STATE OF INDIANA	)	LAKE CIRCUIT COURT
	) SS:	CIVIL DIVISION, ROOM B203
COUNTY OF LAKE	)	CROWN POINT, INDIANA

STATE OF INDIANA
Ex rel. TODD ROKITA,
ATTORNEY GENERAL OF INDIANA,

Plaintiff,

v.

CAUSE NO: 45C01-1705-PL-00051

WILLIAM J. PFISTER, RICHARD A. SOPKO, TRAVELLERS INSURANCE COMPANIES, WESTERN SURETY INSURANCE COMPANY, WESTFIELD COMPANIES, and OHIO FARMERS INSURANCE COMPANY

Defendants.

Filed in Open Court

JUL 29 2024

Michael A. Brown
CLERK LAKE CIRCUIT COURT

ORDER ON SUMMARY JUDGMENT

On October 13, 2023, the State of Indiana and the individual Defendants in this case, William J. Pfister and the Estate of Richard A. Sopko, filed dueling summary judgment motions. The State sought summary judgment awarding it purported overpayments made to the Defendants that exceeded the amounts provided for in their written contracts. The Defendants sought to have the State's case dismissed in its entirety. For the reasons discussed below, this Court now grants summary judgment on Defendants' Motion, and denies summary judgment on the State's Motion. Combined with this Court's prior Order on partial summary judgment, the effect is that the State's Complaint against the Defendants is hereby dismissed in its entirety. This is a final, appealable Order.

Findings of Fact

1. On June 8, 2016, the Indiana State Board of Accounts issued a Special Investigation Report (the "Report"), No. B46414, detailing its findings "relating to the salary and benefits of

[School Town of Munster] administrators [William Pfister and Richard Sopko] for the period July 1, 1999 to June 30, 2014." 10/13/2023 Def's Motion at Exhibit A; *Id.* at 3.

2. Within, the Report "request[ed]" that the Mr. Pfister and Mr. Sopko, the Defendants in this matter, "reimburse the School Town of Munster" various purported overpayments that they collected during the course of their employment as Munster School Town administrators, dating back as early as the 1999-2000 school year. *Id.*

3. Specifically, the Report requested the following reimbursements:

i. In the category of "Overpayment of Annuity Starter," $359,728.94 from Mr. Pfister and $311,198.75 from Mr. Sopko (*Id.* at 4-5);

ii. In the category of Cash Bonus in Lieu of Severance Pay," $27,222.50 from Mr. Pfister and $20,365.77 from Mr. Sopko (*Id.* at 6-7);

iii. In the category of "Investment Allotment," $50,351.13 from Mr. Pfister and $33,204.78 from Mr. Sopko (*Id.* at 8-9);

iv. In the category of "Overpayment of Salaries and Stipends," $24,620.18 from Mr. Pfister and $12,255.98 from Mr. Sopko (*Id.* at 10-11);

v. In the category of "Overpayment of Community Relations Activities," $2,000 from Mr. Pfister and $450 from Mr. Sopko (*Id.* at 12-13).

4. After each category, the State Board of Accounts included a series of "findings" upon which it based its request for reimbursement. *Id.*

5. All of the "findings" were based upon what the SBOA considered violations of various provisions of the "Accounting and Uniform Compliance Guidelines Manual for Indiana Public School Corporations." *Id.*

6. There were no provisions of the Indiana Code cited in the findings. *Id.*

7. The Report was signed by State Board of Accounts Field Examiners Mary Jo Small and Karen Tetrault, who attested to its accuracy "to the best of our knowledge and belief." *Id.* at 27.

9. (sic) According to the procedure set forth by statute, the Report was placed with the Office of the Attorney General and on May 23, 2017, the Office filed a Complaint to Recover Public Funds based upon the findings in the Report. *Id.* at Exhibit B at ¶ 4.

10. The Complaint was brought "pursuant to Ind. Code § 5-11-5-1." *Id.* at ¶ 10.

11. Within, the State sought reimbursement for the same damages listed in the Report. *Id.* at ¶¶ 20, 24, 28, 30, 32, 43, 48, 53, 55, 56.

12. Against Defendant Pfister, the State sought an underlying amount of $473,976.07, due to his alleged "malfeasance and misfeasance[.]" *Id.* at ¶¶ 33-35.

13. Against Defendant Sopko, the State sought an underlying amount of $387,528.60, due to his alleged "malfeasance and misfeasance[.]" *Id.* at ¶¶ 58-60.

14. This Court issued a prior Order granting partial summary judgment to the Defendants. *Id.* at Exhibit C.

15. In that Order, this Court held that: (i) the Defendants did not "deviate" from the "plain reading" of their contract provisions regarding the annuity payments category (the basis of the State's claim), and that "extrinsic evidence favors the Defendants' reading"; and (ii) the

Defendants "did not commit malfeasance, misfeasance, or nonfeasance related to the 'genesis' of the language in the contract.'" *Id.* at 27.[1]

16. Vicki Swing has testified that she was hired into the role of payroll specialist by the School Town of Munster in March 2002, near the end of the 2001-02 school year, and held that position until March of 2022. 12/4/2023 Def's Resp. at Exhibit 1 (Swing Dep.) at 7:13-15, 18-19; 8:9-22.

17. In its Motion for Summary Judgment, the State seeks summary judgment on purported overpayments issued to the Defendants in the category Cash Bonuses in Lieu of Severance. State's Mot. at 6-8.

18. Swing testified that Cash Bonus payments were processed by her department, payroll. 12/4/2023 Def's Resp. at Exhibit 1 (Swing Dep.) at 11:11-14.

19. In its Motion, the State seeks summary judgment on purported overpayments issued to Defendants in the category Investment Allotments. State's Mot. at 9-11.

20. Swing testified that Investment Allotment payments were processed by her department, payroll. 12/4/2023 Def's Resp. at Exhibit 1 (Swing Dep.) at 29:11-14.

21. In its Motion, the State seeks summary judgment on purported overpayments issued to Defendants in the category Salaries and Stipends. State's Mot. at 11-12.

22. Swing testified that she processed biweekly payrolls, through which salaries were paid. 12/4/2023 Def's Resp. at Exhibit 1 (Swing Dep.) at 9:2-16.

23. Swing testified that she also processed stipends. *Id.* at 11:15-21.

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[1] The facts and issues related to the annuity payments and Paragraph 10 of the employment contracts are set forth in exacting detail in that Order and elsewhere and, for the sake of brevity, need not be repeated here.

24. In its Motion, the State seeks summary judgment on purported overpayments issued to Defendants in the category Community Activities. State's Mot. at 13-14.

25. Community Activities were included in the payroll records, and regarding all payroll payments, Swing testified:

> **If it ran through payroll, I issued the checks. I ran the payroll. I printed the checks. I handed out the paychecks.**

12/4/2023 Def's Resp. at Exhibit 1 (Swing Dep.) at 50:8-10.

26. Swing testified that she was never told that she could not compare the administrator contracts to the payments:

> **Q: Bill Pfister never told you that you couldn't look at his contract, did he?**
>
> **A: No, he didn't.**
>
> **Q: And Richard Sopko never told you that you couldn't look at his contract, did he?**
>
> **A: No, he didn't.**
>
> **Q: And Karen – the administrative assistant – she never told you you couldn't look at their contract, did she?**
>
> **A: No, she didn't.**

Id. at 68:25-69:9.

27. At all relative times prior to the 2005-06 school year, the School Town used "DOS" software to maintain payroll records. *Id.* at 17:18-20. Compare also 12/4/2023 Def's Resp. Exhibit 2 (Pfister 2004-05 Pay History) to *Id.* at Exhibit 3 (Pfister 2005-06 Pay History).

28. The records for a particular school year contain several pages detailing regular, bi-weekly payments to employees, including Defendants Pfister and Sopko. See 12/4/2023 Def's Resp. at Exhibit 4 (2001-02 Pfister Pay History) at 1-3.

29. Each record also contains several additional pages, each detailing benefits paid to employees separate from their biweekly payroll checks. See *Id.* at 4-7.

30. Swing testified that the "Pay Description" contained on each such page only refers to "the very last amount that was paid at the time you printed the pay history." *Id.* at Exhibit 1 (Swing Dep.) at 24:3-5.

31. By way of example, on Exhibit 4 (2001-02 Pfister Pay History), page 4 contains the "Pay Description" of "Bonus." It also includes three line item payments, a $9,000 payment dated July 6, 2001, a $20,649.90 payment dated December 7, 2001, and a $45,000 payment dated January 12, 2002. *Id.*

32. As explained by Swing, the "Pay Description" of "Bonus" on the page refers only to the last figure, i.e. the $45,000 payment dated January 12, 2002.

33. Swing testified that "there's no way to run a pay history, back in the old DOS system – for it to specifically say what the pay description was for each line item." *Id.* at Exhibit 1 (Swing Dep.) at 24:9-11. See also *Id.* at 25:7:13.

34. By way of example, on *Id.* at Exhibit 4 (2001-02 Pfister History), Swing testified that she was confident that the final figure on page 7 was related to the Investment Allotment category, because the "Pay Description" on the page indicates "Investment." *Id.* at Exhibit 1 (Swing Dep.) at 28:4-10.

35. However, Swing testified that she was not confident regarding the other amounts, because they were entered by her predecessor, Geraldine Thornberry:

> **Q: [I]s it accurate to say you're not as confident that these amounts are related to investment?**
>
> **A: No. I wasn't – that was the person prior to me; so I can't verify what she did.**

Id. at 28:11-17.

> **Q: You don't necessarily know what these first three are for; right?**
>
> **A: That is correct.**

Id. at 29:8-10.

36. Swing did not speak with Thornberry while she was assisting the State Board of Accounts with its investigation to attempt to identify the purpose of each of the payments. *Id.* at 29:2-6.

37. Thornberry died in 2020. Exhibit 5 (Thornberry obituary).

38. Swing testified that she "may have . . . probably" went through the payments with personnel from the State Board of Accounts, but also testified: "I would assume yes, but I really can't clearly remember." *Id.* at Exhibit 1 (Swing Dep.) at 27:22-28:3.

39. Karen Tetrault, the State's field examiner employed by the State Board of Accounts, testified that she made her determinations regarding which amounts from this period could be attributed to which categories by "talk[ing] to somebody," and said that that person was "probably" Swing. *Id.* at Exhibit 6 (Tetrault Dep.) at 149:1-4.

40. Tetrault is unable to independently recall how she made such determinations, aside from "talk[ing] to somebody." See, e.g., *Id.* at Exhibit 6 at 150:16-22.

41. Swing testified that, once she was hired into the role of payroll specialist, she processed payments based upon information provided to her by Defendant Sopko. *Id.* at Exhibit 1 (Swing Dep.) at 29:22-30:20.

42. Swing testified that Sopko occasionally made mathematical or typographical errors in the information he provided to her.

> **Q: [H]e made mistakes from time to time, I take it?**

A: **Yeah. Everybody does.**

Q: **Right.**

A: **I do.**

Q: **. . . [Y]ou never thought they were anything other than honest mistakes, correct?**

A: **Correct.**

Id. at Exhibit 1 (Swing Dep.) at 47:8-16.

43. Swing further testified as follows regarding Defendants Pfister and Sopko:

Q: **Did you ever have any reason to believe that Mr. Pfister or Mr. Sopko were dishonest?**

A: **No.**

Id. at Exhibit 1 (Swing Dep.) at 48:11-13.

44. Although field examiner Tetrault conducted the investigation of the School Town's finances and wrote the initial draft of the report, she testified that the final decision regarding the report's findings did not belong to her.

Q: **And you would make that determination??**

A: **No.**

Q: **Who would make that determination?**

A: **It would go up the chain of command.**

Q: **To Mary Jo Small?**

A: **Yes.**

Id. at Exhibit 6 (Tetrault Dep.) at 26:10-15.

Q: **But out of those financials, you made a determination of malfeasance, misfeasance, or nonfeasance; correct?**

A: **I did not make that. I suggested that. It went up the chain of command.**

Id. at 64:10-14.

45. The State is not going to be calling Mary Jo Small, who actually made the decision, as a witness at trial because it has not been able to reach her. *Id.* at Exhibit 7 (10/11/2023 H. Crockett email to J. Carroll).

Summary Judgment Standard

Summary judgment is appropriate if the designated evidentiary matter shows that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. Ind. Trial Rule 56(c); *Licke v. Long Beach Country Club*, 702 N.E.2d 738, 739 (Ind. Ct. App. 1998). The party moving for summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Hermann v. Yater*, 63 N.E.2d 511, 513 (Ind. Ct. App. 1994). Once the movant meets these two requirements, the burden shifts to the on-moving party to set forth specially designated facts showing the existence of a genuine issue for trial. *Id.* Finally, Indiana courts follow the standard established in *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014), which requires defendants "to affirmatively 'negate an opponent's claim'" in order to secure summary judgment.

ANALYSIS

I. The State Has Not Identified a Legally Actionable Duty That Defendants Failed to Carry Out Such That an Action for "Nonfeasance" Could Advance to Trial

Regarding the various amounts that it continues to pursue[2], the State concedes that it does not allege intent on the part of either of the individual Defendants. See 12/4/2023 Plaintiff's

[2] The State acknowledged at oral argument that it considers the matter of "annuity" payments, pursuant to Paragraph 10 of the Defendants' employment contracts, to be settled before this Court in Defendants' favor based upon this Court's prior Order on summary judgment.

Response at 10-11. Rather, the State's remaining claims are grounded solely in what it terms "nonfeasance," drawing from the language of I.C. § 5-11-5-1. Setting aside for a moment the issue of whether "nonfeasance" is actually a stand-alone cause of action at all, a notion that the Defendants have challenged and this Order addresses below, the State cites Indiana's Supreme Court as defining the term as "the omission of an act which a person ought to do[.]" 12/4/2023 Plaintiff's Response at 2-3 (citing *State ex rel. Ayer v. Ewing*, 106 N.E.2d 441 (Ind. 1952)). The State also quotes from the online Merriam Webster dictionary, which similarly states that "nonfeasance" is "failure to do what ought to be done." *Id.* Here, the "act," i.e. what the Defendants "ought to" have done, the State argues, is to *affirmatively* ensure that they were not overpaid pursuant to their written employment contracts. *Id.* at 4 ("The nonfeasance here is as simple as they were overpaid – regardless of what their actions were.") No such burden exists in Indiana employment law, however, and all of the State's claims to claw back purported overpayments fail as a result.

According to the State, the duty is established by way of two sources, a nearly 300-page guidebook known as the Indiana 2010 Combined Manual and a statute, I.C. § 22-2-6-4. The Court will first address the statute. I.C. § 22-2-6-4 is a wage offset statute providing employers a mechanism by which they may recoup the accidental overpayment of wages. First, the State cannot either secure or defeat summary judgment based upon this provision for the very simple reason that it never identified it as a ground for its Complaint until it submitted its Motion for Summary Judgment on October 13, 2023. By that time, discovery in this case had been closed for some time. As indicated in the Defendants' opposition to that motion, the State did not identify the provision as a basis for recovery, despite being directly asked by Defendants to "identify the source of the elements" for its claim, "i.e. a specific statute, regulation, or published Indiana court decision." 12/4/2023 Def. Resp. at 16, n.4. This being the case, it has long since waived its ability to try the case on that basis, as this would prejudice the Defendants who did not have the opportunity to pursue potential defenses by way of the discovery process. See *Hilliard v. Jacobs*, 927 N.E.2d 393, 400 (Ind. Ct. App. 2010) (stating that "tactic of asserting new theories of recovery only after the original claims have proven unsound would place an undue burden on [defendant] to defend such piecemeal litigation and would result in potentially endless 'bites at the apple.'").

Second, substantively, I.C. § 22-2-6-4(a) is not applicable here anyway. It establishes that "[i]f an employer has overpaid an employee, the employer may *deduct from the wages* of the employee the amount of an overpayment." (emphasis added.) This grants an employer a very specific right – to "deduct from the wages" an overpayment. It does not grant an employer a legal cause of action extending indefinitely into the future, even after an employee's employment ceases, to recover those funds. The statute also states that "[a]n employer must give an employee two (2) weeks notice before the employer may deduct, under this section, any overpayment of wages from the employee's wages." *Id.* While it may frustrate the State that there is no mechanism built into the statute to provide for recovery of overpayments to *past* employees, it is axiomatic that it is not within the scope of this Court's authority that it may extend the statute to places the legislature has elected not to venture. See *Campbell v. State*, 716 N.E.2d 577, 579 (Ind. Ct. App. 1999) ("Where the language of a statute is clear and plain, there is no room for construction, and this court has no power to limit or extend the operation of the statute by reading into it language which will, in our opinion, correct any supposed defects or omissions therein."). To the extent that the State seeks to recoup the payments based upon I.C. § 22-2-6-4, the State's Motion is denied and the Defendants' Motion is granted. The State's remaining claims are extinguished.

Regarding the Combined School Manual, this is clearly intended to be a "best practices" guide that, by its own terms, addresses Indiana local school boards. See 10/13/2023 State's Motion at Exhibit 32, p. 1 ("Part I, Introduction"). By its own explicit terms, at the top of page 1, it announces that it is *not* legal authority:

> **The information contained herein is intended to assist you and does not represent legal advice, or a legal opinion, references to statutes or other authoritative materials may not be all inclusive.**

Nonetheless, the State has argued that the Manual establishes that "[p]ublic officials and employees have a duty to ensure that they are not overpaid." State's Mot. at 8. The language that the State relies upon, contained within Section 9-5 of the Manual, reads:

> **Payments made or received for contractual services should be supported by a written contract. Each governmental unit is responsible for complying with the provisions of its contracts.**

The Defendants were employees. They were not "governmental unit[s]." The *School Town of Munster* is a governmental unit. Even if one accepts for the sake of argument that the Manual has the force of law, via its mention in I.C. § 5-11-5-1, it seems to accomplish the exact *opposite* of the reading purported by the State, placing the onus on each "governmental unit" to comply with the contracts that it enters, rather than the parties that it contracts *with*, such as employees.

As the State has noted, § 5-11-5-1 does incorporate the Combined Manual, via its instruction that a finding critical of an entity must be based upon: "(1) [a f]ailure of the entity to observe a uniform compliance guideline established under IC 5-11-1-24(a)[;] (2) [f]ailure of the entity to observe a specific law." Again, this portion of the statute addresses entities, not individuals. This tracks with the Manual's express address of entities, as opposed to employees. It is also notable that this portion of the statute addresses findings "critical" of an entity – a State Board of Accounts report can certainly be "critical" without being actionable in a court of law. To the extent that the State seeks to recoup the payments based upon the Combined School Manual, or its mention within § 5-11-5-1, the State's Motion is denied and the Defendants' Motion is granted.

Notably, when directly asked during the discovery process to identify specific acts by the Defendants qualifying as "nonfeasance," the State identified only conduct occurring contemporaneously during the payment process. In other words, the State identified "calculating" or "receiving" overpayments as actions from which sprung a right for the State to seek recovery on behalf of the School Town. In its Motion for Summary Judgment, however, the State wrote that the "nonfeasance" occurred "once [the Defendants] were made aware of the overpayments[,]" and did "not return the funds[.]" State's Motion at 1. At argument, the State clarified that it was specifically referring to the issuance of the State Board of Accounts Special Investigation Report in 2016. As with the State's identification of I.C. § 22-2-6-4 as a basis for recovery, the State has waived any right to proceed to trial on the basis of this particular act by not identifying it during the discovery process, despite being directly asked to do so. (In its Reply brief in support of its Motion, the State seemed to infer that Defendants were arguing that the State never identified "nonfeasance" at all. That is not the case: Defendants argued that the State never identified the particular act of nonfeasance it now alleges, i.e. a failure to return funds once presented with the Report.)

Further, it suffers from the same fatal defect as the State's identification of contemporaneous actions related to purported overpayments – there is simply no existing "duty" in Indiana law to "return the funds once they were made aware of the overpayments." State's Motion at 1. If the State believes this is unfair or some kind of glaring loophole in the law, its recourse is with the legislature, not the courts. This Court will not fashion new duties that do not exist in the current state law. Finally, the State cannot fashion an act of "nonfeasance" by deeming actions (or non-actions) that follow the receipt of the Special Investigation Report itself the act of "nonfeasance." The statute, I.C. § 5-11-5-1 is clear that the Office of the Attorney General is *only* enabled to act upon acts of "malfeasance, misfeasance, or nonfeasance" identified by the State Board of Accounts examiner. By definition, those acts would have occurred *prior to* the issuance of the report, not *subsequent to* the issuance of the report.

In sum, the State has not identified a source establishing the sole "duty" that it alleges the Defendants have violated, the duty "to ensure that they are not overpaid." On this basis, the State's motion for summary judgment is denied, and the Defendants' motion is granted. The State's remaining claims are extinguished.

II. <u>I.C. § 5-11-5-1 is an Enabling Statute and is Directed at the State Board of Accounts and the Office of the Attorney General, Not State Employees</u>

As discussed above, in summary judgment briefing and in argument, the State identifies two sources of the "duty" it alleges that the Defendants ran afoul of that would obligate them to re-pay alleged overpayments made pursuant to their written employment contracts. Both arguments fail. To the extent that the State continues to argue that the law provides it with a general cause of action for "nonfeasance," that argument *also* fails. Section 5-11-5-1 of the Indiana Code is an enabling statute, pure and simple, that is directed toward various State actors to bring actions against public officers that fall into various *categories*, i.e. "malfeasance, misfeasance, or nonfeasance." It is not directed at employees. By its plain reading, § 5-11-5-1 sets forth the *process* by which the State may bring an action to recover public funds.

The Complaint to Recover Public Funds was brought "pursuant to Ind. Code § 5-11-5-1." Compl. at ¶ 10. Further, in Interrogatories issued June 29, 2022, the Defendants requested that the

State identify "the cause or causes of action that the State of Indiana is proceeding under regarding each of the following damages categories:

(a) **Annuity Starter (Paragraphs 20 and 43 of the Complaint to Recover Public Funds);**

(b) **Cash Bonus (Paragraphs 24 and 48 of the Complaint to Recover Public Funds);**

(c) **Investment Allotments (Paragraphs 28 and 53 of the Complaint to Recover Public Funds);**

(d) **Salaries and Stipends (Paragraphs 30 and 55 of the Complaint to Recover Public Funds);**

(e) **Community Relations Fringe Benefit (Paragraphs 32 and 57)."**

10/13/2023 Def's Motion at Exhibit H at 7. In its Responses dated September 19, 2022, the State (acting through the Office of the Attorney General), identified §§ 5-11-5-1(a) and 5-11-5-1(e) of the Indiana Code. *Id.* at 7-9. The first subsection cited, (a), establishes that "[i]f an examination [performed by the state examiner, as here] discloses malfeasance, misfeasance, or nonfeasance in office or of any officer or employee . . . [t]he attorney general shall diligently institute and prosecute civil proceedings against the delinquent officer or employee[.]" The second subsection cited, (e), merely sets forth the mechanism by which a report makes its way from the state examiner, to the Office of the Attorney General, and onto a civil court docket.

Regarding subsection (a), the terms "malfeasance, misfeasance, or nonfeasance" are not defined within the statute, and, in fact, these are the kind of technical legal terms that Article 4, Section 20 of the Indiana Constitution seeks to bar from legislative acts: "Every act and joint resolution shall be plainly worded, avoiding as far as practicable, the use of technical terms." See *Armes v. State*, 191 N.E.3d 942, 952 (Ind. Ct. App. 2022). Karen Tetrault, the State's field examiner in this matter who made the determinations that were eventually adopted into the report, was unable to define any of the three terms that she utilized:

> **Q:** **[H]ow do you define malfeasance?**
>
> **A:** **As – misappropriation of funds would be one.**
>
> **Q:** **Well, that's an example, but what is your – do you have a definition that you use[?]**
>
> **A:** **No. . . .**
>
> **Q:** **So how do you determine –**
>
> **A:** **If there's money missing, basically we consider that malfeasance. . . .**
>
> **Q:** **Do you have a definition that you use for what misfeasance is?**
>
> **A:** **No.**
>
> **Q:** **Do you have a definition that you use for what nonfeasance is?**
>
> **A:** **No.**

10/13/2023 Def's Motion at Exhibit D at 31:6-32:8. See also *Id.* at 35:17-23.

> **Q:** **Have you ever asked for a definition?**
>
> **A:** **No.**

Id. at 36:4-5.

> **Q:** **What does nonfeasance mean?**
>
> **A:** **Are we back to that again?**
>
> **Q:** **I didn't bring it up. Do you know what nonfeasance means?**
>
> **A:** **No.**

Id. at 131:9-13.

A statute is unconstitutionally vague "if it does not make clear what conduct is prohibited and/or required." *Indiana Dept. of Environmental Mgmt. v. Chemical Waste Mgmt., Inc.*, 643

N.E.2d 331, 338 (Ind. 1994). "A law must provide adequate notice of its import to those *at whom it is directed.*" *Id.* (emphasis added.) See also *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). As discussed above, the Report *does* identify several "guidelines" from the Uniform Compliance Guidelines Manual that it believes the Defendants have crossed. But these certainly do not provide a cause of action, beginning with the reasons already discussed, above. But to this Section's point, as the basis of a Complaint, those are undoubtedly void for vagueness. (Example: "Every effort should be made by the governmental unit to avoid unreasonable or excessive costs.")

In *Grayned*, cited above, the United States Supreme Court articulated precisely why the void-for-vagueness doctrine is so vital to due process concerns:

> **Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.**

408 U.S. at 108-10.

In its Response to Defendants' Motion, the State cited *Nuedecker v. Nuedecker*, 566 N.E.2d 557, 562 (Ind. 1991), for the proposition that "[m]eticulous exactitude and absolute precision are not required in drafting statutes." However, *Nuedecker* actually illustrates the Defendants' point perfectly, regarding the difference between an enabling statute and one aimed at potential defendants themselves. In that case, a father challenged a statute providing a trial court with discretion regarding child support determinations on the ground that it was unconstitutionally void for vagueness. The Court of Appeals explained that a statute is not vague "if the provisions under scrutiny extend fair notice of their import *to those to whom the statute is directed*." *Id.* (emphasis in original). "Simply because" the father in that matter "does not know how a trial court will exercise its discretion does not mean the statute is unconstitutionally vague." *Id.* After all, under the statute, [the father] is required to do nothing." *Id.* Ultimately, the court determined that the statute was not vague, because "the statute provides sufficient guidelines for a *trial court* to exercise its discretion in accordance thereto." *Id.* (emphasis in original).

Similarly, here, the relevant question regarding whether I.C. § 5-11-5-1 is facially constitutional would be whether the *State* can determine which particular laws bar conduct that could be described as "malfeasance," "misfeasance," and/or "nonfeasance," which it would then be able to rope in to provide it with a means of recoupment. It appears that the State believes itself capable of this – it provides multiple definitions of "nonfeasance," one from the case *State ex rel. Ayer v. Ewing*, 106 N.E.2d 441 (Ind. 1952), and another from the Merriam Webster Online Dictionary, which says it is the "failure to do what ought to be done." Resp. at 2-3. If the statute were to be directed at the *Defendants*, however, it is undoubtedly unconstitutionally vague, as applied. (This is a vital point the State seems to miss – the Defendants do not ask this Court to take the massive step of striking down a state statute that has been utilized for a century-plus. They argue that it is being *applied* in an unconstitutional and what seems to be new and novel manner.) The fact that "nonfeasance" has a dictionary definition does not change any of this. "It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct' or 'reprehensible conduct.'" *Giaccio v. State of Pa.*, 382 U.S. 399, 404 (1966). "If used in a statute which imposed forfeitures, punishments or judgments for costs, such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause." *Id.* See also *Soglin v. Kauffman*, 295 F.Supp. 978, 984 (W.D. Wisc. 1968) ("A federal, state, or local statute, ordinance, regulation, order or rule, subjecting one to imprisonment or fine or other serious sanction for 'misconduct' would surely fall as unconstitutionally vague.").

Because § 5-11-5-1 is an enabling statute, directed at State agencies, which provides the *process* by which the Office of the Attorney General may pursue misappropriated funds, the State's claims fail for that reason, as well. To the extent that § 5-11-5-1 *is* directed at employees, it is unconstitutionally void for vagueness, as applied here. For these additional reasons, the State's remaining claims are dismissed, and summary judgment is granted on Defendants' Motion and denied on the State's Motion.

III. <u>The State Cannot Recover Several Amounts It Seeks Issued Prior to March 2003 Because It Admittedly Cannot Identify the Category of the Amounts</u>

Portions of the State's claims fail for another reason, as a matter of law – there is no factual dispute that it is unable to identify, based upon the record evidence, the category of particular payments. Among its claims, the State seeks $49,439.75 from Defendant Pfister that was paid out prior to March 2002. It seeks $3,891.58 from Defendant Sopko that was paid out prior to March 2002 that cannot be properly identified, per the State's own witness. The date is significant because it is when testifying payroll specialist Vicki Swing was hired. According to her own testimony and due to the nature of the School Town's prior payroll tracking software, she cannot identify the purpose of the majority of the payments issued prior to that date, under her predecessor. See 12/4/2023 Def's Response Exhibit 1 (Swing Dep.) at 24:3-5, 9-11; 25:7-13; 28:4-10, 11-17; 29:8-10. As explained in the facts section, above, the "Pay History" records prior to the 2005-06 school year do not identify the category or purpose of most payments, and Swing cannot verify the category or purpose of those payments prior to her arrival. Swing also testified that she did not speak with her predecessor in the job, Geraldine Thornberry, prior to Thornberry's death in 2020 for any assistance in identifying the purpose of any payments. *Id.* at 29:2-6.

For Defendant Pfister, the amounts sought include the following:

- For the 1999-2000 school year, the State seeks $6,452.95 identified in the "investment allotment" category. However, that amount, paid on September 17, 1999 as part of a $17,286.70 payment, is included on a page identified as "Bonus." See 12/4/2023 Def's Response Exhibit 12 (Tetrault 1999-2000 Pfister worksheet); see also *Id.* at Exhibit 13 (Pfister 1999-2000 Pay History) at 4. Its purpose, per Swing's own testimony, is not identifiable. Even if this Court were to find that the State has a theoretically viable cause or causes of action to recover this amount (and, as held above, it does not), and even if this Court were to hold that recovery of this amount is not foreclosed by the statute of limitations, this Court denies summary judgment to the State and grants it in favor of Defendants regarding the $6,452 identified as an improper "investment allotment," because it cannot confirm the purpose of the amount. In other words, the State is foreclosed from pursuing that amount.

- For the 1999-2000 school year, the State seeks $1,152.18 identified in the "salary and stipend" category. However, that amount, paid on June 9, 2000, is included on a page identified as "Bonus." See 12/4/2023 Def's Response at Exhibit 12; See also *Id.* at Exhibit 13 at 4. Its purpose, per Swing's own testimony, is not identifiable. This Court therefore denies summary judgment to the State and grants it in favor of Defendants regarding the $1,152.18 identified as an improper "salary and stipend," because it cannot confirm the purpose of the amount. In other words, the State is foreclosed from pursuing that amount.

- For the 2000-2001 school year, the State seeks $8,003.86 identified in the "investment allotment" category. However, the amounts are not identified as such in Pfister's "Pay

History" for that year. According to Tetrault's work papers (12/4/2023 Def's Response at Exhibit 14 (Tetrault 2000-01 Pfister worksheet)), the amount was included within a $5,529.54 payment issued on November 10, 2000, and a $19,000 payment issued on July 7, 2000. The $5,529.54 payment is included on a page identified as "Bonus." *Id.* at Exhibit 15 (Pfister 2000-01 Pay History) at 4. The $19,000 payment is included on a page identified as "Public Relations." *Id.* at 6. The purposes of these amounts, per Swing's own testimony, is not identifiable. This Court therefore denies summary judgment to the State and grants it in favor of Defendants regarding the $8,003.86 identified as an improper "investment allotment," because it cannot confirm the purpose of the amount. In other words, the State is foreclosed from pursuing that amount.

- For the 2001-2002 school year, the State seeks $33,830.76 identified in the "investment allotment" category. However, the amounts are not identified as such in Pfister's "Pay History" for that year. According to Tetrault's work papers (12/4/2023 Def's Resp. at Exhibit 16 (Tetrault 2001-02 Pfister worksheet)), the amount was included within an $870 payment made on January 18, 2002, a $23,000 payment made on April 12, 2002, and a $26,950 payment made on July 6, 2001. The $870 is included on a page identified as "Investment," but not as the last entry on the page, as it must be, per Swing's testimony. *Id.* at Exhibit 17 (Pfister 2001-02 Pay History) at 7. It was also issued prior to her hire, making the purpose of the payment, per Swing's own testimony, unidentifiable. The $26,950 payment is included on a page identified as "Public Relations." *Id.* at 6. It was also issued prior to Swing's hire, making the purpose of the payment, per Swing's own testimony, unidentifiable. This Court therefore denies summary judgment to the State and grants it in favor of Defendants regarding all but $6,010.76 of the $33,830.76 sought, i.e. the $23,000 identified as an investment allotment on the Pay History (*Id.* at 7), minus the

$16,989.24 that the State argues was actually due to Pfister per his written contract. In other words, the State is foreclosed from pursuing $27,820 of the amount at trial.

For Defendant Sopko, the amounts sought include the following:

- For the 2000-2001 school year, the State seeks $2,215.78 identified in the "investment allotment" category. However, that amount, paid on November 10, 2012, is included on a page identified as "Public Relations." See 12/4/2023 Def's Resp. at Exhibit 19 (2000-01 Tetrault Sopko worksheet); see also *Id.* at Exhibit 20 (2000-01 Sopko Pay History) at 5. Its purpose, per Swing's own testimony, is not identifiable. Regardless of its decision regarding recoverability, generally, this Court denies summary judgment to the State and grants it in favor of Defendants regarding the $2,215.78 identified as an improper "investment allotment, because it cannot confirm the purpose of the amount. In other words, the State is foreclosed from pursuing that amount for the same reason.

- For the 2001-02 school year, the State seeks $1,675.80 identified in the "investment allotment" category. However, that amount, paid on July 6, 2001, is included on a page identified as "Bonus – Severance." See 12/4/2023 Def's Response at Exhibit 21 (2001-02 Tetrault Sopko worksheet); see also *Id.* at Exhibit 22 (2001-02 Sopko Pay History) at 6.

Regarding Defendant Pfister, the State is therefore foreclosed from pursuing $43,428.99 of $49,439.75 that it seeks for payments that were issued prior to the date of Karen Tetrault's hire as the School Town's payroll coordinator in March 2002. Regarding Defendant Sopko, the State is foreclosed from pursuing $3,891.58 described above for the reasons discussed above.

IV. Summary Judgment Should Be Denied on a Purported $9,381 Overpayment to Defendant Sopko Because It is Not Supported in the "Pay History" Apparently Referenced

Even if this Court were to provide the State the benefit of the doubt regarding the "Pay History" amounts referenced as unprovided Exhibits 33 and 34, it cannot obtain summary judgment regarding $9,381.00 from Defendant Sopko in the category "Investment Allotments." That "Pay History" for the 2013-14 school year does not include an amount for $17,143.15 as purported by the State. State's Mot. at 10. See 12/4/2023 Def's Resp. at Exhibit 18 (2013-14 Sopko Pay History). Even if this Court were to hold in the State's favor on all other issues set forth in its Motion, it should deny summary judgment regarding the $9,381.00 because the documents that the State appears to reference contain no support for the amount sought.

CONCLUSION

For the reasons discussed above, this Court grants summary judgment to the Defendants in full, and all claims against the individual Defendants in this matter are now dismissed. Likewise, the Court denies summary judgment sought by the State. Any remaining factual disputes regarding whether the amounts did or did not constitute overpayments, are rendered moot by this Order, as the State simply has not set forth any actionable ground for recovery of the amounts, regardless.

SO ORDERED THIS 29 **DAY OF** July **, 2024.**

JUDGE MCDERMOTT, LAKE CIRCUIT COURT

Distribution: All parties of record