

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

PATRICK CHAVEZ, et al.,

Plaintiffs,

vs.

No. CIV 02-0562 JH/ACT

CITY OF ALBUQUERQUE,

Defendant.

**PLAINTIFFS' REVISED PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Plaintiffs propose to the Court the following findings of fact and conclusions of law on the limited issues heard at trial on September 10, 2007.

1. The City's Merit System Ordinance, § 3-1-11, provides that the City will pay overtime wages "for work performed outside of established work hours in accordance with the Fair Labor Standards Act." (City Ordinance).

2. City Personnel Rule 302.2 provides that "when overtime is required for non-exempt employees, compensation must be in accordance with the Fair Labor Standards Act (FLSA) and any applicable collective bargaining agreement." (City Rules & Regulations, emphasis added; Trial Transcript, testimony of Laurice Chappell at p. 90).

3. The normal work week of most City employees is set out in collective bargaining agreements, the Merit System Ordinance and the City's Rules and Regulations. The normal work week for all employees except firefighters is a 40- hours

workweek. (Collective Bargaining Agreements; Chappell testimony, Transcript, at p. 91, lines 10-11 and p. 143, line 17 to p. 144, line 2).

4. The contracts between the Albuquerque Police Officers Association (APOA) and the City have provided that the “normal workday shall be eight or ten hours” and “the normal workweek will be forty hours.” The contracts also state that “Employees shall be entitled to overtime compensation at the rate of time-and-one-half their regular straight time rate when they perform work in excess of forty hours in any one workweek” and that “for the purpose of computing overtime, paid leave shall be considered time worked, as per Section 34 (FLSA).” (Plaintiffs’ Exhibit 7A, 7B, and 7C).

5. The contracts between the APOA and the City state that:

Under the Fair Labor Standards Act paid leave is not considered time worked for the purpose of computing overtime and the regular rate for the purpose of computing overtime includes all remunerations.

The parties thereto agree that for the purpose of computing overtime, paid leave will be considered time worked and the regular rate includes the hourly rate with no other remunerations included. Under 7K of the FLSA, the parties agree that for the purpose of computing overtime, the pay schedule will be a 7 consecutive-day, 40-hour workweek.

Applications of the FLSA as it pertains to the exempt status of positions will not change from current practice.

(Plaintiffs’ Exhibits 7A, 7B, and 7C).

6. The contracts between the Albuquerque Fire Fighters Association and the City provide that overtime “shall be paid at time and one half the regular rate of pay;” that “hours worked in excess of the employee’s regular assigned shift will be compensated at

the overtime rate of time and one half the regular rate of pay;” and that “(t)ime spent in leave with pay status shall be considered time worked for purposes of computing overtime.” (Plaintiffs’ Exhibits 4A, 4B, and 4C)

7. The contracts between the City and AFSCME, Local 3022, provide that “when overtime is required for non-exempt employees, compensation must be in accordance with the Fair Labor Standards Act (FLSA) and this Agreement. (Plaintiffs’ Exhibits 3A, 3B, and 3C).

8. All the AFSCME contracts provide that for the purpose of computing overtime, paid leave will be considered time worked.” (Plaintiffs’ Exhibits 2A, 2B, 2C, 3A, 3B, 3C, 5A, 5B, 5C, 6A, 6B, 6C, and 6D;; also, Chappell Testimony, p. 92, lines 6-7).

9. When calculating employee overtime for all employees except police employees the City makes “two separate calculations.” (Testimony of Laurice Chappell, Transcript at p. 93, line 23 to p. 94, line 4).

10. The City does not make any calculation of overtime pay due to police employees under the provisions of the FLSA. (Testimony of Laurice Chappell, Transcript at p. 97, lines 12-18).

11. When calculating overtime due under the FLSA the City has not considered paid leave time as hours worked for purposes of calculating overtime. (Transcript, p. 9, line 18; Testimony of Laurice Chappell, Transcript at p. 93, lines 8-13).

12. The regular rate and overtime pay calculations made by the City pursuant to which employees were paid did not include any longevity pay, shift differential pay, superlongevity pay, or hazardous duty pay. (Testimony of Tyrone Morgan, Transcript at pp. 26-27; Testimony of Todd Endres, at pp. 40-42; Testimony of Patrick Chavez, at pp. 65-66).

13. When calculating overtime due under the City's collective bargaining agreements, the City's Rule 302.2, and the Merit System Ordinance, the City has not included additional remuneration, such as longevity or other incentive pay, in the calculation of the rate upon which the overtime wages are calculated. (Testimony of Laurice Chappell, Transcript at p. 96, lines 4-12).

14. The City's determination of whether an employee has actually worked the requisite hours during the workweek to be entitled to overtime pay under the FLSA excludes hours and days of paid but unworked leave. (Testimony of Laurice Chappell, at p. 141, line 25 to 142, line 18).

15. "Skill pay" and sick leave and vacation leave buy back (or sell-back) pay are two kinds of non-discretionary bonuses that the City has agreed to pay to certain of its employees. The City does not include "skill pay" or sick leave or vacation leave buy-back (or sell-back) pay in making any of its "regular rate" calculations. (Testimony of Patrick Chavez, at pp. 66-68, 79-80; Testimony of Laurice Chappell, at p. 101, lines 6-15).

16. The City's failure to properly calculate the regular rate of pay and taking of credit for paid leave time against its overtime obligations is willful. (Argument by Ed Bergmann, Transcript, p. 9, line 9 to p. 11, line 12).

17. The City failed to present any evidence or testimony showing that it acted in good faith in its calculation of overtime pay.

PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW

1. Plaintiffs are entitled to overtime wages amounting to not less than one and one-half times the regular rate at which they are employed for hours worked outside of their normal work hours.

2. An employee's "regular rate of pay" as defined in the FLSA and by the Department of Labor includes all non-discretionary bonus payments as additions to the employee's base rate of pay.

3. Under the FLSA the "regular rate" used to calculate overtime pay, "is the hourly rate actually paid to the employee for the normal, non-overtime work week."

4. The City's collective bargaining agreements, the City's Rules, and the Merit System Ordinance, require computation and payment of overtime wages "in accordance with the Fair Labor Standards Act;" the FLSA requires the City to include all additional remunerations in the overtime pay calculations.

5. The regular rate of pay "must be drawn from what happens under the employment contract."

6. The employment contract of classified City employees consists of the City's Rules and Regulations, the City's Ordinances, and any applicable collective bargaining agreements.

7. The "regular rate" is not just the basic rate of pay for the normal workweek but includes "all remuneration for employment paid to, or on behalf of, an employee."

8. The regular rate "must reflect all payments which the parties have agreed shall be received regularly during the work week, exclusive of overtime payments."

9. The City violates the FLSA when it fails to include non-discretionary add-on remuneration when it calculates its employees' overtime wages.

10. The methodology employed by the City in the calculation of overtime wages results in the significant underpayment of overtime wages. This is, in part, because the City fails to include non-discretionary pay bonuses in the regular rate of pay when calculating the overtime wages of almost all City employees who work overtime.

11. Pursuant to 29 U.S.C. § 207(h), the FLSA does not allow the taking of "credits" or "offsets" against owed overtime wages except under certain specific circumstances set out in § 207(e)(5), (6), and (7), when there have been "premium" payments of at least time-and-a-half the regular rate of pay.

12. The City's practice of taking "credits" and "offsets" against its overtime pay obligations for payments other than the "premium" payments specified in the FLSA, §§207 (e)(5), (6), and (7) violates the FLSA.

13. In order to avoid the payment of liquidated damages in an amount equal to the overtime wages owed, the City had the burden of showing that it acted in good faith.

14. Plaintiffs are entitled to the award of liquidated damages because the City failed to present any evidence of good faith in calculating its employees' overtime wages.

15. The City's failure to pay the correct amount of overtime to its employees is willful and entitles Plaintiffs to a three-year statute of limitations.

Respectfully submitted,

Electronically signed and filed

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I hereby certify that the foregoing was filed electronically and a copy has been forwarded by the Court to the following at their e-mail addresses on or before September 26, 2007:

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