roseburg, Oregon), and Southern Oregon Rehabilitation Center & Clinics (SORCC) (White City, Oregon).

8. Nurse practitioners, clinical nurse specialists, and nurse anesthetists are considered registered nurses (“RNs”) appointed under 38 U.S.C. § 7401(1).

9. Plaintiff Michele Gavin is an adult citizen of the United States, residing in North Royalton, Ohio. From March 2010 to September 2015, Ms. Gavin was employed by the VA at the Louis Stokes Cleveland VA Medical Center in Cleveland, Ohio as a physician assistant.

10. Plaintiff Stephen Doyle is an adult citizen of the United States, residing in Winthrop, Maine. From March 2006 to the present, Mr. Doyle has been, and continues to be employed by the VA at the VA Maine Healthcare System in Augusta, Maine as a physician assistant.

11. With respect to the allegations made in this Complaint, Defendant the United States of America has acted principally through the United States Department of Veterans Affairs (“VA”). At all relevant times, the agents, officers, and representatives of the United States who took the actions at issue, were duly authorized by the United States to take those actions and thus, Defendant the United States is ultimately responsible for the actions described in this Complaint.

12. At all relevant times, Plaintiffs and other class members were employed as advanced practice registered nurses or physician assistants by the VA within the meaning of, or as referenced by, 38 U.S.C. §§ 7401(1), 7404, 7421, 7422, 7453, and 7454.

13. During all relevant times, up until and including the present, Plaintiffs and other class members have been paid on an hourly basis.

14. With respect to “Determining Whether Activities of Health Care Professionals Constitute VA Work,” VA policy (VA Handbook 5011, Part II, Chapter 3) states that, “The statutory missions of VHA include patient care, research and education, and supporting these broad missions entail a variety of different work activities. The primary focus is patient care . . . Off-site patient care . . . must also be directly related to VA’s mission and approved by the facility Director or designee and properly documented.”

15. VA policy (VA Handbook 5011, Part II, Chapter 3) also states that, “[On-site (VA grounds)] Clinical duties involve providing and/or supervising patient services at VA, clinical teaching at VA related to the care of VA patients, providing patient care at an outpatient clinic, or participating in interdisciplinary patient care conferences at VA. For example, patient evaluation, invasive procedures, consultation, attending rounds, journal club, follow-up calls, clinical documentation, care coordination, or care planning conferences.”

16. VA policy (VA Handbook 5011, Part II, Chapter 3) further states that, “[Off-site clinical duties includes] “public service or other professional activities when the activity is considered to be of substantial benefit to VA in accomplishing its general mission or one of its specific functions; or providing services regarding a VA patient from another site (e.g., reading x-rays from home or entering patient notes via remote computer log-on).”

17. With respect to the “Establishment of Regularly Scheduled Administrative Workweeks,” VA policy (VA Handbook 5011, Part II, Chapter 3) states that, “Because of the continuous nature of the services rendered at hospitals, the facility Director, or designee (in no case less than a chief of service), has the authority to prescribe any tour of duty to ensure adequate professional care and treatment to the patient, consistent with these provisions considered the employee’s ‘Saturday.’”

18. During all relevant times, up until and including the present, Plaintiffs and other class members worked additional hours, significantly in excess of fifteen (15) minutes duration in a calendar day, on a recurring and involuntary basis, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement performing patient care clinical duties and professional responsibilities managing electronic health records using VA, non-VA, or personal home computers or laptops.

19. The VA uses the Computerized Patient Records System (CPRS) as its electronic health records system. CPRS allows a provider to enter, review, and continuously update all information connected with any patient. With CPRS, a provider can order lab tests, medications, diets, radiology tests and procedures, record a patient's allergies or adverse reactions to medications, request and track consults, enter progress notes, diagnoses, and treatments for each encounter, and enter discharge summaries. In addition, CPRS supports clinical decision-making and enables a provider to review and analyze patient data.

20. The VA assigns CPRS users with an individual account and password. Plaintiffs and other class members were, or continue to be, CPRS users and accordingly, have each been given his or her own CPRS account in which he or she logs in order to access electronic health records.

21. Through their CPRS inbox, Plaintiffs and other class members receive "View Alert" notifications that communicate test results and other important clinical information. These View Alerts may be sent from, or are generated by, other providers, pharmacies, laboratories, patients, and other individuals and locations from within as well as outside the VA system. View Alerts may be sent at any time and at any hour of the day or night and are

continuously sent to a provider to review and manage with no limit as to how many View Alerts a provider's CPRS account may receive. View Alerts that are not reviewed and acted upon within two (2) weeks are automatically removed from a CPRS user's account.

22. View Alerts require varying levels of management. For example, some alerts are merely notifications that require no additional action for the provider to take; some alerts may require the provider to send an electronic message to another VA employee or patient, a task known as secure messaging that is completed through an e-health service called MyHealthVet; some alerts may require the provider to update a patient's electronic health records, and create or update patient or progress notes; some alerts may contain critical test results that must be communicated in a timeframe that minimizes the risk to the patient; some alerts may require the provider to make a phone call to another provider, pharmacy, laboratory, patient, and or other individual within or outside the VA system.

23. Under their professional responsibilities as patient advocates, providers, such as advanced practice nurses and physician assistants, have an obligation to timely manage all View Alerts so as to minimize any health risks to their patients and prevent adverse patient outcomes.

24. Managing View Alerts and electronic patient health records using a VA, non-VA, or personal home computer or laptop constitutes patient care and clinical duties, whether on-site or off-site, and is compensable VA work for purposes of awarding basic and additional overtime pay under 38 U.S.C. §§ 7404, 7453, and 7454 and under overtime regulations and policies of the VA.

25. At all times relevant to this action and continuing to the present, Defendant, including nurse and physician assistant supervisors or other VA personnel with the authority to order or approve overtime work and pay, had knowledge that Plaintiffs and other class members

on a recurring and involuntary basis worked additional hours significantly in excess of fifteen (15) minutes in a calendar day, in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement managing View Alerts, and expected, required, and induced Plaintiffs and other class members to work those additional hours in order to timely manage their View Alerts.

26. Nurses and physician assistants, who do not work in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement to timely review and manage their View Alerts, are subject to intensified scrutiny, management intervention, and disciplinary action for poor time management.

27. Nurses and physician assistants, who do not work in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement to timely review and manage their View Alerts, may jeopardize patient health and safety and cause adverse patient outcomes, which also results in intensified scrutiny, management intervention, and/or disciplinary action by VA management.

28. Nurses and physician assistants, who fail to review and timely manage View Alerts that results in harm to patients, may subject the nurses, physician assistants, and/or the VA to medical malpractice claims and/or claims from state licensing authorities.

29. During either nurse, physician assistant, or management initiated interventions to address time management issues or the overwhelming and excessive workload that timely managing all View Alerts within a regularly scheduled work shift entails, VA management has never instructed Plaintiffs and other class members to reduce the daily volume of View Alerts managed or offered to substantively reduce the workload in other areas of their nurse or

physician assistant responsibilities to allow Plaintiffs and other class members to have a workload that realistically reflects their actual work requirement and can be completed within a regularly scheduled shift.

30. At all times relevant to this action and continuing to the present, VA management has increased the workload for Plaintiffs and other class members by continually expanding the size of the panel of patients to which each nurse or physician assistant is assigned or for which each nurse or physician assistant is effectively responsible. Continual expansions of patient panel sizes have resulted in a greater and ever-increasing volume of View Alerts generated and sent to each nurse and physician assistant.

31. At all times relevant to this action and continuing to the present, there have existed significant staffing shortages for nurses and physician assistants, particularly in the areas of primary care and mental health.

32. On some occasions, Plaintiffs have requested and received overtime pay or compensatory time off for additional hours worked significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of their regularly scheduled daily or weekly shift in order to manage their View Alerts. On other occasions, Plaintiffs' requests for overtime pay, or compensatory time off, for additional hours worked significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of their regularly scheduled daily or weekly shift in order to manage their View Alerts were denied.

33. At all times relevant to this action and continuing to the present, Defendant has willfully failed to compensate Plaintiffs and other class members with overtime pay at one and one-half times each nurse or physician assistant's hourly rate of pay or compensatory time off for all hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15)

minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement, which were not otherwise approved as overtime and paid, or compensatory time off and granted.

34. Plaintiffs and other class members have made numerous attempts to correct the VA's failure to pay the proper additional overtime pay.

35. The VA has disregarded efforts to claim overtime pay or compensatory time off for all additional hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement citing the VA Secretary's authority under 38 U.S.C. § 7422, which prohibits Plaintiffs and other class members from collectively bargaining over matters pertaining to "professional conduct or competence" or "the establishment, determination, or adjustment of employee compensation."

36. Defendant's failure to compensate Plaintiffs and other class members with overtime pay or compensatory time off for all additional hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement continues to the present. As a result of the Defendant's conduct described in this Complaint, Plaintiffs and other similarly situated individuals have suffered and continue to suffer injuries including, but not limited to, economic loss by not receiving the pay or time off to which they are entitled.

37. The conduct described in this complaint has been and continues to be intentional.

CLASS ALLEGATIONS

38. Plaintiffs incorporate the allegations of Paragraphs 1 through 36 of the Complaint as if fully set forth herein.

39. Class Description: The Plaintiff Class consists of all persons who are past or present advanced practice registered nurses employed by the VA, including nurse practitioners, clinical nurse specialists, and nurse anesthetists, and physician assistants; who were or are employed within six (6) years preceding the filing of the original Complaint in this action; who performed or are performing compensable patient care and clinical duties managing View Alerts and electronic patient health records in the VA's Computerized Patient Records System (CPRS); who used or are using VA, non-VA, or personal home computers or laptops to manage View Alerts and electronic health records; who on a recurring and involuntary basis worked additional hours, significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement managing View Alerts and electronic health records; and who did not receive overtime pay at one and one-half times each nurse or physician assistant's hourly rate of pay, or compensatory time off in lieu of overtime pay for all additional hours worked.

40. Included within the class are persons employed by the VA appointed pursuant to 38 U.S.C. § 7401(1), who are nurse practitioners, clinical nurse specialists, nurse anesthetists, and physician assistants.

41. Included within the class is a "New Facilities" sub-class which consists of:

- All advanced practice registered nurses and physician assistants who have been, are, or will be employed by Defendant during at least any one pay period beginning after August 24, 2012;
- who have performed, are performing, or will perform compensable patient care and clinical duties managing View Alerts and electronic patient health records in CPRS;
- who used, are using, or will use VA, non-VA, or personal home computers or laptops to manage view alerts and electronic health records;
- who on a recurring and involuntary basis worked, work, or will work additional hours significantly in excess of fifteen (15) minutes duration in a calendar day and in excess of forty (40) hours in an administrative workweek or in excess of eight (8) consecutive hours in a workday or of their daily work requirement managing view alerts and electronic health records;
- who did not, do not, or will not receive overtime pay at one and one-half times their hourly rate of pay, premium pay, or compensatory time off in lieu of overtime pay for all additional hours worked;
- who work, have worked or will work at VA facilities not otherwise included in the class definition previously adopted in the Court's June 7, 2018 Opinion and Order (Doc. #138) on or after August 24, 2012; and
- who will be represented by Stephen Doyle as the new facilities sub-class representative.

42. This action is properly maintained as a class action under Rule 23(a) and 23(b) of the Rules of the United States Court of Federal Claims ("RCFC").

43. The class is so numerous that joinder of all members as plaintiffs is impracticable. Plaintiffs reasonably estimate that the pool of potential class members is in excess of 10,000 present and former employees.

44. There are common questions of law and fact that affect the members of the class and predominate over any questions affecting only individual members. The primary legal and factual questions in this case include, but are not limited to:

a) Whether the Plaintiffs and other class members on a recurring and involuntary basis worked additional hours, significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement managing View Alerts and electronic health records using VA, non-VA, or personal home computers or laptops that were induced or required by the VA, satisfying the statutory requirement that overtime work be officially ordered or approved;

b) Whether the VA's failure to pay Plaintiffs for all additional hours worked with overtime pay at one and one-half times each affected nurse or physician assistant's hourly rate of pay, or to the extent requested and permissible with compensatory time off request in writing, violates:

i. Additional overtime pay provisions of 38 U.S.C. §§ 7453, 7454;

and/or

ii. VA overtime regulations and policies.

c) If the Plaintiffs prevail on the issues of liability, what are the amount of damages to which the Plaintiffs and other class members are entitled?

45. Plaintiffs' claims are typical of the claims of the class, and Plaintiffs have no interests adverse to or in conflict with those of other class members.

46. Plaintiffs will fairly and adequately protect the interests of the class. They have retained competent counsel experienced in class action litigation and in litigation involving pay statutes.

COUNT I
VIOLATION OF NURSE ADDITIONAL PAY STATUTE
38 U.S.C. § 7453
BY DEPARTMENT OF VETERANS AFFAIRS

47. Plaintiffs incorporate the allegations of Paragraphs 1 through 44 of the Complaint as if fully set forth herein.

48. 38 U.S.C. § 7453(e)(1) requires that, "A nurse performing officially ordered or approved hours of service in excess of 40 hours in an administrative workweek, or in excess of eight consecutive hours, shall receive overtime pay for each hour of such additional service. The overtime rates shall be one and one-half times such nurse's hourly rate of basic pay."

49. 38 U.S.C. § 7453(e)(2) states that, "For purposes of this subsection, overtime must be of at least 15 minutes duration in a day to be creditable for overtime pay."

50. 38 U.S.C. § 7453(e)(3) states that, "Compensatory time off in lieu of pay for service performed under the provisions of this subsection shall not be permitted, except as voluntarily requested in writing by the nurse in question."

51. 38 U.S.C. § 7453(f) states that, "For the purpose of computing the additional pay provided by subsection (b), (c), (d), and or (e), a nurse's hourly rate of basic pay shall be derived by dividing such nurse's annual rate of basic pay by 2080."

52. Defendant's knowledge of Plaintiffs' and other nurse class members' additional hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15) minutes

duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement and expectation, requirement, and inducement to work those additional hours constitute Defendant's order or approval for the additional hours worked.

53. At all times relevant to this action and continuing to the present, Defendant willfully failed to pay Plaintiffs and other nurse class members for additional hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement at an overtime rate of one and one-half times the hourly rate of pay or with compensatory time off.

54. The foregoing actions of Defendant constitute violations of the additional overtime pay provisions of 38 U.S.C. § 7453.

55. Plaintiffs and other class members, who have been employed as advanced practice registered nurses, including nurse practitioners, clinical nurse specialists, and nurse anesthetists, have been financially damaged by the VA's failure to properly pay additional overtime pay and are entitled to recover from the Defendant relief that includes, but is not limited to, any and all unpaid overtime back pay, and interest on such overtime back pay, for all additional hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement; and, reasonable attorneys' fees and costs of this action pursuant to 38 U.S.C. § 7453 and 5 U.S.C. § 5596.

COUNT II
VIOLATION OF PHYSICIAN ASSISTANT ADDITIONAL PAY STATUTE
38 U.S.C. § 7454
BY DEPARTMENT OF VETERANS AFFAIRS

56. Plaintiffs incorporate the allegations of Paragraphs 1 through 53 of the Complaint as if fully set forth herein.

57. 38 U.S.C. § 7454(a) provides that, "Physician assistants [] shall be entitled to additional pay on the same basis as nurses in section 7453 of [Title 38]."

58. Defendant's knowledge of Plaintiffs' and other physician assistant class members' additional hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement and expectation, requirement, and inducement to work those additional hours constitute Defendant's order or approval for the additional hours worked.

59. At all times relevant to this action and continuing to the present, Defendant willfully failed to pay Plaintiffs and other physician assistant class members for additional hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement at an overtime rate of one and one-half times the hourly rate of pay or with compensatory time off.

60. The foregoing actions of Defendant constitute violations of the additional overtime pay provisions of 38 U.S.C. §§ 7453 and 7454.

61. Plaintiffs and other class members, who have been employed as physician assistants, have been financially damaged by the VA's failure to properly pay additional

overtime pay and are entitled to recover from the Defendant relief that includes, but is not limited to, any and all unpaid overtime back pay, and interest on such overtime back pay, for all additional hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement; and, reasonable attorneys' fees and costs of this action pursuant to 38 U.S.C. §§ 7453, 7454, and 5 U.S.C. § 5596.

COUNT III
**VIOLATION OF OVERTIME REGULATIONS AND POLICIES
BY DEPARTMENT OF VETERANS AFFAIRS**

62. Plaintiffs incorporate the allegations of Paragraphs 1 through 59 of the Complaint as if fully set forth herein.

63. 38 U.S.C. § 7421(a) and (b) provides that the VA Secretary "shall prescribe by regulation the hours and conditions of employment and leaves of absence" of employee classifications that include registered nurses.

64. In VA Handbook 5011 and VA Directive 5011, the VA has promulgated policies pertaining to Hours of Duty and Leave for Title 38 employees.

65. VA policy (Handbook 5011, Part II, Chapter 3) states that, "Unless otherwise indicated, the 'basic workweek' for full-time employees shall be 40 hours in length. The normal tour of duty within the 40-hour basic workweek shall consist of five 8-hour days, exclusive of the meal period."

66. VA policy (Handbook 5011, Part II) defines "administrative workweek" to be "[a] period of 7 consecutive calendar days, which coincide with the calendar week, Sunday through Saturday."

67. VA policy (Handbook 5011, Part II, Chapter 3) also provides for “flexible” and “compressed work schedules” that do not conform to the “basic workweek” for title 38 employees appointed under 38 U.S.C. § 7401(1), which includes registered nurses.

68. VA policy (Directive 5011/2, Transmittal Sheet) states that, “In the establishment of work schedules, employees will have their assignments scheduled in advance over periods of not less than one administrative workweek and such schedules will be established in a manner that realistically reflects the actual work requirement.”

69. VA policy (Directive 5011/2, Transmittal Sheet) also states that, “Duty schedules for Title 38 healthcare employees shall be established as appropriate and necessary for performance of services in the care and treatment of patients and other essential activities within the administration for the Under Secretary for Health or designated officials.”

70. In VA Handbook 5007 and VA Directive 5007, the VA has promulgated policies pertaining to Pay Administration for Title 38 employees.

71. VA policy (Handbook 5007/12, Part V, Chapter 2) states that, “Overtime is considered an expedient to be used only under conditions wherein necessary operations cannot be performed through planned coverage by on-duty personnel during their regular non-overtime basic workweek. Supervisory personnel must obtain proper authorization for overtime before permitting or requiring the performance of overtime work by an employee . . . Each responsible official shall also adhere to a policy of authorizing only such overtime as can be readily demonstrated as wholly supported from the standpoint of emergency and/or efficiency in carrying out responsibilities, and with due regard to cost and the availability of current funds.”

72. VA policy (Handbook 5011, Part II, Chapter 3) states that, “Timekeeping documents shall reflect actual hours worked by full-time, part-time, and intermittent employees.

Failure to appropriately monitor compliance with the policies and procedures in this handbook, or failure to properly account for time and attendance may result in appropriate disciplinary and/or legal action.”

73. VA policy (Handbook 5007/12, Part V, Chapter 2) further states that, “Except as provided in paragraph 3a of this chapter, probational and permanent full-time nurses, PAs [physician assistants], and EFDAs are employed on the basis of a 40-hour basic workweek, unless on an alternate work schedule, as indicated in VA Handbook 5011, Hours of Duty and Leave. Computation of regular pay for employees on the 40-hour basic workweek shall be based on a basic hourly rate, derived by dividing the employee’s annual rate of basic pay by 2080 . . . Overtime must be at least 15 minutes duration in a calendar day to be creditable for overtime purposes . . . Overtime is payable for service performed in excess of 40 hours in an administrative workweek, or in excess of 8 hours in a day, whichever is greater, at a rate of one and one-half times the employee’s basic hourly pay. Note: For employees on compressed work schedules, overtime pay is payable for service performed in excess of the employee’s daily work requirement . . . An official authorized to approve overtime work may, at the written request of eligible employees, grant such employees compensatory time off from their scheduled tour of duty in lieu of overtime pay.”

74. VA policy (Directive 5007) states that, “VA will administer pay programs in a fair and equitable manner, consistent with applicable title 5 and title 38 provisions, Office of Personnel Management (OPM) regulations, and applicable Comptroller General and OPM decisions.”

75. Defendant’s knowledge of Plaintiffs’ and other class members’ additional hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15) minutes

duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement and expectation, requirement, and inducement to work those additional hours constitute Defendant's authorization for the additional hours worked.

76. At all times relevant to this action and continuing to the present, the Defendant willfully failed to pay Plaintiffs and other class members for additional hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement with overtime pay at a rate of one and one-half times each nurse or physician assistant's hourly rate of pay or compensatory time off.

77. The foregoing actions of the Defendant constitute violations of VA regulations and policies, enumerated in paragraphs 62 through 74, enacted and implemented pursuant to the VA's authority under 38 U.S.C. § 7421 as well as violations of the additional overtime pay provisions of 38 U.S.C. §§ 7453 and 7454.

78. Plaintiffs and other class members, who have been employed as advanced practice registered nurses and physician assistants, have been financially damaged by the VA's failure to properly pay additional overtime pay and are entitled to recover from the Defendant relief that includes, but is not limited to, any and all unpaid overtime back pay, and interest on such overtime back pay, for all additional hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday,

or in excess of their daily work requirement; and, reasonable attorneys' fees and costs of this action pursuant to 38 U.S.C. §§ 7453, 7454, 5 U.S.C. § 5596, and VA regulations and policies.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

- A. Certify this case as a class action pursuant to RCFC 23(b); certify Plaintiffs as the class representatives; and approve the undersigned attorneys as attorneys for the class;
- B. Declare that the Defendant's conduct alleged herein to be in violation of the Plaintiffs' rights under 38 U.S.C. §§ 7453 and 7454, and under overtime pay regulations and policies of the VA;
- C. Order Defendant to cease failing to comply with 38 U.S.C. §§ 7453, 7454 and regulations and policies of the VA by failing to properly pay Plaintiffs and the class members overtime pay or compensatory time off for additional hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15) minutes duration in a calendar day, in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement;
- D. Enter judgment against Defendant for all back pay due to Plaintiffs and all other class members for any and all unpaid overtime pay due under 38 U.S.C. §§ 7453, 7454, 5 U.S.C. § 5596, and overtime pay regulations and policies of the VA, which Defendant unlawfully withheld from Plaintiffs and all other class members for those hours worked on a recurring and involuntary basis, significantly in excess of fifteen (15) minutes duration in a calendar day, and in excess of forty (40) hours in an administrative workweek, in excess of eight (8) consecutive hours in a workday, or in excess of their daily work requirement during the statutory period;

E. Award Plaintiffs and the class they represent an adjustment for any negative State and Federal Income Tax consequences they may incur, related to the payment of any award herein;

F. Award Plaintiffs and the class they represent pre-judgment interest on any and all unpaid wages or other damages to which they may be entitled;

G. Award interest pursuant to 5 U.S.C. § 5596(b) on all above amounts;

H. Award reasonable attorneys' fees and the costs and disbursements of this action to be paid by Defendant to Plaintiffs' counsel under 5 U.S.C. § 5596, the Back Pay Act;

I. Grant such further and other relief as this Court deems just and proper.

Dated: August 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel for all parties.

/s/ David M. Cook
David M. Cook
Attorney of Record for Plaintiffs