IN THE SUPREME COURT

STATE OF FLORIDA

Case No. 73,475

BROWARD COUNTY,

Petitioner/Appellant,

v.

KEITH FINLAYSON, et al.,

Respondent/Appellee.
_____/

FILED
SID J. WHITE
JUN 7 1989
CLERK, SUPREME COURT
By _____ Deputy Clerk

INITIAL BRIEF OF PETITIONER/APPELLANT BROWARD COUNTY, FLORIDA

JOHN J. COPELAN, JR.
County Attorney
BROWARD COUNTY, FLORIDA
Governmental Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
(305) 357-7600

JAMES C. CROSLAND
GORDON D. ROGERS
MULLER, MINTZ, KORNREICH, CALDWELL,
CASEY, CROSLAND & BRAMNICK, P.A.
Suite 3600
Southeast Financial Center
Miami, Florida 33131-2338

Counsel for Petitioner/Appellant
Broward County, Florida

June 5, 1989

TABLE OF CONTENTS

II

III

TABLE OF CITATIONS

Page

Cases:

Other Authorities Cited:

PRELIMINARY STATEMENT[1/]

The instant case arose as a civil service grievance for retroactive overtime pay on behalf of a class of Emergency Medical Technicians (hereinafter, "EMTs") employed by Broward County (hereinafter, "the County"). The grievance asserted that although EMTs were regularly scheduled to work a 24 hours on duty/48 hours off duty schedule for an average of 56 hours on duty per week, they were nonetheless entitled to retroactive overtime for all hours over 40. The grievance was first filed in June, 1980 and sought retroactive overtime for a period from 1973 through September 30, 1979. It is undisputed that throughout this period the EMTs did receive overtime for hours in addition to their regularly scheduled shifts. The EMTs sought no prospective relief based upon a new, three year collective bargaining agreement between their union, the Professional Medical Rescue Association of Broward County, Local 2485, IAFF (hereinafter, "Local 2485"), and the County which had become effective October 1, 1979.

The civil service grievance was denied for failure to file it within the five (5) working day time limit established by the County's civil service rules. Local 2485 thereupon appealed the denial of the grievance to the Fourth District but then abandoned the appeal in favor of this ~~de novo~~ circuit court action on behalf of the EMT class seeking declaratory relief and damages for breach

---

1/ References to the Record on Appeal before the Fourth District will be designated as [R-page number]. References to the Appendix submitted herewith will be designated as [Appendix-_].

of contract. The case has twice been reviewed by the Fourth District Court of Appeal and now comes before this Court as a final judgment against the County for allegedly unpaid overtime wages ($740,151.65); prejudgment interest computed from 1978 ($534,739.74); "lodestar" attorney's fees ($101,910.20); a "contingency risk enhancement" ($139,323.51); and post judgment interest. This Court accepted jurisdiction based upon an express and direct conflict between the decision below and Sigman v. City of Miami, 500 So.2d 693 (Fla. 3d DCA 1987), and can now review the entire case on its merits. See Bould v. Touchete, 349 So.2d 1181 (Fla. 1977).

STATEMENT OF THE FACTS

Broward County, Florida is a political subdivision of the State of Florida which provided essential governmental services during 1978 and 1979 through more than 4,000 County employees [R-88-89]. Most County employees, including the EMTs, were covered by the Broward County Civil Service Rules and Regulations. Such rules established hiring, promotional and disciplinary procedures, terms and conditions of employment, and an administrative grievance procedure for employees not covered by a collective bargaining agreement.

A. Overtime Under the Civil Service Rules

County employees were required to work a variety of different work schedules dependent upon the nature of the services performed. Secretarial and clerical employees regularly worked a 37 1/2 hour per week schedule whereas employees in other occupations worked a normal 5 day, 40 hour work week [R-85]. Two groups of public safety

employees, the EMTs and County firefighters, were regularly scheduled to work 24 hours on duty/48 hours off duty for an average of 56 hours per week[2/] [R-332].

Broward County's Emergency Medical Services (EMS) division commenced as a pilot project employing only 12 EMTs in 1973 [R-53]. It became a permanent County division in 1974 and by 1978 the number of EMTs employed was approximately 100. The EMS Division operates twenty-four hours per day every day of the year through EMTs who provide medical treatment at the scene of an injury prior to transporting the patient to a hospital. Since the inception of the program, EMTs have been scheduled to work twenty-four continuous hours every third day in accordance with the established custom in the ambulance industry [R-59-61].

EMTs and all other County employees were employed at annual rates of pay within pay ranges for the classification (e.g., EMT-1, Secretary I, etc.) as specified in the Broward County Civil Service Rules and Regulations Pay Plan. The pay plan computations (e.g., hourly, biweekly and annual compensation rates) were based upon a normal 40 hour week (2,080 hours per year). Accordingly, the only computations which accurately reflected the pay of 37 1/2 and 56 hour employees were the biweekly and annual pay amounts. The pay

---

2/ There is no true fifty-six hour week. The 24 hour on duty/48 hour off duty schedule generally required each EMT to work two shifts (48 hours) in one week, two shifts the following week (48 hours) and three shifts (72 hours) in the third week for an average of 112.31 hours in any two week pay period. The operational fiction of a fifty-six (56) hour week is an average derived by dividing annual scheduled hours of work (2,920 hours) by 52 weeks per year for an average of 56.15 hours per week [R-771].

plan stated that the rates and ranges of pay represented gross compensation for full time service [R-772]. This meant that an employee received the full annual compensation as stated in the pay plan if he or she worked all regularly scheduled work hours for the position held [R-86-88, 656-6571.

Overtime for those County employees not covered by a union contract was governed by Sections 103.141 and 103.142 of the County's Civil Service Rules, which provided as follows:

> Section 103.14: Overtime
>
> 103.141. Overtime is work beyond the normal hours of any scheduled work week as authorized or directed by a department, division or office head with the approval of the County Administrator. In any division or office, overtime shall be authorized or directed only when it is in the interest of the County and is the most practical and economical way of meeting unusual workloads or deadlines. As a general rule, the requirement of frequent and considerable overtime services in a department, division or office shall be considered evidence of understaffing or improper organization.
>
> 103.142. Necessary overtime work, when approved by the County Administrator, may be compensated by equivalent time off or cash payment at the regular rate of pay for the class involved up to 40 hours. After 40 hours, [sic] employee will be paid at the rate of time and one half. All overtime must be approved in advance by the employee's supervisor and authorized by the division or office head. Payment for overtime at a higher rate or by any other method than set forth in this Section shall require the specific approval of the Board of County Commissioners [R-717].

In accordance with the above-referenced civil service rules, hours worked by County employees were computed on a weekly basis and paid biweekly, twenty-six times per year. In order to accommodate the County's computerized payroll system which was based upon a regular 40 hour week, a clerical employee who worked his or her regular **37 1/2** hour week would record the **37 1/2** hours plus a **2** 1/2 hour time adjustment (80 hours biweekly) in order to receive the full biweekly salary as indicated in the pay plan. If the clerical employee worked more than **37** 1/2 hours, the first 2 **1/2** additional hours were compensated at straight time and hours over 40 were compensated at the time and one half rate [R-86-88].

A similar time adjustment was utilized for EMTs and firefighters whose regular work week averaged 56 hours on duty. If a 56-hour employee worked all scheduled shifts, he or she recorded 40 hours (80 hours biweekly) on payroll records in order to receive the full biweekly paycheck as provided in the County's pay plan [R-609-611]. If a 56 hour employee worked hours in excess of regularly scheduled shifts, overtime was paid at a time and one half rate for such additional hours. Since the inception of the EMS Division in **1973** (and during the period relevant herein) overtime for EMTs and firefighters was computed and paid only for hours beyond normal scheduled shifts ["Stipulated Facts," Joint Pretrial Stipulation R-**771-772].**

B. Union Organizing By The EMTs

On May **24, 1978,** Local 2485 filed a petition with the Florida Public Employees Relations Commission (PERC) pursuant to Section

447.307, Florida Statutes (1977), seeking to become the exclusive collective bargaining agent for EMTs employed by Broward County [Defendant's Proffered Exh. No. 3 at pp. 1-31. Administrative proceedings to determine the appropriate bargaining unit continued through May 25, 1979, when PERC approved the results of a representation election and certified Local 2485 [R-226, Defendant's Proffered Exh. No. 4 at p. 41.

During the last half of 1978, the County's Personnel Director proposed the elimination of the 40 hour time adjustment for EMTs, even if manual computation of the EMS payroll was required, to enable straight time wages, fringe benefits and overtime to be calculated on the basis of the EMTs' actual 56 hour schedule [Defendant's Exhibit No. 1, R-13291. The revisions were not implemented at that time because Section 447.501, Florida Statutes (1977), required the County to "maintain the status quo" on wages and benefits during the pendency of Local 2485's efforts to unionize the EMTs. In any event, the payroll computer was limited to the 40 hour scale and could not be reprogrammed [R-127-128].

On March 14, 1979, the Broward County Administrator issued Administrative Order No. 419 (effective 3/19/79) as a clarification of the preexisting civil service rules regarding overtime and other rules covering compensatory time, holiday pay, annual leave and bonus days [R-290-292, complete copy of order at Appendix-21. The order stated in pertinent part:

> 2. Overtime (CSR & R Section 103.14)
>
> Overtime is work beyond the normal hours of any scheduled work week. After 40 hours actually worked, [sic] employee will be paid at the rate of time and one half.

> For those employees working a **37 1/2** hour week and recording a two and one half **(2 1/2)** hour time adjustment the following rule applies for work in excess of **37 1/2** hours and not exceeding **40** hours:
>
> This time is recorded as additional regular time on the payroll voucher form -- in the column headed as "ACTUAL". It will be paid at the regular pay rate.
>
> All regular employees, when approved to do *so,* will earn premium (time and one half) overtime for the excess over their total scheduled hours which includes any time adjustment as referenced above.
>
> Sick Pay, Bonus Day, Holidays, Personal Day, Funeral Leave, Civil Leave, Military Leave, Annual Leave, and Leave without Pay will not count toward total hours for overtime computations [emphasis in original].

Collective bargaining negotiations between Local **2485** and the County were already under way by June 20, **1979 [R-105,** Defendant's Proffered Exhibit No. **1].** On November **5, 1979,** while the negotiations were ongoing, the Director of the EMS Division issued a memorandum to all field personnel which stated:

> In accordance with Administrative Order **419,** effective March **19, 1979** (Page **1,** attached), field personnel will receive premium overtime pay only after actually working their scheduled number of shifts **(24** hour) per week. The number of shifts worked per week varies according to a rotating schedule [Defendant's Exhibit 11 at **R-1329].**

C. EMT Overtime Under the Union Contract

On March 11, **1980,** Local **2485** and the County entered into a three year union contract which was effective retroactively to October 1, **1979 [R-222-289;** Defendant's Proffered Exh. No. **4].** In

accordance with the requirements of Section 447.309, Florida Statutes (1979), the union contract set forth the wages, hours, and terms and conditions of employment for EMTs. The union contract called for a six (6) percent increase in annual salary but otherwise continued the past practice of paying overtime only for hours in excess of regularly scheduled shifts. The union contract stated in pertinent part:

> ARTICLE 22
>
> OVERTIME
>
> A. Authorized overtime will be paid at the rate of one and one-half (1 1/2) times an employee's basic rate of pay.
>
> B. Overtime will be computed on the basis of actual hours worked in a seven (7) day period, beginning Sunday at 0900 and ending the following Sunday at 0859. An employee who works more hours than his/her scheduled shifts during this period will be paid overtime for the additional hours worked as long as s/he actually worked the scheduled shifts. Shifts paid for annual leave shall be computed as hours worked [R-264, Defendant's Proffered Exh. No. 4 at p. 22, emphasis supplied].

Article 30 of the union contract, entitled "RATES OF PAY/HOURS OF WORK", acknowledged and continued at Section 3.A. the fifty-six (56) hour average workweek for EMTs which was in effect prior to the Agreement and provided for a future workweek reduction to fifty-three (53) hours per week [R-284; Defendant's Proffered Exh. No. 4 at p. 30A; Joint Pretrial Stipulation at R-772, ¶9]. Finally, Article 30, Section 3.C. of the union contract acknowledged that prior to and after the contract, the annual salary of an EMT was full compensation for a 2,920 hour work year, stating:

> C. The computation for pay purposes shall be based on 2,920 hours per year. [R-285, Defendant's Proffered Exh. No. **4** at **p.** 30B].

D. The Civil Service Grievance

On June 17, 1980, approximately three (3) months after the union contract was signed (eight and one-half months after it became effective), the nominal class Plaintiff herein, EMT Keith Finlayson, filed a formal civil service grievance on behalf of all EMTs employed by the County. The grievance was based upon the foregoing civil service rules and Administrative Order No. **419** and asserted for the first time that EMTs had been paid for only sixteen (16) hours of every twenty-four (24) hour shift worked since 1973. As relief, the grievance sought retroactive overtime and credit for sick and annual leave [R-293-2941.

Section 120.021 of the County's Civil Service Rules defines the term "grievance" in pertinent part as follows:

> Grievance -- A "grievance" is a request for relief in a matter of concern or dissatisfaction, which is subject to control by management; ... it may relate to disputes concerning the interpretation or application of the Civil Service Rules and Regulations and personnel policies [Appendix-3].

Section 120.0501 of the County's Civil Service Rules provides as follows with respect to initiation of a formal grievance:

> Any employee entitled to relief hereunder and who has been demoted, suspended, dismissed or is otherwise aggrieved may take advantage of these grievance procedures providing [sic] that he or she shall:

> (a) Within five (5) working days of the effective date of a disciplinary action or from the date the employee could reasonably be expected to have knowledge of the existence of the condition of employment causing him or her to feel aggrieved, file a Grievance Form with his or her division head setting forth the reasons for the grievance ... [R-505, Appendix-41.

The EMS Division Director denied the grievance as untimely under the above rule because the EMTs failed to file within the five (5) working day time limitation [R-295]. The EMTs did not advance the grievance to the next step before the Department Director and did not request a formal hearing before the County's independent Personnel Review (i.e., civil service) Board as provided in the civil service rules [R-555].

STATEMENT OF THE CASE

A. Abandonment of the Civil Service Grievance

Following the EMS Division Director's denial of their civil service grievance, the EMTs filed a "notice of administrative appeal'' under Chapter 120, Florida Statutes (1979), with the Fourth District Court of Appeal.[3/] Although Local 2485 was not named as a party, the notice of administrative appeal (and the instant circuit court action) were filed by legal counsel retained directly by Local 2485 under a fee arrangement whereby the union was solely respons-

---

3/ The appeal, sub nom. Keith Finlayson et al. v. Broward County, Case No. 80-1251, characterized the Division Director's rejection of the grievance on timeliness grounds as a final order [R-548-5491. The EMTs voluntarily dismissed the appeal on January 27, 1981 [R-553].

ible for a non-contingent $10,000.00 minimum legal fee, plus costs and a contingency bonus in the event of a favorable result [R-1046-10481.

Concurrent with the notice of administrative appeal, Local 2485 also commenced the instant action in circuit court on July 21, 1980 [R-214-215]. Count I of the complaint sought a declaration under Chapter 86, Florida Statutes (1979), that the five (5) working day limitations period set forth in the County's civil service rules was unconstitutional; a declaration regarding the entitlement of EMTs to retroactive overtime; and an order requiring the payment of all overtime due [R-214-2201. Count II of the complaint asserted breach of contract based upon the County's alleged failure to pay overtime in accordance with the civil service rules [R-220-221]. Copies of the civil service grievance and the Division Director's response [R-293-2951 and a copy of the October 1, 1979 - September 30, 1982 union contract between Local 2485 and the County covering EMTs were attached to the complaint as exhibits [R-222-2891.

The County subsequently raised lack of subject matter jurisdiction for failure to exhaust administrative remedies as a defense by motion [R-297, order at R-304] and in its amended answer [R-391-392, order at R-3931. By order dated August 2, 1983, the trial court granted the EMTs' motion for partial summary judgment in their favor as to the jurisdictional defense [R-533]. By order dated September 1, 1983, the trial court granted the County's motion for summary judgment as to the statute of limitations defense, holding that all overtime claims arising prior to July 16, 1978, were conclusively barred [R-563-564].

B. Trial Court Entry of Summary Judgment Rejecting the Retroactive Overtime Claims

By order dated May 30, 1984, the trial court granted final summary judgment to the County, holding that the EMTs were entitled to overtime under the civil service rules and Administrative Order No. 419 only for hours in excess of their regularly scheduled fifty-six **(56)** hours in any work week [R-711-7231. The trial court additionally held that the EMTs had waived any arguable entitlement to overtime and/or were estopped from claiming such retroactive wages by their years of acquiescence in the County's interpretation of its overtime rules [R-722].

C. Reversal by the Fourth District (Finlayson I)

Local 2485 appealed to the Fourth District Court of Appeal. No oral argument was conducted. In Finlayson v. Broward County, 471 So.2d 67 (Fla. 4th DCA **1985)** (Finlayson I), the appellate court reversed, concluding as follows:

> "The operative portion of Order No. 419 reads:
>
> Overtime is work beyond the normal hours of any scheduled work week. After 40 hours actually worked, employee will be paid at the rate of time and one half" [emphasis supplied by Court: id. at p. **68].**

The appellate court thus held that the second sentence of the above paragraph controlled and stated its view that "[o]f the **56** hours worked, **16** were actually overtime." Id. The cause was thereupon "remanded for further proceedings not inconsistent herewith." Id. The appellate court did not address the alternative ground of waiver

relied upon by the trial court and did not question subject matter jurisdiction.

D. Proceedings Upon Remand and Trial

Upon remand, the trial court granted the EMTs' motion for judgment pursuant to mandate and entered a final judgment on liability against the County. The order stated that the County was liable for:

> "... each hour worked by the Class members in excess of **40** hours per week, and not paid, or not fully paid, by the COUNTY" [emphasis supplied, **R-7571.**

The trial court retained jurisdiction to determine the amount of overtime wages due **[R-757].**

During preparation of their joint pretrial stipulation, the parties became aware that they differed greatly on the scope of the issues which remained for trial **[R-1130].** The EMTs filed two motions in limine seeking to preclude the County from presenting evidence concerning facts and legal conclusions which the EMTs claimed had been conclusively determined by the prior appellate court decision **[R-763-764, 767-7681.** Prior to a ruling on the motions, the parties filed a detailed Joint Pretrial Stipulation which included stipulated facts and stated their respective positions on the issues remaining for trial **[R-769-834, 950-9531.**

By order dated October 23, **1986,** the trial court granted the motions in limine **[R-939]** stating as follows:

> THIS CAUSE shall proceed to trial on the only remaining issue in this case, that being whether

> the salary received by members of the plaintiff class constituted payment for all scheduled hours worked or just forty (40) hours per week. The parties shall limit their evidence accordingly [emphasis supplied].4/

At the commencement of trial, the trial court permitted counsel for the County to make an oral proffer concerning what the evidence excluded by the order granting the motions in limine would have shown. The oral proffer included evidence that the EMTs had waived any right to claim overtime by years of inaction [R-14-18] and evidence showing that the EMTs had actually worked (apart from sleep, meal and waiting time) significantly less than fifty-six (56) or even forty (40) hours per week [R-9-12].

The formal trial which followed consisted of the testimony of two EMTs for the Plaintiffs and the testimony of the County's Personnel Director for the Defendant. On direct examination, both EMTs claimed that they had only been paid for forty (40) hours per week or eighty (80) hours per pay period because that was what their computer generated pay documents showed [R-56-57, 73, 77]. One EMT produced what he identified as a County document promising overtime after forty (40) hours work which he received when he was hired by the County 11 1/2 years previously (i.e., 1975) [R-73]. On cross examination, both EMTs testified that they had been hired at an annual salary to work fifty-six (56) hours (on average) per week:

4/ The trial was thus limited to whether the EMTs had already been paid for all 56 hours, on average, per week at straight time, thus entitling them to 16 hours pay per week at a half time rate, or whether the salary covered only 40 hours and entitled the EMTs to 16 hours pay per week at a time and one half rate.

that they received their full annual salary if they worked all regularly scheduled shifts **[R-63-64, 76];** and that they had received overtime at time and one-half rates for hours in excess of their regularly scheduled shifts **[R-60-61, 791.**

One of the two EMT witnesses was Local **2485** Union President Dominic Lanza **[R-37-38].** He testified that pay practices for EMTs had been discussed with a former EMS Division Director in **1975** but had not been changed since that time 5/ **[R-53-54].** During cross examination Mr. Lanza testified that the **24** hours on duty/48 hours off duty work schedule was customary in the fire and ambulance industries and that it was also customary to pay overtime only for hours worked in excess of regularly scheduled shifts **[R-59-61].** The trial court thereafter refused to permit the County to elicit any testimony concerning the collective bargaining negotiations between Local **2485** and the County (which predated the filing of this lawsuit by up to one year) or the resulting collective bargaining agreement (which predated this lawsuit by more than four **(4)** months). The trial court ruled that the collective bargaining negotiations and the subsequent collective bargaining agreement constituted inadmissible "settlement negotiations" **[R-66-68].**

The trial court thereafter prevented the County from presenting any evidence to the jury showing that the manner in which EMTs were

---

5/ See Defendant's Exhibit **12,** in evidence, wherein notes of a **1975** meeting contain the notation "Pay: They (EMTs) are on duty for **24** hours but are only paid for **16** hours. They do not want additional pay, however; they would prefer that their hourly rate be changed to reflect that they are paid for **24** hours and not **16** hours as defined in the Federal Register" **[R-142, 13291.**

paid was not changed in **1978** primarily because of Local **2485's** union organizing efforts. The trial court also sustained Plaintiffs' objections to all evidence concerning subsequent collective bargaining negotiations **[R-105, 125, 128, 136, 139, 1931** and refused to admit into evidence the collective bargaining agreement entered into by the parties four and one-half months prior to the filing of the lawsuit **[R-146-148,** Defendant's Proffered Exhibit No. 4**].**

After closing arguments, the case was submitted to the jury for a special verdict on a single issue:

> "Did the annual salary received by each member of the class constitute payment for **40** hours per week or **56** hours on an average per week?" [R-**210.** See also **R-170, 200-2011.**

The jury returned its verdict holding the EMTs' annual salary was payment for only forty hours per week **[R-210].** The jury thus held that each class member was owed retroactive payment for sixteen hours pay at time and one half overtime rates for each week worked during the fourteen and one half month period from July **16, 1978** through September **30, 1979.**

E. Post Trial Motions: Prejudgment Interest and Attorney's Fees

The County filed a motion for new trial on the grounds that the pretrial orders prevented the County from presenting probative evidence, including the collective bargaining agreement, on relevant issues and that the jury verdict was against the manifest weight of the evidence **[R-959-963].** The motion was denied **[R-968].**

The EMTs thereafter submitted a proposed final judgment which included a sum in excess of one-half million dollars as prejudgment interest. The County objected on the grounds that prejudgment interest could not lawfully be assessed against it on a back wage claim because such interest was not requested in the complaint or in the pretrial stipulation and because, even if such interest could be assessed, it should only be computed from the time the civil service grievance (June 17, **1980)** put the County on notice of the demand **[R-1000-10061.** After a hearing at which the trial court acknowledged the apparent conflict between the decisions of the Third and Fourth Districts concerning prejudgment interest, the proposed judgment, including full prejudgment interest was entered by the trial court [R-1048-1049].6/

The EMTs subsequently filed a motion for attorney's fees under Section **448.08,** Florida Statutes **(1986)** [R-1040-1044]. They asserted that the "lodestar" value of legal services rendered in the case (reasonable hours x reasonable hourly rate) was **$101,910.20** and proposed a "contingency risk enhancement" of three (3) for a total fee award of **$305,730.60.** However, a supplemental affidavit revealed that the EMTs' counsel had been retained directly by Local **2485** under an arrangement whereby the union agreed to pay a non-contingent ten thousand dollar ($10,000.00) legal fee, plus costs, irrespective of the outcome of the case [R-1045-1046]. The repre-

---

6/ The County's subsequent motion to amend the final judgment on similar grounds **[R-1053-10551** was also denied [R-1057]. The judgment also awarded the Plaintiffs post judgment interest and attorney's fees to be determined at a later date.

sentation agreement also provided for a contingent fee in the amount of $241,233.71 in the event of a successful outcome, computed as follows:

20% of the first $1,000,000.00
15% of the next $500,000.00
10% of any award above $1,500,000.00

The County opposed the attorney's fees motion on the grounds that no fee award was appropriate under Section 448.08 because legal fees for the class had been contracted for by union Local 2485 rather than individual employees [R-1306-1307]. The County also argued that application of a "contingency risk enhancement" was inappropriate in a back wage case and could not be applied in this case because the fee arrangement was not truly contingent [R-1279, 1306-1307]. Finally, the fee award was also improper because it included attorney time expended on the appeal in Finlayson I for which fees were not authorized by the Fourth District [R-1276, lines 14-19]. The trial court granted attorney's fees in the full amount of the contingency fee agreement ($241,233.71) by applying whatever undetermined "risk enhancement" factor was necessary to increase the reasonable value of services to the amount of the contingency fee [Order at R-1168-1170. See also R-13171.

F. Finlayson II

The County appealed the judgments to the Fourth District Court of Appeal. The trial court's rulings were subsequently affirmed in all respects in Broward County v. Finlayson, 533 So.2d 817 (Fla. 4th DCA 1988) (Finlayson II) which characterized the case as a breach of

contract action. By order dated May 11, **1989**, this Court accepted jurisdiction to resolve an express and direct conflict between Finlayson II and Sigman v. City of Miami, **500** So.2d **693** (Fla. 3d DCA **1989).**

SUMMARY OF ARGUMENT

The lower courts lacked jurisdiction over the subject matter of this breach of contract case because the EMTs failed to exhaust available and adequate administrative remedies before the County's independent Personnel Review (i.e., civil service) Board. Accordingly, the case should be remanded and thereupon dismissed in its entirety.

Assuming, arguendo, that the lower courts had jurisdiction over this case, the trial court erred after the decision in Finlayson I by refusing to allow the County to prove that a different overtime policy applied to EMTs and by entering a summary judgment for liability against the County. The only issue which remained for trial after that ruling was whether an EMT's annual salary constituted payment for 56 hours (on average) per week and entitled the EMT to **16** hours pay per week at a half time rate or whether the salary covered only 40 hours and entitled the EMT to **16** hours pay at a higher, time and one half rate.

In the abbreviated jury trial which followed, the court erred in granting two motions in limine which prevented the County from showing that the EMTs spent an average of 3 hours per 24 hour shift on rescue calls and spent the rest of their time eating, sleeping or waiting for calls [R-12]. This evidence supported the County's

position that the EMTs were paid the lower **56** hour rate precisely because they spent much of their time "housesitting" and should have been allowed to go to the jury. The trial court also refused to allow the jury to consider evidence that the EMTs had admitted that their annual salaries were full compensation for **56** hours (on average) per week in collective bargaining negotiations in **1979.** The court likewise held that the written union contract which continued the past practice of paying overtime only after 56 hours (on average) after the October 1, **1979** cutoff date for the instant overtime claim was inadmissible at trial. The collective bargaining negotiations and the union contract (which was attached to the complaint as an exhibit) were erroneously excluded as "settlement negotiations" despite the fact that they predated the EMTs' claim to retroactive overtime by a substandard period of time.

Following the jury verdict holding that an EMT's annual salary covered only forty hours per week, the trial court erred in failing to grant the County's motion for new trial. The jury's verdict was clearly contrary to the manifest weight of the evidence, which included direct admissions by the two EMT witnesses that their annual salary covered an average **56** hours of work per week and that they were paid overtime when they worked additional hours.

The lower courts then compounded the above errors by awarding the EMTs over one half million dollars in prejudgment interest (computed from **1978)** on their retroactive overtime claims because the County's inherent sovereign immunity from liability for such interest had not been expressly or impliedly waived by statute or the express terms of an authorized contract. The civil service employ-

ment contract (as characterized by the Fourth District) contained no express stipulation for the payment of prejudgment interest and contained its own expedited procedure for enforcement of the rules through administrative proceedings before an independent civil service board. This limited authorization for back wage suits in an expedited administrative forum did not provide a lawful basis for finding an implied waiver of the County's immunity from prejudgment interest. The mere fact that statutes authorized the County to contract and to sue and be sued as to other matters is insufficient to imply a waiver on claims specifically covered by the civil service rules. Moreover, even if a waiver of sovereign immunity could properly have been implied, the lower courts erred in failing to deny prejudgment interest because its exaction would be inequitable and by failing to limit the assessment of such interest until the first demand for overtime was made.

Finally, the lower courts departed from the standards announced by this Court by awarding counsel for the EMTs attorney's fees which included a "contingency risk enhancement." No such enhancement should have been applied under Florida law because the fee arrangement between the EMTs and their counsel provided for a non-contingent $10,000.00 minimum attorney's fee, plus costs, which the attorneys would receive irrespective of the outcome of the case.

ARGUMENT AND CITATION OF AUTHORITY

I

THE TRIAL COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF THE EMTS' BREACH OF CONTRACT CLAIM. ACCORDINGLY, THE DECISIONS BELOW SHOULD BE REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS THE CASE IN ITS ENTIRETY.

It is settled law in Florida that a circuit court lacks subject matter jurisdiction to adjudicate claims asserted by public employees where the employees fail to exhaust available and adequate administrative remedies. City of Miami v. Fraternal Order of Police, Lodge No. 20, 378 So.2d 20, 23 (Fla. 3d DCA 1980), cert. denied, 388 So.2d 1113 (Fla. 1980) (circuit court lacked jurisdiction over declaratory judgment action which employees failed to submit to arbitration); Migliore v. City of Lauderhill, 415 So.2d 62, 65 (Fla. 4th DCA 1982), aff'd, 431 So.2d 986, 987 (Fla. 1983) (police officers who failed to appeal dismissals to civil service board could not seek reinstatement and back pay via mandamus); Fink v. Metropolitan Dade County, 403 So.2d 1060, 1062 (Fla. 3d DCA 1981) (action for declaratory relief and breach of contract by county firefighters properly dismissed for lack of jurisdiction); City of Miami v. Sigman, 448 So.2d 533, 534 (Fla. 3d DCA 1984) (circuit court lacked jurisdiction where City employee failed to first present issue to civil service board). Lack of subject matter jurisdiction cannot be waived and can be raised at any time. Tamiami Trail Tours v. Wooten, 47 So.2d 743 (Fla. 1950); Pushkin v. Lombard, 279 So.2d 79 (Fla. 3d DCA 1973), cert. denied, 284 So.2d 396 (Fla. 1973).

It is undisputed in the instant case that the EMTs based their claim for retroactive overtime upon the County's civil service rules and an interpretive administrative order. It is likewise undisputed that the County's Personnel Review (i.e., civil service) Board had jurisdiction to resolve the EMTs' overtime claims under Section 120.021(a) of the County's Civil Service Rules which allowed grievances "concerning the interpretation or application of the Civil Service Rules and Regulations and personnel policies." Finally, it is clear that upon the timely filing of an appropriate grievance, the County's independent Personnel Review Board had the binding authority to order the County to pay any overtime found to be due [R-554-5551. See Carson v. Hollingsworth, **381** So.2d 1144 (Fla. 1st DCA **1980)** (civil service board order requiring sheriff to grant pay increase appropriately enforced by mandamus).

The EMTs' class complaint states on its face that the EMTs filed a civil service grievance seeking retroactive overtime prior to commencing the instant action in circuit court. The complaint also admits that the grievance was denied by the EMS Division Director for failure of the EMTs to file it within five (5) working days after becoming aware of the overtime dispute [**R-295**]. The EMTs then failed to advance their grievance to the appropriate Department Head or the County's Personnel Review Board for a formal hearing as required by the civil service rules [R-554-555].

The EMTs argued below that the County rendered compliance with the civil service grievance procedure impossible or futile by flatly denying the grievance as untimely. This same argument was squarely rejected in FOP Lodge No. 20, supra, wherein the court held that

public employees could not relieve themselves of the obligation to exhaust administrative remedies by simply accepting a supervisor's grievance response as unchallengable. Likewise, Perry v. City of Fort Lauderdale, 387 So.2d 518 (Fla. 4th DCA 1980), is inapposite because in this case the EMTs sought only retroactive (as opposed to prospective) monetary relief and did file a formal grievance which was formally denied at the first step and was susceptible to resolution by the County's civil service board.

The EMTs thus had the obligation to enforce their civil service "contract" (as characterized by the Fourth District) through the administrative dispute resolution process contained in those same civil service rules. They could not lawfully avoid this obligation through the simplistic assertion, in the guise of a declaratory judgment action, that the five (5) working day time limit violated their alleged constitutional right to due process of law. See School Board of Leon County v. Mitchell, 346 So.2d 562 (Fla. 1st DCA 1977), cert. denied, 358 So.2d 132 (Fla. 1978).[7/] If, upon request, the civil service board had refused to grant a hearing on timeliness or any other grounds, judicial review of that decision would have been available through mandamus. See DeNigris v. City of Fort Lauderdale, 518 So.2d 469 (Fla. 4th DCA 1988) (court properly upheld civil service board's refusal to hear grievance which was not filed within thirty day time limit set by civil service rules): City of Tarpon Springs v. State ex rel. Meister, 392 So.2d 1345 (Fla. 2d DCA

7/ See also FOP Lodge No. 20 in which the contractual grievance procedure contained an identical five (5) working day limitations period for filing grievances. 378 So.2d at 22.

1980) (mandamus appropriate to compel civil service board to conduct a hearing). Alternatively, if the civil service board had ruled against the EMTs on the merits of their overtime claim, judicial review of any interpretation of the civil service rules or any constitutional objection to the procedure utilized would have been available in the circuit court via certiorari. City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982); DeNigris, 518 So.2d at 470.

In summary, the EMTs clearly failed to exhaust their administrative remedies before the County's Personnel Review (i.e., civil service) Board. Such failure deprived the circuit court of subject matter jurisdiction over this declaratory judgment and breach of contract action. Accordingly, the decision below should be reversed and remanded with instructions to dismiss the action in its entirety.

II

ASSUMING ARGUENDO THAT THE TRIAL COURT HAD JURISDICTION OVER THIS BREACH OF CONTRACT ACTION, IT ERRED BY ENTERING SUMMARY JUDGMENT AGAINST THE COUNTY ON LIABILITY AND BY THEREAFTER LIMITING THE EVIDENCE AND ISSUES FOR TRIAL.

The crux of the appeal below was the extent to which the County should have been precluded from litigating collateral issues after the Fourth District's opinion in Finlayson I construed the following language:

> Overtime is work beyond the normal hours of any scheduled work week. After 40 hours actually worked, employee will be paid at the rate of time and one-half.

In its original summary judgment in favor of the County, the trial court held that the first sentence referencing a "scheduled work week" controlled the EMTs' entitlement to overtime. The Finlayson I court reversed, holding that the second sentence was the "operative portion". The District Court could have, but ~~did not~~, remand with instructions to enter judgment on liability against the County.

A. The County Should Have Been Permitted to Present Evidence Showing That The EMTs Were Covered By a Different Overtime Rule

It is settled law that upon reversal and remand with general directions the trial judge is vested with broad discretion in conducting subsequent proceedings. Lucom v. Potter, 131 So.2d 724 (Fla. 1961). In spite of this general rule, the trial court herein erroneously accepted the argument that it was precluded by the "law of the case" doctrine from allowing the County the opportunity to prove that EMTs were not covered by the portion of Administrative Order No. 419 construed by the Fourth District or were not otherwise entitled to overtime.

In the very similar case of Perry v. City of Fort Lauderdale, 352 So.2d 1194 (Fla. 4th DCA 1977) (Perry I), the court issued an opinion reversing summary judgment on the grounds that the court below had misconstrued a public sector overtime ordinance. Upon remand with general instructions the lower court considered collateral issues including whether police officers were covered by and entitled to overtime under the ordinance. In a subsequent appeal of the same case, the appellate court considered the collateral issues on their merits. Although the court again disagreed with various

rulings, it did not indicate or even mention that the court below erred in considering the collateral issues. Perry v. City of Fort Lauderdale, 387 So.2d 518 (Fla. 4th DCA 1980) (Perry II). The case was thereupon remanded with specific instructions to enter judgment for overtime wages.

In the instant case, as in the Perry I decision, reversal of the summary judgment established only the proper interpretation to be given to the administrative order. The decision did not conclusively determine that the County was liable for overtime any more than did Perry I. The question of whether the EMTs were entitled to overtime under the appellate court's interpretation was left to the trial court through remand with only general instructions. The trial court therefore erred by refusing to permit the County to show that EMTs were covered by a different overtime policy. For this reason, the case should be remanded to the trial court with instructions to permit the County to present evidence showing that EMTs operated under a different overtime policy and were not covered by the forty hour provision set forth in the administrative order. See Hurley v. Slingerland, 480 So.2d 104 (Fla. 4th DCA 1985), rev. denied, 492 So.2d 1335 (Fla. 1986) (remand was required where the lower court after remand erroneously construed the appellate decision as limiting its authority to conduct further evidentiary proceedings).

B. The Lower Courts Erred By Prohibiting The County From Presenting Evidence Relevant to the Issue of Whether an EMTs Salary Constituted Payment For 56 or Only 40 Hours Per Week

Based upon the final judgment on liability and the subsequent order granting the EMTs' motions in limine, the trial court permitted only one issue to be presented to the jury. That issue was whether the annual salary received by EMTs constituted payment for 56 hours per week or only for 40 hours per week. As noted above, the trial court clearly erred by so limiting the issues. However, even assuming, arguendo, that it was correct, the trial court still committed reversible error by refusing to allow the County to present evidence relevant to the only remaining issue which would have shown that the annual salary of an EMT constituted full payment for 56 hours (on average) per week.

1. Exclusion of Evidence Showing "Hours Actually Worked"

The trial court refused to permit the County to present evidence showing that when actual rescue calls, as opposed to sleep, meal and waiting time were considered, EMTs actually worked far less than 40 hours per week. The County proffered evidence which would have shown that EMTs averaged six (6) calls per shift on a year round basis and that the average duration of a call was less than thirty (30) minutes [R-12].

The trial court's basis for refusing such evidence was its conclusion that the prior appellate decision had conclusively determined this issue. However, even if that conclusion was correct, the evidence should still have been permitted to go to the jury as proof

that the EMTs were paid the lower **56** hour hourly rate (annual salary divided by **2,920** hours per year) precisely because they spent the majority of their time sleeping, eating, or waiting to respond to rescue calls. In response to the County's motion for new trial, even Judge Burnstein observed that EMTs were paid "whatever it is, **$4.50** an hour, the minimum wage [because] basically what they are doing is housesitting, and they are making themselves available" [R-**9831**. In view of this acknowledgment, the County was clearly prejudiced by the trial court's refusal to let the jury hear evidence showing that the lower fifty-six hour pay rate should apply because the EMTs spent considerable time "housesitting."

2. Exclusion of Evidence Showing Union Organizing Activities

The trial court erred further in refusing to allow the County to present evidence to the jury concerning Local **2485's** efforts to unionize the EMTs in **1978** and **1979**. The very limited testimony which was permitted on this issue (which the jury was ordered to disregard) showed that ~~but for~~ the union petition the County would have abandoned the time adjustment factor for EMTs in **1978** or early **1979** even if it required manual payroll computations based upon their actual **56** hour week. However, it was prohibited from doing *so* based upon its legal obligation to maintain the "status quo ante" on wages and hours during Local **2485's** efforts to unionize the EMTs.

The EMTs contended below that the County could lawfully have changed the EMT pay system before or after Local **2485** became certified. The case of Sarasota Professional Fire Fighters v. Town of Longboat Key, **12** F.P.E.R. **¶ 17323 (1986)** (copy attached as Appendix-

5) is virtually "on all fours" with the instant case in this regard and shows that the EMTs are clearly wrong. There, as in the instant case, firefighters were paid based upon a fictional forty (40) hour week, even though they regularly worked fifty-six (56) hours. The employer unilaterally altered its past practice by changing the hourly pay rate to reflect the true fifty-six (56) hour schedule. The employer also concurrently announced that it would commence charging leave time on an hour for hour basis, whereas it had previously charged employees only 16 hours leave for every 24 hour shift they were off. PERC held that unilateral implementation of the leave time change during negotiations for a first collective bargaining agreement constituted an unfair labor practice. As relief, PERC ordered the employer to reinstate the prior practice of charging leave time on a 16 hour basis. The same result would have obtained in this case.

The foregoing establishes that the County was prohibited by law from altering the status quo with regard to pay practices during both the union organizing campaign and subsequent bargaining activities (i.e., the entire period for which the EMTs claim entitlement to overtime herein). As clarification, this Court should note that the County in no manner asserts that this legal prohibition or its inability to reprogram its computers should insulate or shield it from liability for any overtime which was legitimately due during the applicable period. Instead, the County submits only that this evidence should not have been excluded by the trial court and should have been considered by the jury as evidence of why the County did not scrap the fictional forty (40) hour time adjustment in 1978 and

implement manual payroll and benefit computations to reflect the EMTs' true fifty-six (56) hour schedule. Such evidence would have undoubtedly helped the jury understand that irrespective of the forty **(40)** hour fiction, the EMTs' annual salary had always constituted full payment for their regularly scheduled fifty-six **(56)** hours on duty per week. The County was severely prejudiced by exclusion of this evidence.

C. Exclusion of Evidence Concerning Collective Bargaining Negotiations

The most egregious evidentiary error below was exclusion of evidence concerning the positions taken and admissions made by EMTs during collective bargaining negotiations with the County. These negotiations commenced on or before June 20, **1979** and continued until March 11, **1980.** They occurred at a time when there was no pending dispute or contemplation of litigation between the County and the EMTs concerning overtime. In spite of this fact, the trial court erroneously held that statements made in collective bargaining negotiations were inadmissible offers of settlement or compromise under Section **90.408,** Florida Statutes **(1986).** That section provides:

> **90.408 Compromise** and **offers to compromise.--** Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value.

The foregoing rule has no application to the collective bargaining negotiations excluded by the trial court because there was no claim

for back overtime pending during such negotiations, therefore there could have been no offer to compromise a then nonexistent claim. It is well settled that statements or negotiations which precede the assertion of a disputed claim are fully admissible and cannot be excluded as offers of compromise. Miller Yacht Sales v. Lee, 368 So.2d 916 (Fla. 4th DCA), cert. denied, 378 So.2d 347 (Fla. 1979); H.R.J. Bar-B-Q, Inc. v. Shapiro, 463 So.2d 403 (Fla. 3d DCA 1985); Frank v. Ruwitch, 318 So.2d 188 (Fla. 3d DCA 1975), cert. denied, 330 So.2d 725 (Fla. 1976).

The ruling was also erroneous because it failed to take into consideration the fact that the County was legally required by Section 447.309(1), Florida Statutes (1979), to enter into negotiations with Local 2485 after that union was certified as the exclusive bargaining agent of the EMTs. Such contract negotiations were required by law to be conducted in meetings open to the press and public. The resulting union contract was intended to take the place of the terms and conditions of employment set forth in existing civil service rules covering everything from vehicle maintenance to paid holidays, including overtime. Statements made by the lawfully designated bargaining agent for the EMTs admitting that annual salary was full compensation for an average fifty-six hour week would therefore have been proper evidence for consideration by the jury. Independent Petroleum Workers of America, Inc. v. American Oil Company, 324 F.2d 903 (7th Cir. 1964) (union statements and proposals submitted during negotiations were admissible to show that union's interpretation of contract was meritless).

D. Exclusion of the Collective Bargaining Contract

The foregoing evidentiary error regarding the collective bargaining negotiations was compounded by failure to allow the jury to hear evidence showing that the parties continued the same overtime arrangements in the subsequent union contract, executed on March 11, 1980. That contract predated the existence of a disputed claim for back overtime by the EMTS and the commencement of this suit by months. Accordingly, the statements contained in the contract were fully admissible into evidence. See Miller Yacht Sales, 368 So.2d at 918.

It cannot reasonably be disputed that the County's posit on on the single issue presented to the jury was severely prejudiced by exclusion of the union contract. The jury was never permitted to consider this documentary evidence showing that the EMTs voluntarily agreed and acknowledged in the contract that their annual salaries covered 2,920 hours of work per year and that overtime was due only after scheduled shifts had been worked. It would unquestionably have been probative for the jury to know that the EMTs voluntarily agreed in the contract to accept annual salaries for working the same 56 hours per week which were sixty percent lower than the salary they alleged they were already entitled to under Administrative Order No. 419. Accordingly, this Court should reverse the decision below and remand this case for a new trial without the limitations on relevant evidence erroneously imposed by the trial court.

III

THE LOWER COURTS ERRED BY AWARDING THE EMTS PREJUDGMENT INTEREST BECAUSE SUCH AWARDS ARE NOT PERMITTED ON BACK WAGE CLAIMS AGAINST PUBLIC ENTITIES UNDER FLACK V. GRAHAM, 461 So.2d 82 (Fla. 1984). IN THE ALTERNATIVE, THE LOWER COURTS ERRED BY FAILING TO LIMIT ASSESSMENT OF SUCH INTEREST UNTIL THE DATE OF THE FIRST DEMAND FOR PAYMENT OF OVERTIME BY THE EMTS.

It has long been settled under the jurisprudence of the United States that a state and its subdivisions are not liable for interest in the absence of an express statutory provision or an authorized stipulation by contract that interest will be paid. United States v. North Carolina, 136 U.S. 211 (1890). Immunity from interest is an attribute of sovereignty, implied by law for the benefit of the state. Treadway v. Terrell, 117 Fla. 838, 158 So. 512, 518 (Fla. 1935).

In Board of Public Instruction of Okaloosa County v. Kennedy, 109 Fla. 153, 147 So. 250 (Fla. 1933), a bus driver was employed pursuant to a written contract by a school board at a stated monthly salary. The school board was unable to pay the full salary due to lack of funds. It therefore issued the driver a certificate of indebtedness which specifically stated that the back wages would be paid, with interest, from the first available funds. The bus driver thereafter sued to collect the back wages, plus interest. This Court ultimately approved the judgment for back wages and held that the school board had the legal authority to enter into enforceable contracts with teachers, bus drivers and other employees in order to operate the school system. Although the underlying wage claim was

held valid, the Court nonetheless rejected the claim for prejudgment interest, stating:

> The allowance of interest prior to judgment, on an ordinary unpaid school claim of the character here dealt with, can only be justified when specifically provided for by statute ... or where the contract at its inception had included in it an authorized stipulation agreeing to pay interest on deferred payments required to be made under the contract. No such stipulation appeared in the contract sued on, nor was an agreement to pay interest authorized to be made by the school board after the service had been completely rendered and the contract fully executed, since there was no valid consideration for any such an undertaking [citation omitted, Id. at p. 254].

In Flack v. Graham, 461 So.2d 82 (Fla. 1984), this Court restated the rule that prejudgment interest generally is not available on public sector back wage claims. As in its prior Okaloosa County decision, the Court found the underlying back wage claim to be enforceable but rejected a claim for prejudgment interest in the absence of clear statutory authority for such payment. The ruling was consistent with this Court's demonstrated concern for preserving to the state and its subdivisions the traditional protections of sovereign immunity except to the extent specifically abrogated by statute. See e.g., Circuit Court of the Twelfth Judicial Circuit v. Department of Natural Resources, 339 So.2d 1113 (Fla. 1976); Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 1024 (1988); Skoblow v. Ameri-Manage, Inc., 483 So.2d 809 (Fla. 3d DCA 1986), approved in Spooner v. Department of Corrections, 514 So.2d 1077 (Fla. 1987) (sovereign immunity barred public employee's civil rights action under 42 U.S.C. § 1983 asserting wrongful discharge). The decision was also consistent

with the uniform federal rule which barred awards of prejudgment interest on backpay awards against the United States. Library of Congress v. Shaw, 478 U.S. 310 (1986); Segar v. Smith, 738 F.2d 1249, 1295-1296 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985).[8]

Okaloosa County and Flack thus established the general rule which allows public employment contracts to be enforced against state entities in apropriate administrative or judicial proceedings but prohibits awards of prejudgment interest unless specifically authorized by statute or the express terms of the contract sued upon.[9] Flack then went on to explain two criteria to be considered in reviewing a claim for prejudgment interest against a state entity. The first criterion is whether the state's traditional immunity from interest has been expressly or impliedly waived by statute or an express, authorized contract agreeing to the payment of interest. Whether or not a statutory waiver will be implied turns primarily upon the nature of the claim and whether the purpose

---

[8] The federal rule was changed legislatively through the 1987 amendments to the Back Pay Act, 5 U.S.C. § 5596, to allow limited interest on back pay claims asserted after December 22, 1987.

[9] The County acknowledges that awards of prejudgment interest on public employee back wage claims were approved by the District Courts in Brooks v. School Board of Brevard County, 419 So.2d 659 (Fla. 5th DCA 1982) and Broward County v. Sattler, 400 So.2d 1031 (Fla. 4th DCA 1981). Neither case was reviewed by this Court and based upon Okaloosa County and Flack, it is submitted that both cases were wrongly decided. This Court's decisions make it clear that the mere fact that a state entity can be sued to enforce a particular type of contract does not automatically mandate an award of prejudgment interest on all contract claims.

or object to be served in permitting suits against the state warrants such relief. This Court's continued reliance upon Treadway, indicates that a generalized statutory authorization for a state entity to sue or be sued is not sufficient to imply a waiver of sovereign immunity. Treadway, 158 So. at 518. The second criterion involves the equities of the p rticular case and can be invoked even where a waiver of sovereign immunity might arguably be implied.

More recently, in Pan Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1984), this Court considered waiver of sovereign immunity in the context of a suit for breach of an express written contract between the state and a private corporation. The issue presented was whether the state could be sued at all on the contract. The availability of prejudgment interest as a remedy was not discussed. The Court held that where the state enters into an arms-length contract in the same manner as a private citizen it must as a matter of law, be held accountable and cannot simply avoid all liability by invoking the shield of sovereign immunity.[10/] However, consistent with its prior Okaloosa County decision, the Court was careful to specifically limit its holding "to suits on express, written contracts into which the state agency has the statutory authority to enter." Id. at p. 6.

The foregoing decision was construed in Southern Roadbuilders Inc. v. Lee County, 495 So.2d 189 (Fla. 2d DCA 1986), rev. denied, 504 So.2d 768 (Fla. 1987), as preserving a county's sovereign immun-

---

10/ The only alternative to this eminently pragmatic ruling was that all state contracts would be void for lack of mutuality and therefore unenforceable by either party.

ity on claims arising from, but not founded upon, an express written contract. In that case, a road contractor sued claiming damages for delay and additional work on a county contract. The contractor had failed to advise the county of the additional costs until three (3) months after all work had been completed and additionally had failed to comply with contractual procedures to be followed to change the written contract. Under these circumstances, the court refused to imply any waiver of sovereign immunity and held that the suit was barred in its entirety, stating:

> Sovereign immunity is a doctrine designed to protect the public treasury from what would otherwise be countless claims filed by the vast number of citizens affected by the actions of a government. Though it germinated in the monarchial maxim, "The King Can Do No Wrong,'' Prosser, Law of Torts 971 (4th ed. 1971)--an odious concept by modern standards--sovereign immunity, at least to the extent retained by the legislature and courts, is a positively necessary and rational safeguard of taxpayers' money [Id. at p. 190, n.1].

The Third District similarly relied upon the Flack decision in in Sigman v. City of Miami, 500 So.2d 693 (Fla. 3d DCA 1987) (Sigman II), ruling that under the public policy expressed by this Court, a city was immune from prejudgment interest on a back wage claim by a public employee. The court rejected the trial court's reliance upon Section 295.14, Florida Statutes (1985), as an implied waiver because the statute did not apply to municipalities and, finding no other statutory basis for waiver, reversed an award of prejudgment interest, stating:

> There is a public policy, expressed by the Supreme Court in Flack v. Graham, 461 So.2d 82

> (Fla. 1984), which insulates government from liability for interest on back pay in the absence of an express statutory provision, authorization implied by statute, or stipulation by government. Here there is no express statutory provision waiving the immunity of municipal corporations, no stipulation by the City to be responsible for interest on back pay awards, and no statute which implies that interest shall be paid by the State or its political subdivisions in an action for back pay [Id. at p. 6951.

Proper application of the foregoing precedents to the instant case requires consideration of each of the factors discussed by this Court in Okaloosa County, Treadway, Flack and Pan Am Tobacco. This inquiry must start with the general rule that the state may be held liable for back pay but not prejudgment interest in an appropriate administrative or judicial proceeding. The next inquiry is whether the Legislature intended to waive the County's sovereign immunity from a breach of contract suit in circuit court for alleged violation of its civil service rules. The obvious answer is that such immunity from suit was not waived, impliedly or otherwise, because the civil service rules contained their own exclusive administrative procedure for expedited enforcement which anticipated only judicial review of civil service board decisions. Accordingly, the mere fact that the County was generally authorized to sue or be sued with respect to other types of contracts under Section 125.15, Florida Statutes (1979), did not provide a lawful basis for the waiver of sovereign immunity implied by the lower courts herein.

The third inquiry under Treadway and Flack is whether a waiver of the County's inherent immunity from liability for prejudgment interest can reasonably be implied from its consent to be sued before its civil service board on public employee wage claims. This

inquiry must also be answered in the negative because no statute authorizes de novo breach of contract suits against the County in circuit court for alleged violations of its civil service rules. Instead, the clear purpose or object of allowing claims to be asserted before the County's civil service board was to have such claims adjudicated expeditiously by requiring them to be asserted within five (5) working days after the employee became aware of the alleged grievance. In the instant case, this would have required an EMT to file a grievance within five (5) working days after receiving one paycheck in which overtime had been improperly computed. The civil service board could then have granted retroactive relief for that single paycheck and a prospective interpretation of the overtime rules which would have governed overtime from the date of the grievance forward. If the instant class of EMTs had come forward with a formal grievance in 1975 or at any time within five (5) working days after receiving any paycheck (prior to October 1, 1979) the civil service board could have quickly resolved the overtime dispute.[11/] Thus, under Treadway and Flack, even if the County's sovereign immunity was waived to permit expedited civil service

---

11/ The County acknowledges that in Department of Health and Rehabilitative Services v. Boyd, 525 So.2d 432 (Fla. 1st DCA), rev. denied, 525 So.2d 877 (Fla. 1988), an award of prejudgment interest on a public employee's back pay claim was upheld following administrative proceedings before PERC. However, it was clear in Boyd that the Legislature transferred jurisdiction over discipline and discharge claims of state employees to PERC precisely because of the untenable backlog of such cases and with full knowledge that PERC could award prejudgment interest on back pay claims based upon Town of Pembroke Park v. Florida State Lodge, Fraternal Order of Police, 501 So.2d 1294 (Fla. 4th DCA 1986). No similar argument can be raised in the instant case.

proceedings and court review, the purpose or object of that limited waiver does not support an implied waiver of the County's inherent immunity from liability for prejudgment interest.

Finally, analysis of the equities factor in Flack makes it clear that the County should not be held liable for prejudgment interest under the facts of this case. The evidence at trial showed that the EMTs were fully aware of the potential overtime claim asserted herein in 1975 and took no steps to resolve the problem. They likewise did not raise that claim in response to the November 5, 1979 memorandum from the EMS Director confirming that overtime would be paid only for hours in excess of regularly scheduled shifts. They instead participated in months of collective bargaining negotiations, without even mentioning the claim, and agreed to a union contract which continued the practice of paying overtime only for hours in excess of regularly scheduled shifts. Then, more than eight months after the October 1, 1979 date upon which the civil service rules ceased to apply to them, they first disclosed the retroactive overtime claim asserted herein. At that time, they chose to pursue a remedy which was contrary to the express terms of their civil service "employment contract." Thus, as with the contractor in Southern Roadbuilders, no waiver of sovereign immunity should be implied with respect to the EMTs' deficient, undisclosed

and untimely claims for additional compensation long after all work had been performed.[12/]

Under the equities inquiry, the Court should note that the EMTs first asserted their overtime claim only after all disputed work had been performed and that all relief sought was retroactive. Thus, unlike the public employer in Perry II (378 So.2d at 521-522), the County cannot be blamed for any failure to timely resolve a known dispute over an overtime rule during the pendency of litigation. The County had no knowledge in this case of any dispute prior to the June, 1980 grievance. At that time, the matter had already been resolved for the future through the union contract and there was nothing which the County could do except deny the claim as untimely under its civil service rules and defend its position in this litigation. Based upon the prevailing law at the time this suit was filed neither the County nor the EMTs could have anticipated an award of prejudgment interest on the retroactive overtime. The EMTs did not even request such award based upon the County's sovereign

---

12/ Florida courts have uniformly denied all relief to public employees who failed to litigate back pay claims with reasonable diligence in view of the potentially disastrous impact such claims could have upon governmental operations. For example, see Okaloosa County, where this Court observed that the payment of a back wage claim, without prejudgment interest, could be ordered only with due regard for preserving sufficient funds for the school system to operate that year. Okaloosa County, 147 So. at 252. See also Renshaw v. State ex rel. Hickland, 149 Fla. 342, 5 So.2d 700 (Fla. 1942); State ex rel. Hann v. Burns, 109 So.2d 195 (Fla. 1st DCA 1959); City of Miami v. Kellum, 147 So.2d 147 (Fla. 3d DCA 1962); Rubin v. Shapiro, 198 So.2d 854 (Fla. 3d DCA), cert. denied, 204 So.2d 331 (Fla. 1967) and City of St. Petersburg v. Norris, 335 So.2d 333 (Fla. 2d DCA 1976), cert. denied, 344 So.2d 325 (Fla. 1977) for cases denying all relief on public employee back pay claims based upon the equitable theory of laches.

immunity and the fact that the overtime claim involved disputed facts and was therefore unliquidated. This Court reaffirmed the County's sovereign immunity from interest in Flack in 1984 but then significantly changed the law regarding unliquidated claims in Argonaut Insurance Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985). Based upon their intentional failure to timely disclose and pursue their retroactive overtime claims, the EMTs should not be awarded both overtime and a second windfall of prejudgment interest against the taxpayers of Broward County.

As a final point, assuming, arguendo, that an award of prejudgment interest was proper, the trial court still erred in assessing such interest for any period before the County was put on notice of the EMTs contrived claim for overtime. Even under the "loss theory" of awarding prejudgment interest adopted in Argonaut, interest cannot begin to run until a demand for payment is made. Law v. Blue Lagoon Pompano, Inc., 470 So.2d 33, 35 (Fla. 4th DCA 1985); Butler Plaza, Inc. v. Allen Trovillion, Inc., 389 So.2d 682, 683 (Fla. 5th DCA 1980); Icard v. Henderson, 455 So.2d 417 (Fla. 2d DCA 1984). In the instant case, the only record evidence of any such demand is the class overtime grievance filed on June 17, 1980 [R-293-2941. Accordingly, at the very least, this case should be remanded with directions to disallow the assessment of prejudgment interest for any period before June 17, 1980.

In summary, the foregoing precedents establish that the County's sovereign immunity from liability for prejudgment interest was not expressly or impliedly waived by the limited authorization to pursue employment contract claims before its civil service

board. Further, the knowing failure of the EMTs to timely disclose and pursue their retroactive overtime claims renders it patently inequitable for the Court to award the EMTs the windfall of an unbudgeted and undeserved 60% pay increase for a period of 14 1/2 months in addition to unanticipated prejudgment interest on that sum. Accordingly, the award of prejudgment interest should be disallowed in its entirety by this Court.

IV

THE COURTS BELOW ERRED IN AWARDING THE EMTS' ATTORNEY'S FEES WHICH INCLUDED A CONTINGENCY RISK ENHANCEMENT BECAUSE THE UNDERLYING FEE AGREEMENT WAS NOT CONTINGENT.

The EMTs sought and obtained an attorney's fee award under Section 448.08, Florida Statutes (1986), which permits, but does not require, an award of attorney's fees in an action for unpaid wages. Williams v. Florida Memorial College, 453 So.2d 541 (Fla. 3d DCA 1984). The purpose of that statute is to avoid the inequities inherent in requiring employees to pay their own attorney's fees in order to recover relatively small amounts of unpaid wages. Doyal v. School Board of Liberty County, 415 So.2d 791, 793 (Fla. 1st DCA 1982). Accordingly, a reasonable attorney's fee is added to any wages recovered under the statute in recognition of the probability that a contingency fee based upon a percentage of the recovery normally would not attract competent counsel.

The County's primary objection to the fee award below involved the trial court's purported reliance upon Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1151 (Fla. 1985) in awarding

the EMTs a "contingency risk enhancement" in addition to "lodestar" fees. The County maintained that the fee award was erroneous under Rowe because it was undisputed that counsel for the EMTs had received a non-contingent $10,000.00 attorney's fee and thus did not bear the risk of receiving no fee whatsoever if the case was lost. The Fourth District left the award of a contingency risk enhancement undisturbed in Finlayson 11, but thereafter adopted the precise position advanced by the County in Head v. Lane, 541 So.2d 672 (Fla. 4th DCA 1989) stating:

> We find no basis for application of a contingency risk factor in the instant case because the fee arrangement the appellee had with his attorney was not a pure contingency fee agreement. It was not "nothing or something," it was "something or something." See Country Manor Ass'n v. Master Antenna Systems, Inc., 534 So.2d 1187, 1193 (Fla. 4th DCA 1988) [Id.].

Head is clearly consistent with this Court's decision in Rowe. Finlayson II clearly is not and accordingly, this Court should reject the contingency risk enhancement awarded herein. In so ruling, this Court will find support in Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 483 U.S. 711, 107 S.Ct. 3078 (1987), wherein a divided United States Supreme Court recently held that contingency risk enhancements are not appropriate unless the applicant can show that without such enhancement the prevailing party would have faced substantial difficulties in finding competent local counsel. The Court additionally held that enhancement for the risk of losing a particular case should never be allowed because such risks are adequately addressed in the "lodestar" (i.e., hours multiplied by a reasonable hourly rate) figure. Id. at 3089-3091.

Accord Spell v. McDaniel, 824 F.2d 1380, 1404 (4th Cir. 1987), cert. denied, sub nom. City of Fayetteville v. Spell, __ U.S. __, 108 S.Ct. 752 (1988). Finally, the Supreme Court therein cited with approval such cases as Jones v. Central Soya Co. Inc., 748 F.2d 586, 591-593 (11th Cir. 1984), and Cook v. Block, 609 F.Supp. 1036, 1043-1044 (D.D.C. 1985), for the proposition that a contingency risk enhancement is never appropriate where a plaintiff has agreed to pay its attorney, win or lose, because the attorney has not assumed the risk of receiving no fee for services if the case is lost. Delaware Valley, 107 S.Ct. at 3082.

It is undisputed in the instant case that counsel for the EMTs took this case for a fixed minimum fee of $10,000.00, plus costs which they would receive irrespective of the outcome of the litigation [R-1045-46, Appendix-6]. The additional contingency fees they would potentially enjoy if they won do not change this fact. Accordingly, under Jones and Cook, supra, no contingency risk enhancement was appropriate because the attorneys for the EMTs did not accept the risk of receiving no compensation if the case was lost. See e.g., Welch v. University of Texas, 659 F.2d 531, 535 fn.6 (5th Cir. 1981) (fee was not contingent and no enhancement was appropriate where attorney received $25.00 per month from his client); Murray v. Weinberger, 741 F.2d 1423, 1431 (D.C. Cir. 1984) (fee was not contingent where client had agreed to pay one quarter of counsel fees regardless of the outcome of the case).

Finally, the "lodestar" amount awarded by the trial court must be further revised in any event because it includes compensation for past appellate services in Finlayson I for which attorney's fees

were neither authorized nor awarded by the Fourth District [R-1276, lines **14-19].** This defect is jurisdictional because such an award was beyond the authority of the trial court. Elswick v. Martinez, **394** So.2d 529 (Fla. 3d **DCA 1981).** Accordingly, the attorney's fee award in this case cannot be sustained by this Court and must be remanded for recomputation based upon the above principles.

CONCLUSION

The instant case has now been pending in the courts for nearly nine years. The taxpayers of Broward County have heretofore been held accountable for prejudgment and postjudgment interest on these back overtime claims since 1978 in spite of the fact that the EMTs clearly failed to timely assert such claims or to exhaust available and adequate administrative procedures. This Court should therefore end this charade and reverse and remand the case with instructions for dismissal based upon lack of subject matter jurisdiction.

In the alternative, this Court should reverse the judgments for back wages, interest and attorney's fees and remand the case for a new trial on all issues, including the entitlement of EMTs to overtime after forty hours. The trial court should be instructed to permit all relevant evidence as discussed above to be considered by the jury and should be prohibited from assessing interest on any future back pay award or a contingency risk enhancement of attorney's fees against the County.

Suite 3600
Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2338
(305) 358-5500 (Dade)
(305) 522-0393 (Broward)

MULLER, MINTZ, KORNREICH, CALDWELL,
CASEY, CROSLAND & BRAMNICK, P.A.

By James C. Crosland
James C. Crosland

By
Gordon D. Rogers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner/Appellant with separately bound Appendix has been furnished to Paul R. Regensdorf, Esquire, Fleming, O'Bryan & Fleming, P.O. Drawer 7028, Fort Lauderdale, Florida, 33338, Counsel for Respondent/Appellee, by depositing same in the United States mail, first class postage affixed thereto June 5th, 1989.

Gordon D. Rogers

BRE-077