

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

**PATRICK CHAVEZ, JEANNINE CHAVEZ,
RUDY CAMPOS, MICHAEL COCCHIOLA,
and FORTINO ORTEGA**

**on behalf of themselves and all other
City employees who have been paid
overtime that was improperly determined
under 29 U.S.C.A. § 207(a)(1) (Section
7(a)(1) of the Fair Labor Standards Act),**

CIV 02-0562 JH/ACT

Plaintiffs,

v.

CITY OF ALBUQUERQUE

Defendant.

**DEFENDANT CITY'S
REVISED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

FINDINGS OF FACT

1. The City of Albuquerque is a municipality and public employer which provides various services to its citizens through the City's employees. A number of City employees are represented by labor unions and covered by Union contracts. (Plaintiffs' Exhibits 1 through 7.) These contracts establish various terms and conditions of employment. Some of the terms and conditions of these contracts exceed the requirements of the Fair Labor Standards Act as will be discussed below. (Ibid.)
2. The City of Albuquerque pays its employees under established payroll procedures through its Empath System. The Empath System followed the prior Ross System which was provided by the same vendor. (Trial Transcript at 127.) The pay stubs given to

employees with their pay represent summary totals of their pay amount for a biweekly period. The pay stubs do not include the back up calculations. (Trial Transcript at 87.)

3. Under the Empath System, two separate and distinct calculations are made. The first calculation is made under the respective union contracts according to their terms relative to contractual overtime. Pay that is not for hours worked such as vacation, holiday, etc. is included in determining overtime eligibility under the Union contract. Overtime payments are also made for certain days as such and for work beyond an employee's regular schedule. (Union Exhibits 1 through 7) (Trial Transcript at 95, 140, 141). The second calculation is made on a weekly basis under the Fair Labor Standards Act pursuant to its terms. Under the second calculation all non-discretionary bonuses are included in determining the regular rate for statutory overtime. Only compensation for actual hours worked is included in the FLSA regular rate calculation. All nondiscretionary bonuses are included in this FLSA calculation. (Trial Transcript at 83, Defendant's Ex. B.) Pay that is not for hours worked such as vacation, holiday and sick pay is not included in the FLSA regular rate calculation. (Trial Transcript at 92, 93, 104.)
4. The Empath System pays the employee the higher of the two separate calculations and never pays the employee less than the highest figure. If the contractual figure is higher due to contractual overtime payments, then the employee is paid that figure. (Plaintiffs' Ex. 12.) If the FLSA calculation is higher, then the employee receives the full FLSA calculation amount. The difference between the contractual payment and the FLSA payment is shown as an FLSA adjustment which is reflected on the employee's pay stub. (Trial Transcript at 92, 105, 137; Plaintiffs' Ex. 12; Defendant's Ex. B.) Specifically, the City's payroll supervisor, Laurice Chappell, testified as follows:

We do two separate calculations. One calculation is to the FLSA Act, which includes worked time. And we do a separate calculation for the collective bargaining agreement. We then do a comparison between the two. And if the employee has come up short, we give them the extra money . . .

If the comparison shows that the collective bargaining calculation has paid more, no adjustment is done and the employee does not get docked.

(Trial Transcript at 92-3.)

5. Under the Empath System, the City takes credit for contractual premium payments such as overtime for working beyond shift hours or court appearances by paying the contract earnings when those are higher than the FLSA required payment. (Trial Transcript at 140-141; Plaintiffs' Ex. 12; Defendant's Ex. B.)
6. The Union contracts provide for numerous overtime payments which are not required under the FLSA such as:
 - a. overtime pay for work beyond the regular schedule (Trial Transcript at 76, 140, 141);
 - b. overtime pay for working on a holiday (Plaintiffs' Exhibits 1-7);
 - c. overtime pay for off shift court appearances for police officers (Plaintiffs' Ex. 7; Trial Transcript at 43);
 - d. overtime pay caused by counting unworked days as hours worked for contractual overtime eligibility (Plaintiffs' Exhibits 2, 3, 4, 6, 7).
7. The Union contracts provide compensation for unworked days such as holidays, vacation time and sick time during which periods the employees are not scheduled and do not perform work. (Plaintiffs' Exhibits 1A, B, C; 2A, B, C; 3A, B, C; 4A, B, C; 5A, B, C; 6A, B, C; 7A, B, C.) If employees perform work on holidays, they receive premium compensation under their respective union contracts. (Ibid.)

8. Police officers receive overtime compensation, inter alia, for hours worked above 40 in a week. The Police Department has adopted a seven-day work period under § 7(k) of the Fair Labor Standards Act under which overtime is due after 43 hours per week. (Plaintiffs' Exhibit 7A, B, C § 34; Trial Transcript at 95.) Plaintiff Todd Endres testified that Section 34 is "what the federal law says." (Trial Transcript at 47.)
9. The Fire Department follows a 24-day work period under § 7(k) under which overtime is due after 182 hours. (Trial Transcript at 123, 124.) FLSA calculations for the fire department's non-exempt employees are based upon a 24-day work period. (Trial Transcript at 124.) No evidence was introduced reflecting whether any Fire Fighters, including exempt employees worked in excess of 182 hours in a 24-day work period.
10. A separate FLSA calculation is not made for police law enforcement employees because the City's payroll department has determined that such employees always receive more under the union contract than is required under the Fair Labor Standards Act. (Trial Transcript at 99.) One of the reasons for this conclusion is that police employees receive overtime under the union contract after 40 hours even though overtime is not required under Section 7(k) of Fair Labor Standards Act until after 43 hours in a seven-day work period. The City's payroll supervisor has reviewed police employee payroll records to be sure that such employees always receive more compensation under their union contract than the FLSA. City witness Laurice Chappell testified:

I monitor the police to make sure that they are paid their extra payments because they have so many who have not gotten anywhere near the threshold for coming up to the 43-hour requirement

When we do the outside-the-system FLSA, we do. We do include them (non discretionary bonuses) to make sure that we

have not fallen within the area where the police would not receive full FLSA payments.

(Trial Transcript at 97, 98.)

11. None of the Plaintiffs who testified have asked the City about their compensation even if they didn't understand the calculation. (Trial Transcript at 31.) Employees who do not understand their pay can talk to their supervisors, to central payroll personnel, department directors or Human Resources. (Trial Transcript at 86, 87.)
12. Plaintiff Chavez talked to the Union and its attorney about his compensation and served as a union official but the firefighter union contract was never changed relative to his complaints. (Trial Transcript at 79, 80) (Plaintiffs' Exhibits 4A, 4B, 4C). Former Police Officer Todd Endres also spoke to the police union president and the union attorney. (Trial Transcript at 48.) There was no mention of any action taken by the Union as a result of those meetings.
13. Laurice Chappell is the City employee with responsibility for the City's payroll administration and its compliance with the Fair Labor Standards Act. (Trial Transcript at 82.) She is a certified payroll professional and understands the Fair Labor Standards Act. She has been a payroll supervisor at the City and in private industry for twenty years and has attended seminars on the FLSA as part of her continuing education requirements. She receives publications on the Fair Labor Standards Act. (Trial Transcript at 120-122.)
14. Ms. Chappell testified as to the two separate calculations by the City, one under the union contract and one under the FLSA and prepared exhibits reflecting the calculations. These exhibits were based upon the actual hours worked and pay received by City employees. (Trial Transcript at 127-138) (Defendant Exhibit B) (City's Motion for Reconsideration, docket 252). Where the FLSA calculation indicates a higher amount than the contract

calculation, the employee receives the FLSA calculation. (Trial Transcript at 138) (Plaintiffs' Ex. 10, Defendant's Ex. B).

15. The biweekly pay stubs introduced by Plaintiffs did not identify the hours worked per week or in which week overtime was worked or how many hours were worked in each week or in which week benefit time was taken or how much time was taken. (Trial Transcript at 93; Plaintiffs' Exhibits 8-11.) Plaintiffs' witnesses were unable to clarify these omissions. (Trial Transcript at 28, 44, 57.) Plaintiff Endres could not state how many of his Metro Court hours were actually worked because he is guaranteed two hours of pay and his actual time in court can be less. (Trial Transcript at 44.)
16. The pay stub of Plaintiff Cartwright reflects an FLSA overtime adjustment. Such adjustments are made when the FLSA calculation is higher than the Union contract calculation. (Trial Transcript at 137.) Mr. Cartwright had received an FLSA adjustment in the past. (Defendant's Ex. B.) He never asked what the FLSA adjustment meant because it was not a negative figure. (Trial Transcript at 59.)
17. The City's Union contracts provide for overtime compensation for certain hours worked without regard to whether the applicable Fair Labor Standards Act standard has been exceeded. (Trial Transcript at 43; Plaintiffs' Exhibits 1 through 7.)
18. Plaintiffs offered no evidence that a grievance or prohibited practice charge had ever been filed under any of the seven collective bargaining agreements between the City and its unions or the Municipal Bargaining Ordinance, respectively, over the subject of overtime compensation. No union officers or officials who served during the period covered by the lawsuit testified in this case, nor did any union intervene in the case.

19. Patrick Chavez, a firefighter lieutenant who directs four employees in the alarm office and occasionally works as a paramedic lieutenant, receives overtime at time and one half his base rate rather than the regular rate under the Fair Labor Standard Acts because he has been classified by the City as exempt under the Fair Labor Standards Act. (Trial Transcript at 100.)
20. Under the Union contracts employees receive their regular pay for time not worked such as holidays, sick time and vacations. (Plaintiffs' Exhibits 1-7.) The Plaintiff witnesses testified they do not work on such days unless specifically scheduled. (Trail Transcript at 33, 58.)
21. Plaintiff Chavez testified he could sell back excess sick and vacation time which was above accrual levels or he would lose the benefit time. (Trial Transcript at 66, 67.) The last time he sold benefit time was a long time ago. (Trial Transcript at 68.) Plaintiff Chavez testified he does not know how he is classified but he does receive overtime payments at time and one half his base rate. (Trial Transcript at 65, 75, 76.) He did not testify as to whether he works statutory overtime.

CONCLUSIONS OF LAW

1. The City of Albuquerque is a public employer or public agency within the coverage of the Fair Labor Standards Act. (29 U.S.C. § 203).
2. City of Albuquerque employees who are not otherwise exempt under the Fair Labor Standards Act are subject to the overtime provisions of the Act as set forth in Section 7. (29 U.S.C. § 207).
3. City employees other than those public safety employees covered by Section 7(k) of the Fair Labor Standards Act, are subject to the 40-hour per week overtime standard of Section 7(a). (29 U.S.C. § 207 (a)).

4. Public Safety employees of the City employed as fire protection or law enforcement personnel are subject to § 7(k) of the Act (29 U.S.C. § 207 (k)) which provides a liberalized overtime standard for work periods of 7 to 28 days. Lamon v. City of Shawnee, 972 F.2d 1145 (10th Cir. 1992), cert. denied, 507 U.S. 972 (1993). Section 207(k) “gives employers of fire protection and law enforcement personnel greater leeway in structuring wage and time calculations.” (Id. at 1153.) The Section 7(k) period chosen need not coincide with the payroll period. (Id. at 1151-2; see also 29 C.F.R. § 553.224.) The fact that the public employer may choose to pay overtime under a union contract on a more favorable basis to employees does not negate the employer’s ability to select § 7(k) coverage and be governed under the Fair Labor Standards Act by that coverage. (Id. at 1152, n8.) “There is nothing improper about a state or local government employer adopting the subsection (k) framework in order to take advantage of the subsection’s provisions.” (Id. at 1152.)
5. The burden of proof to establish a violation under the Fair Labor Standards Act is on the Plaintiffs to show that they have not received overtime compensation as required by the Act. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946). This burden requires that Plaintiffs provide evidence as a matter of just and reasonable inference that they were improperly compensated. (Id. at 687-8.)
6. The Fair Labor Standards Act requires employees to be paid overtime compensation for all hours worked over 40 in a work week unless they are subject to the liberalized standard of Section § 7(k) which is applicable to law enforcement and fire protection employees. (29 U.S.C. § 207(a), § 207(k).) Under § 7(k) the overtime standard for law employment personnel for a seven-day work period is 43 hours and the overtime standard

for fire protection employees for a twenty-four day work period is 182 hours. (29 C.F.R. § 553.230.) See also Ball v. City of Dodge City, 67 F.3d 897 (10th Cir. 1995) (affirming partial summary judgment for city where court found that although Act had not yet taken effect for payments in question, the city “properly exploited” employer-favorable overtime provisions under § 207(k)).

7. Paid but unworked time does not count toward overtime entitlement under the Fair Labor Standards Act. (29 U.S.C. § 207(e)(2).) Payments made under union contracts for time not worked are not subject to FLSA (29 U.S.C. § 207 (h)).
8. Premium payments made to employees under an employer’s policy or a union contract are excluded from the regular rate under Sections 7(e)(5)(6) and (7) which provide as follows:

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee’s normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

9. The premium payments described in paragraph 8 above can be taken as a credit by the Employer against its overtime liability under the Act pursuant to § 7(h)(2) of the Act. (29 U.S.C. § 207(h)(2).)
10. Whether the City of Albuquerque has violated any of its union contracts by its payment of overtime under those contracts is not before the Court.
11. A collective bargaining agreement cannot alter an employer's obligations under the Fair Labor Standards Act. Lamon v. City of Shawnee, *supra*.
12. The City of Albuquerque has calculated overtime compensation due under the Fair Labor Standards Act correctly under its Fair Labor Standards Act calculation. Ball v. City of Dodge City, 842 F. Supp. 473, 475 (D. Kansas 1994) ("even if the effect of the City's adoption of a § 207(k) plan is to reduce the amount of compensation plaintiffs would have received had a § 207(a) been in effect, the FLSA is not violated), *aff'd on other grounds*, 67 F.3d 897 (10th Cir. 1995); O'Brien v. Town of Agawam, 350 F.3d 279 (1st Cir. 2003) ("That the parties have by contract designated certain compensation for labor under the forty-hour threshold "overtime" does not affect the characterization of those payments under the FLSA"). *See also* Monahan v. County of Chesterfield, 95 F.3d 1263, 1280 (4th Cir. 1996) ("Even though the financial terms of an employee's [straight time compensation] agreement [under 207(k)] may not be as lucrative as the employee desires, parties should be free to negotiate those terms without government interference as long as the agreed upon terms do not violate the minimum wage/maximum hour requires of the FLSA").
13. The specific calculations made by the City under the union contracts and under the Fair Labor Standards Act were specifically approved by the Wage & Hour Division of the

Department of Labor over twenty years ago. See 1985 WL 304329, Wage & Hour Opinion Letter WH-526 (Dec. 23, 1985) (pp. 4-5).

14. The City's practice of paying the amount due under the Fair Labor Standards Act when that amount is higher than the amount due under union contracts or City policy is in accordance with the Act. Aaron v. City of Wichita, 54 F.3d 652 (10th Cir. 1995) (finding no violation of FLSA where contract and practice of the parties "indicate that that the base salaries in the [memorandum of agreement] was intended to cover a 56 hour work week") (citing 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199, 204 (1947) (when determining number of hours a salary is intended to cover, the contract between the parties is not necessarily determinative)); Franklin v. City of Kettering, 246 F.3d 531, 536 (6th Cir. 2001) (affirming summary judgment for city where "defendant offered evidence showing that it calculated the overtime compensation due to its patrol officers under the CBA and under the FLSA and concluded that in every case, payment under the terms of the CBA equaled or exceeded that due under the terms of the FLSA with a twenty-eight day work period"); Monahan v. County of Chesterfield, 95 F.3d 1263,1265 (4th Cir. 1996) (reversing summary judgment for plaintiffs and granting summary judgment to county because "employee has been paid for all non-overtime hours at a lawful rate pursuant to an employee agreement to which that employee has impliedly or expressly agreed, and the employee has also been paid at a lawful rate for all overtime hours, the employee does not have a claim for any hour compensation due under the FLSA"); Harris v. City of Boston, 312 F. Supp. 2d 108, 115 (D. Mass. 2004) ("the work period does not have to reflect the actual practices between the [defendant] and the officers; as long as qualifying work period is announced, the employer can choose to pay

its employees more generously”); McGrath v. City of Philadelphia, 864 F. Supp. 466, 476 (E.D. Pa. 1994) (in case of first impression in Third Circuit district court adopted rationale of Lamon and noted that “the fact that a contract between the parties sets forth a different pay period or compensation schedule than the 7(k) work period is not dispositive”).

15. Plaintiff’s misread the Supreme Court’s decision in Bay Ridge v. Aaron, 334 U.S. 446 (1948), where the opinion considered the difference between shift differential or inconvenience payments which are includable in overtime, and overtime premiums for work outside of normal work time, which are not includable in overtime, and can be used as a credit. See Addison v. Huron Stevedoring Co., 11 WH Cases 312 (2nd Cir. 1953). Plaintiffs have made no showing that any of the payments that the City seeks to credit toward its overtime liability are shift differentials or inconvenience payments. Instead the payments are all premium payments for work performed beyond the employee’s regular shift. See 1997 WL 998016, Wage & Hour Opinion Letter, June 11, 1997.
16. The City’s practice of taking credits for contractual premium payments under its union contracts and not paying additional compensation when those payments exceed the requirements of the Fair Labor Standards Act is in accordance with the Act. Kohleim v. Glynn County Georgia, 915 F.2d 1473 (11th Cir. 1990); Bell v. Iowa Turkey Growers Cooperative, 407 F. Supp. 2d 1051 (S.D. Iowa 2006); Laboy v. Alex Displays, 8 WH Cases 2d 1436 (N.D. Ill. 2003); Nolan v. Chicago, 125 F. Supp. 2d 324 (N.D. Ill. 2000). The fact that the contractual overtime was at time and one-half base rate does not alter this conclusion under the cases cited above. Hesseltine v. Goodyear Tire & Rubber Co., 391 F. Supp. 2d 509, 522 (E.D. Tex. 2005) (“The rate may qualify as premium pay even

if it is less than one and one-half times the employee's regular rate, provided that only the extra compensation beyond the employee's regular rate is credited toward the employer's overtime obligation").

17. The Plaintiffs have failed to sustain their burden of proof by failing to present credible evidence that they have been paid less than required by the Fair Labor Standards Act. See e.g., Franklin, 246 F.3d at 536; Donovan v. Simmons Petroleum Corp., 725 F.2d 83 (10th Cir. 1983) ("The employee bears the burden of proving he performed work for which he was not properly compensated").
18. Plaintiffs failed to identify workweeks **or work periods** where they worked overtime or the amount of overtime they worked as required to sustain their burden of proof.
19. Mere conclusions unsupported by direct evidence do not satisfy the burden of proof or persuasion. Anderson, 328 U.S. at 687 (employee carries burden by *proving* that he has "in fact performed work for which he was improperly compensated and . . . [producing] sufficient evidence *to show* the amount and extent of that work as a matter of just and reasonable inference") (emphasis added).
20. The City of Albuquerque acted in good faith by its personnel consulting Department of Labor publications, attending seminars on the Fair Labor Standards Act and monitoring payrolls to be sure that employees were never paid less than the Act required. The City's payroll manager understood and applied the FLSA based on that understanding. Pabst v. Oklahoma Gas & Elec., 228 F.3d 1128, 1137 (10th Cir. 2000); Walton v. United Consumers Club, 786 F.2d 303, 312 (7th Cir. 1986). None of the City's evidence in this regard was controverted by Plaintiffs. Indeed, prior to this litigation, no employee has ever raised an issue with the City's overtime payment policy through a union contract

grievance or a prohibit practice charge under the City's Collective Bargaining Ordinance. See, e.g., Monahan v. County of Chesterfield, 95 F.3d 1263, 1275 (4th Cir. 1996) ("We do not put much weight in nor find such "no one ever told us" claims very persuasive. . . . Where the parties' actions and the circumstances demonstrate that the plaintiff was aware of a particular condition of employment, the employee's acceptance of, and continued, employment manifests acceptance of the condition").

21. Plaintiffs have failed to provide any evidence to sustain their burden to prove that the City's conduct was willful. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988) ("plaintiffs bear the burden of proving that the defendant willfully violated the FLSA; standard is whether employer knew or showed reckless disregard for whether its conduct was prohibited by the FLSA").
22. Lastly, Plaintiffs' presented no evidence that any sell back of benefit time occurred within the period covered by the case. Plaintiff Chavez testified his last sale back occurred a long time ago. (Trial Transcript at 68.) In any event, such sales backs where the benefits would be lost otherwise are not includible in the regular rate. Featsent v. City of Youngstown, 70 F 3d 900,905 (6th Cir. 1995); Wage & Hour Opinion Letter No. 152 (February 1, 1963). (copy attached) Acton v. City of Columbia, 436 F 3d 969 (8th Cir. 2006), is factually distinguishable because there the sale backs were not of benefit time about to be lost.

CONCLUSION

The Plaintiffs have failed to prove that the final compensation paid to Plaintiffs was less than required under the Fair Labor Standards Act or that the City of Albuquerque violated the Act by its compensation payments to the Plaintiffs. Accordingly, Defendant City respectfully

request that its Motion for Reconsideration be granted and the Plaintiffs' Complaint be dismissed.

Respectfully submitted:

CITY OF ALBUQUERQUE
Robert M. White
City Attorney

/s/ Electronically Filed
Michael I. Garcia
Assistant City Attorney
P. O. Box 2248
Albuquerque, NM 87103
(505) 768-4500

I hereby certify that a true copy of the foregoing pleading was e-mailed to:

Sam Bregman, Attorney for Plaintiffs
(sam@bregmanlawfirm.com)

Paul Livingston, Attorney for Plaintiffs
(living@rt66.com)

Jerry Walz, Attorney for Defendant
(jerrywalz@aol.com)

Edward Bergmann, Attorney for Defendant
(ebergman@seyfarth.com)

this 25th day of September, 2007.

/s/ Electronically Filed
Michael I. Garcia