

**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),**

Plaintiffs,

v.

CIV 02-0562 JH/ACT

CITY OF ALBUQUERQUE

Defendant.

**DEFENDANT'S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Defendant, City of Albuquerque, (“Defendant”), pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1 submits this memorandum in support of its motion for summary judgment.

INTRODUCTION

There are no disputed issues of material fact. Rather, the only dispute in this case concerns a fundamental misconception of the law by plaintiffs as to the proper method for calculating overtime pay premiums for non- exempt public employees subject to collective bargaining agreements. Plaintiff Patrick Chavez, a fire department lieutenant, and approximately 780 opt-ins (collectively, “Plaintiffs”), allege that the City of Albuquerque (the “City”) violated the Fair Labor Standards Act (“FLSA” or “the Act”) in determining the amount allegedly due as overtime compensation. There is no dispute regarding the number of hours Plaintiffs worked or the timeliness of the payments made. Rather, Plaintiffs’ erroneously contend that the City

underpaid them by: (1) excluding certain remunerations in calculating regular rates of pay under the FLSA and applicable union contracts; (2) utilizing an incorrect formula in calculating regular rates of pay; and (3) crediting contractual premium payments against statutory overtime payments.¹ The undisputed facts, however, clearly prove that all three of Plaintiffs' contentions must necessarily fail as a matter of law. First, there is no dispute as to the types of remunerations the City includes and excludes in calculating a non-exempt employee's "regular rate" under the FLSA or base rate under collective bargaining agreements. Rather, Plaintiffs' primary objection to the City's overtime calculations seems to be that the City's calculations under the collective bargaining agreements differ from the calculations under the FLSA notwithstanding the fact that the applicable union contracts do not require identical calculations. This difference is irrelevant because the City makes two calculations. The first calculation involves determination of overtime under the City policy or the applicable union contract and the second calculation involves determination of overtime under the FLSA. The City then pays the higher of the two as provided under Section 7(e) and (h) of the Act. Plaintiffs' objection is in direct conflict with the Act, its regulations, and interpreting case law. Likewise, Plaintiffs' contention that holiday pay must be included within the FLSA regular rate of pay is simply counter to the plain language of the statute.

Second, there is no dispute as to the elements of the City's formula for calculating overtime under the FLSA and applicable collective bargaining agreements. With regard to the FLSA overtime premium calculation, the City's mathematical calculation formula is exactly as

¹ Although the City maintains that Plaintiff Chavez was exempt from the minimum wage and overtime requirements of the Act under Section 13(a)(1) of the Act, the City brings this motion for summary judgment only as to the regular rate issue. No discovery has been done on any exempt status issue. See the Court's Order of April 26, 2006 (Docket No. 175).

outlined in Department of Labor regulations and has been consistently approved by courts. The City based its approach on a publication issued by the Wage and Hour Division of the U.S. Department of Labor in 1985, shortly after the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (Hollyfield Dep. at 44, 63, & Ex. 1D)². The City's calculation was thus established in good faith under the Portal to Portal Act (29 C.F.R. § 790.13-790.19). On the other hand, the formula proposed by Plaintiffs' purported expert improperly multiplies the employee's regular rate by 1.5 instead of $\frac{1}{2}$. Both the regulations and case law reject such double counting. Where a calculation's divisor included all hours worked, the regular rate should be multiplied by one-half for the hours over 40 since the employee already received straight time for the hours worked over 40. Thus, the additional half time (beyond that straight time) is all that is required for the overtime hours. Significantly, the Court rejected Plaintiffs' expert's status as such under the FLSA and limited her testimony to at most only assisting the trier of fact in understanding the City's method of calculation of overtime.

Finally, there is no dispute that the City offsets a non-exempt employee's entitlement to statutory overtime under the FLSA with the contractual overtime paid to that employee as provided for under § 7(h) of the Act. In calculating overtime pay under its dual method, the City determines the amount it owes under the FLSA and also the amount it owes pursuant to applicable collective bargaining agreements (*i.e.*, contractual pay rates). The latter includes certain premium payments not required under the FLSA. The contractual pay rates are then credited against the City's FLSA overtime liability to the employee. Time and again, such

² Materials referenced herein are included in Defendant's Appendix, which was contemporaneously filed with its Motion for Summary Judgment and Memorandum of Law in Support of the same.

credits have been approved under 29 U.S.C. § 207 (h)(2). *See, e.g., Nolan v. City of Chicago*, 125 F. Supp. 2d 324, 332 (N.D.Ill. 2000); *Bell v. Iowa Turkey Growers Cooperative*, 407 F.Supp. 2d 1051 (S.D. Iowa 2006).

In short, Plaintiffs simply cannot produce any evidence or statutory authority to show that the City has improperly taken credits or improperly calculated the regular rate and overtime pay for any employee. The City has consistently followed Department of Labor directives which are in accord with established court authority. For these reasons, and those that follow, Defendant respectfully requests that this Court grant its motion for summary judgment.

STATEMENT OF MATERIAL FACTS

The Parties

1. The City is a municipal corporation organized and operating under the laws of the State of New Mexico and is an employer under the FLSA. 29 U.S.C. § 203.

2. Janet Hollyfield (“Hollyfield”), a twenty-five year veteran with the City, was employed as Assistant Accounting Officer. (Hollyfield Dep. at 4). As Assistant Accounting Officer, Hollyfield was responsible for assisting the accounting officer in the management of the accounting division, including supervising the payroll office. *Id.* at 6-7. Given her nearly ten year career as Assistant Accounting Officer, Hollyfield has extensive knowledge about the City’s pay system and the requirements of both the FLSA and governing collective bargaining agreements *Id.* at 6-7.

3. The City’s expert, Lloyd Hill, began his employment with the Department of Labor, Wage and Hour Division in 1960 and rose to Assistant District Director, U.S. Department of Labor, Wage Hour Division, Chicago, Illinois. (Hill Dep. at 4-5, 7). The City hired Hill to determine whether its method of pay was proper under the FLSA. *Id.* at 5-6. Mr. Hill served for 43 years with Wage and Hour Division before his retirement. *Id.* at 7-8.

4. Plaintiffs are approximately 780 current and former City employees who held various jobs with the City and were members of various unions.

5. The Albuquerque Area Fire Fighters Union (“Fire Fighters Union”), International Association of Fire Fighters, City Chapter, is the sole and exclusive collective bargaining representative for all fire fighter employees through rank of Captain prior to 2006 and through rank of Commander since 2006. *See* www.cabq.gov/jobs/pdf/ABQAreaFireFighters.pdf.³ *See also* www.iaff244.org. The City and the Fire Fighters Union have been parties to the relevant collective bargaining agreement ("CBA") since at least February 10, 2001. *Id.*

6. Local 3022 AFSCME, Council 18, AFL-CIO (“Local 3022”) is the sole and exclusive collective bargaining representative for certain M-Series employees. *See* www.afscmenm.org/locals/local_3022.html. The City and the Local 3022 AFSCME have been parties to the relevant CBA since at least November 17, 2001. *Id.*

7. The Albuquerque Officers’ Association, Local 1888 (“Local 1888”), is the sole and exclusive collective bargaining representative for all officer employees classified as General Services Officers, Animal Control Officers, Corrections Officers, Corrections Transportation Officers, Corrections Identification Officers, Corrections Community Custody Officers, Transit Security Officers, Solid Waste Security Officers, and Cultural Services Security Officers. *See* www.afscmenm.org/locals/local_1888.html. The City and the Local 1888 have been parties to the relevant CBA since at least June 10, 2002. *Id.*

³ Applicable CBAs and information regarding the City employees’ bargaining units are accessible to the general public via the worldwide web. Although the City has referenced specific public internet sites herein., for the Court’s convenience, the City has attached relevant portions. *See* Tab C of Appendix.

8. Albuquerque Clerical and Technical Employees, Affiliated with the American Federation of State, County, and Municipal Employees, AFSCME, Local 2962 (“Local 2962”) is the sole and exclusive collective bargaining representative for C-Series employees (white-collar) employees. See http://www.afscmenm.org/locals/local_2962.html. The City and the Local 2962 have been parties to the relevant CBA since at least November 17, 2001.

9. United Transportation Local 1745 (“Local 1745”) was the sole and exclusive collective bargaining representative for operators of the City’s public transportation system. <http://www.nmtu.com/ltr-PSL-Tmstrs.pdf>. The Local has subsequently become an independent union. See <http://www.cabq.gov/jobs/pdf/NMTransportationUnion.pdf>.

Overtime Payment Process

10. The City makes overtime payments in accordance with CBAs negotiated by its employees’ unions (or in the case of non-union represented employees, the City’s written pay policies) or statutory requirements, whichever yields the greater amount for the employee. (Hollyfield Dep. at 28-29,31-33, 63); (Hill Dep. at 51-52).

11. To determine the amount of wages owed to each employee during a given pay period, the City utilizes a dual method of pay calculations whereby it compares the employee’s wage entitlements under the applicable CBA (*i.e.*, contractual wages) to the employee’s wage entitlements under the FLSA (*i.e.*, statutory wages). (Hollyfield Dep. at 28-29, 31-33).

12. The dual calculations are completed for each employee for each pay period. (Hollyfield Dep. at 50).

1. Determination Of “Contractual Overtime Premiums”

13. The CBAs provide for the payment of certain overtime premiums that are not required by the FLSA. (Hollyfield Dep. at 34-35). For example, certain CBAs require the payment of daily overtime; payment of overtime to police after forty in a work week rather than

after 43; payment of overtime on holidays; and inclusion of holiday, paid leave, and other time not actually worked in calculating overtime entitlement. *Id.* at 41-42.

14. Pursuant to Section 21 of the “Fire Fighters Union” CBA, work weeks consist of a 56-hour work week cycle consisting of two consecutive 24-hour shifts and four days off; 42-hour work week cycle consisting of two 10-hour shifts, two 14-hour shifts and 4 days off; and a 40-hour work week cycle will consist of 4 - 10 hour shifts. Section 7(k) of the FLSA establishes a different overtime standard for fire fighters. (29 C.F.R. § 553.230). Under Section 7(k), employers may establish a 28 day work period with 212 hours as the maximum number of hours before the requirement to pay overtime, down to, a 7-day work period with 53 hours as the minimum number of hours before the requirement to pay overtime. *Id.* Here, the CBA provides for premium pay far beyond that required under the FLSA as follows:

Section 21. Work Hours and Overtime

C. Overtime worked shall be paid at time and one-half the regular rate of pay. All 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.

F. Time spent in leave with pay status shall be considered time worked for purposes of computing overtime.

Section 11. Holidays

Employees who are required to work on the holiday or designated holiday will receive straight time pay for the holiday and time and one half for the regular hours paid for the holiday.

Section 25. Call In Guarantee

An employee called back to work after the completion of their normal assignment will be guaranteed for each such call-in a minimum of four (4) hours and shall be compensated for all such time at a rate equal to one and one-half (1-1/2) times their regular pay. (Emphasis added)

See Tab C, Sections 11, 21, 25 of Fire Fighters Union Agreement.

15. The CBA negotiated by Local 3022 provides that “paid time will be considered hours worked for purposes of calculating overtime” and is paid “in accordance with the Fair Labor Standards Act and this Agreement.” *See* Tab C, Local 3022 CBA, Section 14. Additionally, the CBA provides that non-exempt employees who work holiday will be paid at a rate of two and one-half their hourly rates including pay differentials. *Id.*, Section 18.4.

16. The CBA negotiated by Local 1745 provides that operators “will be paid at the rate of time and on-half their regular hourly rate of pay for all hours worked in excess of 40 hours per week”; the Chairman of the Local Committee of Adjustments may count up to eight (8) hours per pay period of unpaid leave for Union business as time worked, for purposes of computing overtime; two members of the Local Committee of Adjustments, one from Sun Tran and one from Sun Van may count up to four (4) hours of unpaid leave for Union business as time worked, for purposes of computing overtime under this section. *See* Tab C, Local 1745 CBA, Section 12.

17. The CBA negotiated by Local 1888 provides that paid leave is considered time worked for purposes of computing overtime; employees called in for an overtime assignment shall receive a minimum of two hours pay at overtime rate and the overtime begins at the time the officer is contacted. *See* Tab C, Local 1888 CBA, Article 4. Additionally, the CBA provides that holiday pay will be paid as straight time at the employees hourly rate of pay if the holiday is not worked; in the event the employee works on a holiday, the employee receives straight time plus time and one half for all hours worked. *Id.*, Article 39B

18. The CBA negotiated by Local 2962 provides that employees must be “paid at the rate of time and one half (1-1/2) for all hours worked in excess of forth (40) hours per week” and “[f]or the purpose of computing overtime, paid leave will be considered time worked.” *See* Tab

C, Local 2962 CBA, Section 7. Additionally, employees required to work on holidays “will be paid regular holiday pay plus time and one-half (1-1/2) for the hours actually worked” and “[f]or the purpose of computing overtime, an employee will be credited with holiday time plus the number of hours worked.” *Id.*, Sections 7 and 14. A shift differential is paid to “[a]ny employee regularly assigned to the swing of graveyard shift is entitled to shift differential pay.” *Id.*, Section 9.

19. As provided in the foregoing CBAs, contractual overtime requires that certain hours be counted toward reaching CBA overtime thresholds that would not otherwise be counted in determining whether an employee worked over forty hours in a workweek. (Hollyfield Dep. at 32, 34-35).

20. Additionally, contractual overtime is calculated at one and one-half the employee’s base hourly rate and pursuant to the CBA, the employee’s base rate excludes the following payments: Shift Differential Pay, Hazardous Duty Pay, Longevity Pay, Super Longevity Pay, Bilingual Pay, Educational Pay, and Firearms Qualification Pay. (Hollyfield Dep. at 35) (explaining difference between FLSA “regular rate” and CBA rate).

21. Contractual overtime premiums are not granted nor based on FLSA requirements, but relate solely to the contractual obligations provided in the applicable CBA. (Hollyfield Dep. at 35); (Hill Dep. at 13-14). This fact is one of the reasons for the dual calculation which provides for the employee to receive total compensation based upon the contract or the FLSA whichever is higher. (Hollyfield Dep. at 34, 50; Hill Dep. at 51).

2. Determination Of “FLSA Overtime Premiums”

22. Once the employee's contractual overtime premium is calculated, the City determines whether the employee has actually worked the requisite hours during the workweek in question to be entitled to overtime pay under the FLSA. (Hollyfield Dep. at 10, 34-35).

23. The City does not include hours paid but not actually worked in determining whether the employee's hours exceeds the statutory threshold. (Hollyfield Dep. at 32, 34-35); (Hill Dep. at 36).

24. If an employee's actual hours of work exceed forty or if a fire protection and law enforcement employee's ratio of the number of hours worked to the number of days in the work period exceeds the applicable standard under Section 7(k), the City calculates the employee's statutory overtime pay entitlement. (Hollyfield Dep. at 35, 41, 48).

25. The City's calculations are based upon a manual entitled "State and Local Government Employees Under the Fair Labor Standards Act" issued by the Employment Standards Administration, Wage and Hour Division of the Department of Labor as a guideline as FLSA overtime pay calculations. (Hollyfield Dep. at 48). Additionally, the City relied upon the specific examples set forth in Department of Labor Regulations. *Id.*

26. For employees categorized as exempt and thus not entitled to overtime pay under the FLSA, compensation is calculated solely pursuant to the terms of applicable collective bargaining agreements, as explained *supra*. (Hollyfield Dep. at 41-42).

27. The City calculates an employee's FLSA overtime premium at one and one-half times the employee's "regular rate." (Hollyfield Dep. at 10); (Hill Dep. at 25).

28. In determining an employee's regular rate for purposes of the FLSA overtime premium, all nondiscretionary bonuses -- including shift differential pay, longevity pay,

superlongevity pay, bilingual pay, educational pay, and firearms qualifications are included. (Hollyfield Dep. at 10, 22); (Hill Dep. at 24-25; 43-44).

29. By way of illustration, a City's employee's rate of pay is \$15.00/hour and he received a bonus equal to \$.340625/ hour. During the workweek in question, he worked 48 hours. The City's calculation of total overtime pay pursuant to the FLSA is as follows:

Bonus rate (\$ 16.35/48 hours)	\$.340625/ hour
Bonus for 40 hours (\$.340625 per hour x 40 hours)	\$13.625
+ Bonus for overtime hours (+ \$.340625 per hour x 8 hours)	<u>+ \$ 2.725</u>
= Total Bonus	\$ 16.35
Straight time regular pay (40 hours x \$15.00 per hour)	\$ 600.00
Straight time bonus pay (40 hours x \$.340625/ hour)	<u>\$ 13.63</u>
Total straight time pay	\$ 613.63
Total overtime pay (8 hours x 1.5 times the regular rate of \$15.34)	\$ 184.08
Straight time pay + overtime pay = Total Pay	\$613.86 + \$ 184.08 = \$ 797.71

(Hollyfield Dep. at 18-21, Hollyfield Dep. Ex. 1D).

30. Another correct method of performing the same calculation yields the same result, as follows:

Hourly rate	\$15.00/hour
Total hours worked	48
Bonus pay (per week)	\$16.35

Total straight time pay	\$736.35
Regular Rate	\$15.34/hour
Total straight time pay	\$736.35
<i>.5 times the regular rate (<u>NOT</u> <u>1.5</u> times the regular rate)</i>	<i>\$ 7.67</i>
Hours worked over 40	8
Overtime pay (\$ 7.67 x 8 hours)	\$ 61.36
Straight time pay + overtime pay = Total Pay	\$736.35 + 61.36 = \$ 797.71

(Hollyfield Dep. at 12-14, Hollyfield Dep. Ex. 1A).

3. Payment Of Greater Amount

31. Once calculated, the City compares the employee's compensation under the applicable contract or City policy with that due under the Act and pays the employee the greater amount between the two. If the FLSA requires an additional amount beyond what has already been paid that amount is reflected in the form of an adjustment designated as "FLSA" pay on the employee's paycheck. (Hollyfield Dep. at 34, 50); (Hill Dep. at 51). If the employee has already been paid an amount greater than that required under the Act, no further payment is required.

32. For purposes of the FLSA, whether the City is paying its employees properly may be determined by the City's payroll records. (Hill Dep. at 23).

ARGUMENT

I. Summary Judgment Standard

Summary judgment is appropriate where the moving party shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The rule provides that "the mere existence of some alleged factual dispute between the

parties will not defeat an otherwise properly supported motion for summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1985). To prevail on summary judgment, the moving party need only demonstrate that "there is an absence of evidence to support the nonmoving party's case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1985).

II. The City Properly Includes All Necessary Remunerations In Calculating Plaintiffs Entitlement To Overtime.

A. Plaintiffs err in trying to overlap contractual overtime and statutory overtime.

Throughout this litigation, Plaintiffs have seemingly maintained the mistaken belief that the FLSA enhances overtime entitlements pursuant to collective bargaining agreements or conversely, that the collective bargaining agreements enhance entitlements under the FLSA. Neither proposition is accurate. For purposes of calculating overtime wages under the FLSA, only the types of remuneration specified by the FLSA must be included in the regular rate. (Hill Dep. at 24-25; 44). Conversely, the fact that the FLSA requires certain payments to be included in calculations of premium rates for overtime hours, such a requirement has no affect on their inclusion in contractual overtime pay calculations. *See Nolan v. City of Chicago*, 125 F. Supp. 2d 324, 330 (N.D.Ill. 2000) (rejecting plaintiffs’ argument that defendant violated FLSA, in part, by miscalculating overtime premiums paid pursuant to collective bargaining agreement and further refusing to rule on whether defendant violated the agreement). Plaintiffs err in trying to overlap the two separate calculations. Indeed, as Hill explained that regardless of a CBA’s requirements, an employer must still pay in accordance with the FLSA. (Hill Dep. at 36, 55). *Bell v. Iowa Turkey Growers Cooperative*, 407 F. Supp. 2d 1051 (S.D. Iowa 2006).

B. The City Properly Includes All Nondiscretionary Bonuses In Calculating An Employee’s Regular Rate.

It is undisputed that the City includes all nondiscretionary bonuses in calculating a non-exempt employee's regular rate of pay under the FLSA. In computing FLSA overtime premiums, the first step is to determine the employee's "regular rate." "Regular rate" is defined to include "all remuneration for employment paid to, or on behalf of, the employee . . ." with seven exceptions. 29 U.S.C. § 207(e). "Where a bonus payment is considered a part of the regular rate at which an employee is employed, it must be included in computing his regular hourly rate of pay and overtime compensation." Section 778.209 of Interpretive Bulletin 778 – Overtime Compensation. Shift differential pay, longevity pay, superlongevity pay, bilingual pay, educational pay, and firearms qualifications are all "bonuses" for purposes of the FLSA. (Hill Dep. at 43-44). Despite the City's strict compliance with this principle, Plaintiffs assert that the City improperly excludes nondiscretionary bonuses. Plaintiffs' contentions are unsupported. As Hollyfield explained, in performing its FLSA calculation, the City includes shift differentials and other remunerations as required by the FLSA in its calculation of the regular rate to be used for purposes of paying time-and-a-half. (Hollyfield Dep. at 10, 22); (Hill Dep. at 24-25).

On the other hand, the City properly excludes holiday pay in the regular rate under the FLSA, because Section 7(e) excludes, among other things: (2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness . . .". 29 C.F.R. § 778.200(a). *See also* DOL Opinion Letter, 1997 WL 998016 (DOL WAGE-HOUR) (June 11, 1997) (Pay for not working on a designated holiday is excludable from the regular rate, and premium pay not less than time and one-half paid for working on a holiday may be treated as an overtime premium pursuant to section 7(e)(6) of the FLSA and is creditable towards any FLSA overtime compensation due). Accordingly, the City's calculation of employees' regular rate of pay for purposes of the FLSA is proper.

III. The City's Mathematical Formula Is Proper.

Although not specifically included in Plaintiffs' complaint, it appears that Plaintiffs take issue with the mathematical formula utilized by the City to calculate overtime pay. Plaintiffs, however, are simply mistaken.

Hollyfield, payroll supervisor for the City, explained during her deposition the method by which the City pays its employees. The City pays FLSA overtime pay at an overtime rate equal to one and one-half times the employee's "regular rate." (Hollyfield Dep. at 10); (Hill Dep. at 25). The employee's regular rate consists of the employee's "hourly" rate *plus any nondiscretionary additional pays*. (Hollyfield Dep. at 10, 22); (Hill Dep. at 24-25). The City correctly calculates the regular rate, as in the following example:

Hourly rate	\$15.00/hour
Hours worked	48
Bonus pay (per week)	\$16.35
Total straight time pay	\$736.35
Regular rate	\$15.34/hour

(Hollyfield Dep. at 10, 22); (Hill Dep. at 24-25; 44).

The City correctly calculates total overtime pay, as in the below continuation of the same example:⁴

⁴ Section 7(k) of the Act provides a partial overtime pay exemption for fire protection and law enforcement personnel, including correctional officers, who are employed by public agencies on a work period basis.

Bonus rate (\$ 16.35/48 hours)	\$.340625/ hour
Bonus for 40 hours (\$.340625 per hour x 40 hours)	\$13.625
+ Bonus for overtime hours (+ \$.340625 per hour x 8 hours)	<u>+ \$ 2.725</u>
= Total Bonus	\$ 16.35
Straight time regular pay (40 hours x \$15.00 per hour)	\$ 600.00
Straight time bonus pay (40 hours x \$.340625/ hour)	<u>\$ 13.63</u>
Total straight time pay	\$ 613.63
Total overtime pay (8 hours x 1.5 times the regular rate of \$15.34)	\$ 184.08
Straight time pay + overtime pay = Total Pay	\$613.86 + \$ 184.08 = \$ 797.71

(Hollyfield Dep. at 13-14, Hollyfield Dep. Ex. 1A).

In contrast, Plaintiffs (as made clear in questioning of Hollyfield during her deposition), argue for a method of calculation that the Department of Labor and courts have consistently held is incorrect under the FLSA because it “double counts” bonuses and regular pay, such that the employer would be paying above and beyond what the FLSA requires. Plaintiffs first *correctly* calculate the regular rate as follows:

Hourly rate	\$15.00/hour
Total hours worked	48
Bonus pay (per week)	\$16.35
Total straight time pay	\$736.35
Regular Rate	\$15.34/hour

(Hollyfield Dep. at 18-21, Hollyfield Dep. Ex. 1D). *See also* (Hollyfield Dep. at 12-14, Hollyfield Dep. Ex. 1A).

But then, Plaintiffs *incorrectly* calculate the total overtime pay, as in the below continuation of the example:

Straight time pay	\$736.35
Overtime rate (1.5 times the regular rate)	\$23.01/hour
Hours worked over 40	8
Total overtime pay (8 hours x 23.01/ hour)	\$184.08
Straight time pay + overtime pay = Total Pay	\$736.35 + \$184.08 = \$ 800.43

(Hollyfield Dep. at 13-16, Ex. 1B, 1C).

Plaintiffs' method is incorrect because the employee is compensated twice for the regular rate paid for the overtime hours, and for the portion of bonus pay attributable to the overtime hours. Regular pay and bonus pay were paid at the outset in the "straight time pay" sum of \$ 736.35. Then, when the 8 hours above 40 were multiplied by time-and-a-half the regular rate – straight time was paid again for those same hours, despite the fact that it had already been paid (i.e. "double counting"). (Hollyfield Dep. 17, 48); (Hill Dep. at 30-31). Because the employee has already been paid straight time for those 8 hours, only the half time need be added for FLSA overtime. Courts have consistently held that such "double counting" is incorrect and not required by the FLSA. *See Wisnewksi v. Champion Healthcare Corporation*, 2000 WL 1474414 at *7, n.11, 12 (D.N.D. 2000), *aff'd Reimer v. Champion Healthcare Corp.*, 258 F.3d 720, 726 (8th Cir. 2001); *see also Frank v. McQuig*, 950 F.2d 590, 595, 597 n.9 (9th Cir. 1991) (*citing Brooks v. Weinberger*, 730 F. Supp. 1132 (D.D.C. 1989); *Federation of Gov't Employees, Local 3721 v. District of Columbia*, 732 F. Supp. 1, 4 (D.D.C. 1989)).

Also by way of illustration, another correct method of performing the same calculation parallels the City's method and highlights Plaintiffs' error (shown in bold and italics). Under this method, the correct calculation of the regular rate is the same as in the prior two examples:

Hourly rate	\$15.00/hour
Total hours worked	48
Bonus pay (per week)	\$16.35
Total straight time pay	\$736.35
Regular Rate	\$15.34/hour

Then, the correct calculation of overtime pay is as follows:

Total straight time pay	\$736.35
<i>.5 times the regular rate (NOT 1.5 times the regular rate)</i>	<i>\$ 7.67</i>
Hours worked over 40	8
Overtime pay (\$ 7.67 x 8 hours)	\$ 61.36
Straight time pay + overtime pay = Total Pay	\$736.35 + 61.36 = \$ 797.71

As demonstrated above, this calculation yields the same result as the calculation performed by the City. The Department of Labor has found that the calculation can be done either way, and yields nearly the same result. *See, e.g.*, DOL Opinion Letter 1999 DOL WHLEXIS 4 (January 8, 1999) (discussing different results in overtime calculations and stating that “assuming that the employee receives all straight time earning and no less than *additional half-time* of the regular rate for each overtime hour worked” employee is paid in compliance with FLSA) (emphasis added).

IV. The City's Calculations Were Made In Good Faith

The FLSA provides that an employer who violates the Act by failing to pay compensable wages is ordinarily liable for the unpaid wages and "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). However, if the employer had a good faith belief that its actions did not violate the FLSA, the court may, in its sound discretion, decline to award liquidated damages. See 29 U.S.C. § 260; *see also Department of Labor v. City of Sapulpa*, 30 F.3d 1285, 1289 (10th Cir. 1994). Additionally, ordinarily a two-year statute of limitations applies to violations of the FLSA, unless the employer acted willfully, in which case a three-year limitations period applies. See 29 U.S.C. § 255(a); *see also Brinkman v. Department of Corrections*, 21 F.3d 370, 372 (10th Cir. 1994). Here, the undisputed facts show that the City's calculation of overtime pay under the FLSA were made good faith and that neither liquidated damages nor the imposition of the three-year statute of limitation applies.

To begin with, the City follows a manual issued by the Employment Standards Administration, Wage and Hour Division of the Department of Labor as a guideline as to how FLSA overtime pay should be calculated, entitled "State and Local Government Employees Under the Fair Labor Standards Act." Moreover, the City follows the specific examples set forth in Department of Labor Regulations. (Hollyfield Dep. at 48).

Further, Hill, former Assistant District Director of the Chicago Regional Office of the Wage and Hour Division Department of Labor and a 43 year employee of the Department of Labor, has reviewed examples of Defendant's pay practices, as well as the report of Plaintiffs' former expert Wagner, and has determined that the City is calculating pay correctly in all respects and Wagner was mistaken in her opinions. (Hill Dep. at 30-31).

These undisputed facts lead to but one conclusion: The City's calculation was established in good faith under the Portal to Portal Act, 29 C.F.R. 790.13-790.19. *See Pabst v.*

Oklahoma Gas & Elec. Co., 228 F.3d 1128, 1137 (10th Cir. 2000) (affirming lower court's finding that defendant employer acted in good faith under a reasonable, albeit mistaken, belief that its particular on-call scheme was non-compensable under the statute based in part, on employer's payment of overtime premiums beyond what was required under the FLSA).

V. The City Properly Credits Its Overtime Liabilities

Certain contractual overtime payments are creditable towards deficiency in FLSA overtime payments. 29 U.S.C. § 207(h)(2). Subsections (5), (6) and (7) of the Act provide in relevant part that credits toward statutory overtime requirements can be taken by the Employer for:

(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 non-overtime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employee 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.

29 U.S.C. § 207(e)(5)-(7); 20 C.F.R. § 778.108.

Where an employer pays certain types of premium pay to the employee (those types are specified below), that premium amount is counted against any overtime pay that might be owed to the employee under the FLSA. For example, if an employer pays the employee a contractual

premium of \$5.00 for time worked on a Saturday (a premium not required by the FLSA), and in the same period owes the employee \$5.00 FLSA overtime pay for hours worked in excess of 40, the employer breaks even and need not pay the employee any additional FLSA overtime pay. *See* DOL Opinion Letter 1999 WL 33210914 (DOL WAGE-HOUR) (October 21, 1999) (payment of an additional amount for hours worked in excess of 36 hours per week will not be considered part of the regular rate of pay; and in addition, the employer may take credit for or offset that additional amount against overtime compensation due under the FLSA).

Here, the City takes credits for hours paid but not worked, such as holiday pay, call-in pay, longevity pay, to offset overtime liability. (Hollyfield Dep. at 10, 22); (Hill Dep. at 24-25; 44). Many employers, like the City of Albuquerque here, use their premium credits by performing a dual calculation in every pay period for each employee. The first calculation is done under contractual or collective bargaining agreement, and includes all premium pay required by the agreement, but without regard to FLSA requirements. The second calculation is in strict compliance with the FLSA. The City then properly pays any amount owed under the FLSA calculation that is beyond what is paid under the collective bargaining agreement. *See Iowa Turkey Growers Cooperative*, 407 F.Supp. 2d at 1061 (holding that defendant was entitled to a credit for the overtime payments it had previously paid its employees for working a sixth day per week).

Plaintiffs will likely argue the City is in violation of the FLSA because its CBA does not include certain payments, such as shift differentials, when calculating regular rates of pay and because the shift differentials are not equal to one and one half times the regular rate of pay, a credit cannot be taken. *See, e.g., Wheeler v. Hampton*, 399 F.3d 238 (3rd Cir. 2005) (holding that the employer did not qualify for the credit allowed under § 207(h)(2) where it only paid

employees under the CBA and where the CBA provided for less remuneration than required by the FLSA). Plaintiffs' reliance *Wheeler* is entirely misplaced. First, the City either pays time and one half as is required by the FLSA or more if the calculation of premium overtime pay under the CBA exceeds the FLSA calculation amounts. All of the CBAs provide for greater remuneration and hence, employees are almost always receiving payments under the CBA (*i.e.*, compensation that far exceeds the amounts they would be otherwise entitled to under the FLSA). Second, it is undisputed that when the City's payment of contractual overtime is less than that required under the FLSA, the City pays the amount required under the FLSA. This fact was not present in Wheeler.

Indeed, time and time again, courts allow credits as those taken by the City. *See, e.g., Franklin v. City of Kettering*, 246 F.3d 531, 536 (6th Cir. 2001) (affirming summary judgment for defendant employer 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); *Kohleim v. Glynn County, Georgia*, 915 F.2d 1473, 1481 (11th Cir. 1990) (allowing county to use all contractual overtime, not just overtime paid at a time-and-one-half rate, towards statutory overtime found to be due); *Biggs v. Joshua Hendy Corp.*, 183 F.2d 515 (9th Cir. 1950) (employer is liable for overtime incurred when employees worked through lunch period, but liability may be offset with contractual overtime not required by statute); *Bell v. Iowa Turkey Growers Cooperative*, 407 F.Supp. 2d 1051 (S.D. Iowa 2006) (holding that defendant was entitled to a credit for the overtime payments it had previously paid its employees for working a sixth day per week); *Nolan v. City of Chicago*, 125 F. Supp. 2d 324, 331 (N.D. Ill. 2000) *citing Alexander v. United States*, 32 F.3d 1571, 1576 (Fed.

Cir. 1994) (extra compensation provided at a premium rate pursuant to subsections (5) and (6) of § 207(e) was creditable towards overtime compensation due to border patrol agents under FLSA). *See also* DOL Opinion Letter 1985 WL 304329 (DOL WAGE-HOUR) (December 23, 1985) (explaining proper method for use of premium pay credits against overtime liability).

VI. CONCLUSION

The City has consistently followed Department of Labor regulations, statutory provisions and applicable case law in its calculation of overtime compensation under the Fair Labor Standards Act. The City's methodology has been approved by its expert witness a career employee and former Assistant District Director of the Chicago Regional office of the Wage & Hour Division. This methodology is universally followed by employers.

Compliance with the Act requires adherence to its standards. An employer can, as the City does, pay more under its policies and union contracts. However, such payments do not change the requirements of the Act.

The plaintiffs seek to convert contractual and policy premiums into FLSA requirements which if allowed would stand the policies and contracts on their heads and cause totally inappropriate and unexpected consequences. Not surprisingly the Wage & Hour regulations and consistent Court authority reject the plaintiff's approach. Furthermore, since the City always pays no less than the Act requires, the plaintiffs' claims are baseless.

Thus, the City should be granted summary judgment on the regular rate issue and those allegations in the complaint dismissed.

Respectfully submitted:

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