

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ANDREW RUSSELL and RUTH GALLEGO,)
individually and on behalf of all others similarly)
situated,)

Plaintiffs,)

v.)

THE UNITED STATES OF AMERICA,)

Defendant.)

Case No. 1:14-cv-01062-SGB

The Honorable Susan G. Braden

FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiffs Andrew Russell and Ruth Gallego, on behalf of themselves and a class of similarly situated persons, bring this class action against Defendant the United States of America (the "Government") and allege as follows upon personal knowledge as to themselves and their own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by their attorneys:

NATURE OF THE CASE

1. This class action is brought on behalf of all current and former employees of the Government who, at any time after November 1, 2008, were eligible for night shift differential, worked one or more regularly scheduled nonovertime shifts where the majority of hours worked occurred either between 3 p.m. and midnight (the "second shift") or between 11 p.m. and 8 a.m. (the "third shift") and were not paid a night shift differential for the entire shift.

2. The payment of shift differential is mandated by federal statute and/or regulations which require that eligible employees working the second shift be paid a night shift differential of 7.5% of their scheduled rate of pay for the entire shift when the majority of whole hours worked fall within the second shift, or 10% of their scheduled rate of pay for the entire shift

when the majority of whole hours worked fall within the third shift.

3. Pursuant to said statute and/or regulations, the Government, in fact, often paid shift differential to Plaintiffs and the Class (thereby acknowledging their eligibility for it), but due to a problem with its automated payroll system, the Government failed to properly calculate and pay all of the shift differential amounts due and owing to Plaintiffs and the Class.

4. Plaintiffs and the Class seek damages, costs, and reasonable attorneys' fees.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1). The Tucker Act provides, in relevant part, as follows:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

6. Plaintiffs' and the Class's claims against Defendant are founded upon either, or both, a money mandating Act of Congress and/or executive department regulations, including the Prevailing Rate System Act, 5 U.S.C. § 5343(f) and its implementing regulations, including 5 CFR § 532.505 and Office of Personnel Management's Federal Wage System Operating Manual Subchapter S8-4(c), and/or various other executive department regulations, including Department of Defense ("DoD") Instruction 1400.25-V1405, Army and Air Force Regulation AR 215-8/AFI 34-211(I) and Exchange Operating Procedure ("EOP"), 15-10.

7. The aforementioned statutes and regulations constitute an express waiver of the sovereign immunity of the United States of America and can fairly be interpreted as mandating compensation by the Government for damages sustained and/or creating a substantive cause of action and/or right to recover money damages against the Government.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1491(a)(1).

PARTIES

9. Plaintiff Andrew Russell is a citizen of Box Elder, South Dakota. Mr. Russell is a former employee of the Government, having worked for The Exchange a/k/a the Army and Air Force Exchange Service (“The Exchange”) on an hourly rate basis from June 6, 2000 through April 29, 2011. During his employment, Mr. Russell worked at Ellsworth AFB Exchange in Ellsworth, South Dakota at the Ellsworth Main Store as a Pay For Performance “PFP” associate, holding job titles that included Store Associate, Senior Store Associate and Supervising Store Associate. He also worked at the Exchange’s Burger King Express as a Crafts & Trade “C&T” associate, holding a job title of Food Service Worker.

10. Plaintiff Ruth Gallego is a citizen of Box Elder, South Dakota. Ms. Gallego is a former employee of the Government, having worked for The Exchange on an hourly rate basis from March 16, 2011 through July 15, 2013. During her employment, Ms. Gallego worked at the Ellsworth Main Store as a Pay For Performance “PFP” associate, holding job titles that included Store Associate, Senior Store Associate and Supervising Store Associate.

11. Exchange employees, such as Plaintiffs, are federal employees within the Department of Defense (“DoD”). *See* Army & Air Force Regulation, AR 215–8/AFI 34–211(I), 5-1(a) (Eff. Nov. 5, 2012); *see also* AR 215–8/AFI 34–211(I), 4-1 (Eff. July 30, 2008)

12. Defendant is the United States of America (the “Government”), a sovereign entity and body politic. Defendant is responsible for the actions of its various agencies, including, for example, the Department of Defense (“DoD”) and Nonappropriated Fund Instrumentalities (“NAFIs”) within the DoD, such as The Exchange.

13. The Exchange is a Joint NAFI of the Army and the Air Force under the

jurisdiction of the Chief of Staff of the Army and the Chief of Staff of the Air Force. *See* AR 215–8/AFI 34–211(I), 1-10 (Eff. Nov. 5, 2012); *see also* AR 215–8/AFI 34–211(I), 1-9 (Eff. July 30, 2008). The Army and Air Force, and all offices, agencies, activities, and commands under their control or supervision, are part of the DoD. *See* 10 U.S.C. § 111. The DoD is an executive department. *See* 5 U.S.C. § 101; *see also* 10 U.S.C. § 111

14. The DoD has vested in the Secretaries of the Army and Air Force all functions, powers, and duties relating to exchange activities within their respective military departments. AR 215–8/AFI 34–211(I), 1-5. The Secretaries of the Army and Air Force have authorized the “AAFES director and chief executive officer” (and prior to November 5, 2012, the “AAFES commander”) to issue exchange operating procedures (“EOPs”) and exchange service regulations to establish and fulfill Exchange policies, including personnel policies and practices which apply to all Exchange employees, and to manage Exchange activities and supervise Exchange personnel worldwide. AR 215–8/AFI 34–211(I) at 1-10, 2-5 and 5-1 (Eff. Nov. 5, 2012); *see also* AR 215–8/AFI 34–211(I), at 1-10, 2-5 and 4-1 (Eff. July 30, 2008).

15. Exchange employees are required to be “advised of policies, programs, and procedures,” including “pay and compensation practices” and “Employee benefits programs.” *See* Army & Air Force Regulation, AR 215–8/AFI 34–211(I), 5-1(e) (Eff. Nov. 5, 2012); *see also* AR 215–8/AFI 34–211(I), 4-1(e) (Eff. July 30, 2008).

16. The Exchange’s purpose is to provide quality goods and services at competitively low prices to military personnel and generate funds for morale, welfare, and recreational activities. The Exchange operates more than 3,100 retail, food, and service facilities at Army and Air Force installations throughout the world and has over 45,000 employees.

FACTS

Plaintiffs and the Class Are Entitled To Mandatory Payment Of Night Shift Differential

17. Evening or night work is often considered less desirable work than regular daytime work due to, among other things, the potential adverse biological, psychological and/or social effects that working such hours can have on employees. As a consequence, premium pay is often provided to employees who work night shifts.

18. Indeed, various federal laws mandate the payment of premium pay, known as “night shift differential,” to employees of the Government who work night shifts.

19. For instance, § 5343 of the Prevailing Rate System Act (“PRSA”), provides that “A prevailing rate employee is entitled to pay at his scheduled rate plus a night differential—

(1) amounting to 7 ½ percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 3 p.m. and midnight; and

(2) amounting to 10 percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 11 p.m. and 8 a.m.

A night differential under this subsection is a part of basic pay.”

See 5 U.S.C § 5343; *see also* 5 U.S.C § 5342 (“prevailing rate employee” includes certain individuals and employees “employed in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement.”).

20. 5 CFR § 532.505 provides, *inter alia*, that such “Employees shall be entitled to receive night shift differentials in accordance with section 5343 of title 5, United States Code” and 5 CFR § 532.501 defines night shift differential as “the differential paid the employee when

the majority of regularly scheduled nonovertime hours worked fall between 3 p.m. and 8 a.m."

21. The Office of Personnel Management ("OPM") Federal Wage System Operating Manual, Subchapter S8-4(c), entitled "**Night Shift Differential**," provides that:

A prevailing rate employee is entitled to pay at his or her scheduled rate plus a differential of seven and one-half per cent of his or her scheduled rate for regularly scheduled nonovertime work when a majority of his or her work hours occur between 3 p.m. and midnight; or 10 percent of his or her scheduled rate if the majority of his or her work hours occur between 11 p.m. and 8 a.m. The night shift differential is paid for the entire shift when the majority of hours fall within the specified periods. Majority of hours means a number of whole hours greater than one-half (including meal breaks), e.g., 5 hours of a scheduled 8-hour shift. (53 Comptroller General 814).

(1) *Shifts for which night shift differentials are payable.*

- An authorized night shift differential of seven and one-half percent will be paid for the entire shift when a majority of the employee's regularly scheduled nonovertime hours of work fall between the hours of 3 p.m. and midnight.
- An authorized night shift differential of ten percent will be paid for the entire shift when a majority of the employee's regularly scheduled nonovertime hours of work fall between the hours of 11 p.m. and 8 a.m.

(2) *Relation of night shift differential to overtime, holiday, and Sunday premium pay.* Night shift differentials are included in the rates of basic pay for wage employees and are used as a basis for computing overtime pay, Sunday pay, holiday pay, and amounts of deductions for retirement and group life insurance.

(7) *Meal breaks.* Meal breaks of 1 hour or less that occur when a night shift differential is authorized should be included for purposes of determining a prevailing rate employee's entitlement to a night shift differential. Thus, when an employee works from 11:30 a.m. to 8 p.m., with a meal break from 3:30 p.m. to 4 p.m., the 30-minute meal break is included to determine that a majority of hours of work occur during the second shift and a 7½ percent night shift differential is payable.

FWSNF S8-4, 2014 WL 637613; FWS S8-4, 2014 WL 637521

22. Prevailing rate employees, however, are not the only employees of the Government eligible for and entitled to night shift differential payments. For example, the DoD authorizes shift differential to be paid not only to “CT Employees” (“Crafts & Trade”) covered by the prevailing rate law, but also to NAF “White-Collar Employees,” as follows:

3. NIGHT, SUNDAY, AND HOLIDAY PAY. Since FLSA does not cover night, Sunday, or holiday pay, the exempt or nonexempt status is not a factor in determining such pay. The prevailing rate law covering CT employees, subchapter IV of chapter 53 of Reference (f), does cover this pay. Therefore, there are two categories of employees for purposes of applying rules for night, Sunday, and holiday pay: CT and white-collar.

a. CT Employees. Payment for night, Sunday, and holiday work must comply with sections 5343 and 5544 of Reference (f); subparts 532.505, 532.507, and 532.509 of Reference (h); and Reference (g). Pay for Sunday work must also comply with paragraph 2d(5) of Appendix 2 to Enclosure 3.

b. White-Collar Employees. There is no law or regulation external to the Department of Defense that addresses night, Sunday, or holiday pay for NAF white-collar employees. DoD Components may grant these payments in consideration of the prevailing practice in the locality, and recruitment and retention problems. Payments may be less than, but may not exceed, payments pursuant to part 550 of Reference (h).

See DoDI 1400.25-V1405, Appendix 4 to Enclosure 3, Premium Pay (Overtime, Night, Sunday, Or Holiday) (Eff. June 26, 2014); *see also* DoDI 1400.25-V1405, Appendix 4 to Enclosure 2, Premium Pay (Overtime, Night, Sunday, Or Holiday) (Eff. December 1, 1996).

23. Pursuant to such authorization, the Exchange has issued regulations that mandate the payment of night shift differential to both prevailing rate employees (including Crafts & Trades or “C&T” associates) and to Pay for Performance or “PFP” associates. *See* Exchange Operating Procedure (“EOP”) 15-10, at 1-47, 1-57, and 13-88 to 13-92.

24. EOP 15-10 mandates that shift differential be paid to employees, as follows:

“Shift Differentials

13-88. Paid to eligible C&T and PFP associates working second or third shifts.

Note: MBP associates are not paid Shift Differential. See paragraph 13-91 for Night Differential for eligible MBP management associates.

13-89. To be eligible to receive a shift differential, the associate must work more than 50% of the workshift’s regularly scheduled work hours during a qualifying second or third shift differential period. Shifts qualifying for Shift Differentials are:

- a. Second Shift: 3 p.m. to Midnight
- b. Third Shift: 11 p.m. to 8 a.m.

13-90. Shift differentials are paid for an entire work-shift, if enough of that work-shift’s hours fall within a qualifying second or third shift.

13-91. Qualifying associates are paid shift differentials as follows:

- a. Second Shift. 7.5% of the scheduled rate of pay for the entire scheduled shift when the majority of non-overtime shift hours (in whole hours greater than one-half of the shift) fall between 3 p.m. and midnight.
- b. Third Shift. 10% of the scheduled rate of pay for the entire scheduled shift when the majority of non-overtime shift hours (in whole hours greater than one-half of the shift) fall between 11 p.m. and 8 a.m.

13-92. Shift differentials will be included as a part of the rate of basic pay in the computation of overtime pay, holiday pay, Sunday premium pay, sick leave, annual leave, and lump sum payments for annual leave only.

25. The night shift differential provisions of EOP 15-10 have the force and effect of law. *See Hamlet v. United States*, 63 F.3d 1097, 1105 (Fed. Cir. 1995) (“regardless of whether a provision of an agency’s personnel manual or handbook was published or promulgated under the

standards set out in the APA, such provision is a regulation entitled to the force and effect of law if (1) the promulgating agency was vested with the authority to create such a regulation; (2) the promulgating agency conformed to all procedural requirements, if any, in promulgating the regulation; (3) the promulgating agency intended the provision to establish a binding rule; and (4) the provision does not contravene a statute. In determining whether a provision was intended to be binding, the court should consider (a) whether the language of the provision is mandatory or advisory; (b) whether the provision is “substantive” or “interpretive”; (c) the context in which the provision was promulgated; and (d) any other extrinsic evidence of intent.”)

26. The Exchange was vested with the authority by the DoD and the Secretaries of the Army and Air Force to issue EOP 15-10. *See, e.g.*, DoD Instruction 1400.25-V1405 and AR 215-8/AFI 34-211(I). The Exchange conformed to all procedural requirements, if any, in promulgating EOP 15-10. The Exchange was not required by the Administrative Procedure Act (“APA”) to publish EOP 15-10 in the Federal Register, as a matter “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552(b)(2). The APA also provides that rulemaking relating to “a military ... function of the United States,” (5 U.S.C. § 553(a)(1)), matters “relating to agency management or personnel,” (5 U.S.C. § 553(a)(2)) and “rules of agency organization, procedure, or practice,” (5 U.S.C. § 553(b)(3)(A)), are all exempt from notice and comment requirements. The night shift differential provisions of EOP 15-10 also do not contravene a statute. Rather, they mirror 5 U.S.C § 5343 with respect to C&T employees, and with respect to PFP employees, there is “no law or regulation external to the Department of Defense that addresses” night shift differential. *See* DoDI 1400.25-V1405, App. 4 to Encl. 3.

27. Finally, the Exchange intended the night shift differential provisions of EOP 15-10 to establish a binding rule. EOP 15-10 is a “directive” that gives “policies and procedures for

the functions performed” by the Exchange Human Resources Offices, “delegates authority and assigns responsibility for human resources management of all associates” (*see* EOP 15-10, 1-1) and provides “policies for the application of the various types of premium pay” including night shift differential to eligible associates. *See* EOP 15-10, 13-1; *see also* EOP 15-10, 1-79 (AAFES Director/CEO or Commander is vested authority to “Develop personnel policy, publish implementing instructions and procedures, and administer the Exchange personnel program worldwide”) and EOP 15-10, 1-80 (AAFES Director/CEO or Commander “is the sole authority for exceptions to the policies contained in this EOP, except where specifically delegated or where policies are dictated by laws or regulations external to the Exchange.”). The Secretaries of the Army and Air Force also intended for EOPs to be binding. *See* EOP 15-10, Forward (U.S. Army Chief of Staff describes EOP 15-10 as a “directive” that gives “policies and procedures for the functions performed” by the Exchange Human Resources Offices); *see also generally* AR 215–8/AFI 34–211(I), 2-5, 2-10, 3-5, 7-3, 7-7, 12-2, 12-3, 13-3, 14-1 (EOPs to be used “to fulfill policies in this regulation and establish policies” and calling for formulation and execution of “procedures to implement the operating policy in this regulation and EOPs and exchange service regulations,” and relying on “standards” set forth in the relevant EOPs).

28. Indeed, EOP 15-10 has clear standards for paying money to recipients, commanding that “Payment for all associates will be made under the MBP, PFP, or C&T pay systems” (*see* EOP 15-10, 1-46), that “All associates paid under the C&T and PFP systems” are “eligible for major benefits” including “Shift differential” (*see* EOP 15-10, 1-47) and that “Shift Differentials” are “Paid to eligible C&T and PFP associates working second or third shifts.” *See* EOP 15-10, 13-88. EOP 15-10 describes the conditions precedent that must be met before payment is compelled, explaining that the associate must work more than 50% of the workshift’s

regularly scheduled work hours during a qualifying second or third shift differential period “To be eligible to receive a shift differential” (*see* EOP 15-10, 13-89) and that “Shift differentials are paid for an entire work-shift, if enough of that work-shift’s hours fall within a qualifying second or third shift.” *See* EOP 15-10, 13-90. EOP 15-10 then specifies the precise amounts to be paid once those conditions are met, stating that “Qualifying associates are paid shift differentials...” of either 7.5% or 10% of the scheduled rate of pay, for working a qualifying second or third shift, as the case may be. *See* EOP 15-10, 13-91; *see also* EOP 15-10, 13-92 (“Shift differentials will be included as a part of the rate of basic pay” and describing the “Minimum Number of Working Hours that Must Fall Within a Qualifying Shift to Trigger Eligibility for Shift Differential Pay” and the “minimum number of hours required to qualify for shift differential premium pay.”); EOP 15-10, p. 2-30 (chart entitled “QUICK REFERENCE FOR ASSOCIATE BENEFITS AND ENTITLEMENTS” identifies “Shift Differential (Night)” as one of the “Benefits and Entitlements” of “PFP” and “C&T” employees); EOP 15-10, at p. 13-14 (provides specific situational examples of shift differential pay, repeatedly stating that a qualifying C&T or PFP associate who works a majority of his or her hours during the second shift or third shift “is entitled to” a shift differential). EOP 15-10 is both substantive and mandatory, entitling those within its terms to the right to receive payment of night shift differential.

**The Government’s Failure to Properly Calculate And Pay
Night Shift Differential To Eligible Employees**

29. The Government contracts with various outside vendors and suppliers to help manage, process and automate employee time and attendance, scheduling and payroll functions.

30. One such vendor is Kronos, Incorporated, which provides workforce management solutions, including time and attendance, scheduling, absence management, HR and payroll, hiring, and labor analytics solutions, to tens of thousands of organizations worldwide.

31. Kronos provides workforce management solutions to more than one million federal employees within 70 Government agencies and instrumentalities, including, among others, the Department of Commerce; the Department of Labor, Treasury/Bureau of Engraving and Printing; Treasury/Financial Management Services; Treasury/Bureau of the Public Debt; Treasury/Office of Thrift Supervision; Department of Justice Bureau of Alcohol, Tobacco, Firearms, and Explosives; Federal Deposit Insurance Corporation; Appalachian Regional Commission; Architect of the Capitol; Government Accountability Office; Government Printing Office; Library of Congress; Smithsonian Institution, Department of Homeland Security, Social Security Administration, National Science Foundation, Department of Interior, Federal Election Commission, Federal Housing Finance Board, Federal Bureau of Investigation, Patent and Trademark Office, Department of Defense, Department of Agriculture and Merit Systems Protection Board, Department of Veteran Affairs and The Exchange.

32. Kronos touts its ability to provide a complete time and labor management system to the Government, which includes, among other things, the licensing or sale of equipment, software and services for capturing time in/out for work, handling complex federal work and pay rules and processing and calculating employees' pay, including night shift differential.

33. Kronos has an entire division (Kronos for Federal Government) devoted to the Government and several of its products (e.g., Kronos webTA and Kronos Federal Apps) are solely and exclusively sold to agencies and instrumentalities of the Government.

34. For years, however, the Government has been improperly calculating and paying night shift differential to eligible employees.

35. In 2012, the Government received one or more complaints alerting it to the fact that it was improperly calculating and paying night shift differential. In response, inquiry was

made into the matter, and about a year later, in or about May 2013, the Government acknowledged that it was improperly calculating and paying night shift differential, knew that the Kronos system was making incorrect shift calculations, sought action from Kronos regarding a program fix to solve the problem, sent alerts to various time keepers and managers reminding them that they were responsible for reviewing timecards to ensure that time worked was paid correctly and reported that it would identify those employees who were not correctly paid all night shift differential to which they were entitled.

36. Nonetheless, on information and belief, the problem has not been fixed and affected employees have not received the full amount of night shift differential pay to which they are entitled pursuant to federal statute and/or regulations.

37. In addition, because shift differentials are included as a part of the rate of basic pay in the computation of overtime, holiday and Sunday premium pay, and other benefits, affected employees have not received the full amount of such other premium pay and benefits.

CLASS ACTION ALLEGATIONS

38. Plaintiffs bring this action pursuant to Rule 23 of the Rules of the United States Court of Federal Claims (“RCFC”) on behalf of themselves and the following class:

All current and former employees of the Government who, at any time after November 1, 2008: (1) were eligible for night shift differential (2) worked one or more regularly scheduled nonovertime shifts where the majority of hours worked occurred either between 3 p.m. and midnight or between 11 p.m. and 8 a.m. and (3) were not paid a night shift differential for the entire shift.

39. The Class consist of thousands of individuals, making joinder impractical, in satisfaction of RCFC 23(a)(1). The exact size of the Class and the identities of the individual members thereof are ascertainable through Defendant’s records.

40. The claims of Plaintiffs are typical of the claims of all of the other members of the

Class. The claims of the Plaintiffs and the Class are based on the same legal theories and arise from the same unlawful conduct, resulting in the same injury to the Plaintiffs and the Class.

41. The Class has a well-defined community of interest. The Defendant has acted and failed to act on grounds generally applicable to the Plaintiffs and the Class, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the Class.

42. There are many questions of law and fact common to the claims of Plaintiffs and the Class, and those questions predominate over any questions that may affect individual Class members within the meaning of RCFC 23(a)(2) and 23(b)(2).

43. Common questions of fact and law affecting members of the Class include, but are not limited to, the following:

- a. Whether Defendant, due to problems with its automated payroll system, failed to properly calculate night shift differential;
- b. Whether Defendant failed to provide Plaintiffs and the Class all night shift differential payments to which they were entitled;
- c. Whether Defendant's conduct in failing to pay night shift differential to Plaintiffs and the Class violated federal statute and/or regulations mandating the payment of night shift differential; and
- d. Whether Plaintiffs and the Class are entitled to relief, including damages, interest, costs and/or attorney's fees.

44. Absent a class action, most class members would find the cost of litigating their claims to be prohibitive, and will have no effective and complete remedy. The class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants, and promotes consistency and efficiency of adjudication.

45. Plaintiffs will fairly and adequately represent and protect the interests of the Class. Plaintiffs have retained counsel with substantial experience in prosecuting complex

litigation and class actions. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the Class, and have the financial resources to do so. Neither Plaintiffs nor their counsel have any interest adverse to those of other Class members.

COUNT I
Failure to Pay Night Shift Differential
Mandated By Federal Statute and/or Regulations

46. Plaintiffs incorporate the foregoing allegations.

47. By either, or both, federal statute and/or regulation, Plaintiffs and the Class were eligible for and entitled to mandatory payment of night shift differential.

48. 5 U.S.C. § 5343(f), 5 CFR § 532.505 and OPM's FWS Operating Manual Subchapter S8-4(c) (collectively, the "prevailing rate law") mandate that a prevailing rate employee is entitled to be paid a night shift differential amounting to 7 ½ percent of his or her scheduled rate of pay for regularly scheduled nonovertime work when a majority of his or her work hours occur between 3 p.m. and midnight; or 10 percent of his or her scheduled rate for the entire scheduled shift if the majority of his or her work hours occur between 11 p.m. and 8 a.m.

49. Similarly, regulations promulgated by the DoD and its components, including the Army and Air Force and the Exchange, authorize (*see* DoDI 1400.25-V1405, AR 215-8/AFI 34-211(I)) and mandate (*see* EOP 15-10) that Crafts & Trade "C&T" associates (who are covered by the prevailing rate law) and Pay For Performance "PFP" associates (who are not covered by the prevailing rate law) are entitled to be paid a night shift differential amounting to 7 ½ percent of his or her scheduled rate for regularly scheduled nonovertime work when a majority of his or her work hours occur between 3 p.m. and midnight; or 10 percent of his or her scheduled rate if the majority of his or her work hours occur between 11 p.m. and 8 a.m.

50. Shift differentials are required to be paid for an entire shift when the majority of

hours fall within the specified periods. Majority of hours means a number of whole hours greater than one-half. Meal periods of one hour or less that occur within the specified shift differential hours are considered as hours worked for the purpose of determining the minimum number of hours required to qualify for shift differential premium pay.

51. Plaintiffs and the Class were either “prevailing rate employee[s]” within the meaning of 5 U.S.C. § 5342(2) and the regulations implemented thereunder, and/or Crafts & Trade “C&T” associates or Pay For Performance “PFP” associates within the meaning of EOP 15-10 or were otherwise eligible to receive night shift differential by statute or regulation.

52. Plaintiffs and the Class worked one or more regularly scheduled nonovertime shifts where the majority of hours worked occurred between 3 p.m. and midnight or between 11 p.m. and 8 a.m. such that they were entitled to night shift differential pay for the entire shift.

53. Defendant violated the aforementioned statute and/or regulations, by failing to pay Plaintiffs and the Class all night shift differential to which they were entitled.

54. As a result, Plaintiffs and the Class have suffered damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the Class, pray for the following relief:

- a. An order certifying the Class and appointing Plaintiffs as representatives of the Class, and appointing counsel for Plaintiffs as lead counsel for the Class;
- b. A judgment for and award of damages to Plaintiffs and the Class;
- c. Payment of costs and reasonable attorneys’ fees;
- d. For other and further relief as the Court may deem proper.

Dated: April 27, 2015

Respectfully submitted,

By: /s/ John G. Jacobs
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2015, I served the foregoing document by electronically transmitting it to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing upon the following ECF registrants:

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/s/ John G. Jacobs
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