

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

**PATRICK CHAVEZ, TODD BARTLETT,
JEANNINE CHAVEZ, RUDY CAMPOS,
MICHAEL COCCHIOLA, ROBERT
GUTIERREZ, FORTINO ORTEGA,
and MICHAEL TOYA, on behalf of
themselves and all other City employees
who have been paid overtime that was
improperly determined under 29 U.S.C.A.
Section 207(a)(1),**

Plaintiffs,

vs.

No. CIV 02-0562 JH/ACT

CITY OF ALBUQUERQUE,

Defendant.

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT (DOC 231)**

Plaintiffs present the following opposition to the City's Motion for Summary Judgment. Doc. 231. This is a collective action brought under the Fair Labor Standards Act (FLSA) by City employees and former employees charging that the City has incorrectly calculated their overtime compensation. Approximately 775 employees and former employees who worked overtime have opted in to this collective action.¹

I. Introduction

Under the FLSA, Plaintiffs are owed overtime wages amounting to "not less than one and one-half times the regular rate" at which they are employed," 29 U.S.C. Sec 207(a)(1), for hours

¹ At least 230 of the opt-in Plaintiffs are present or former Fire Dept. Employees; at least 135 are from Transit; over 105 from the Police Dept.; around 70 are from Corrections; and about 90 are from Water, Solid Waste and Public Works Departments

worked in excess of their normal 40-hour (except for Fire Dept. employees) workweeks. The “regular rate” used to calculate overtime pay, “is the hourly rate actually paid to the employee for the normal, non-overtime work week.” *Aaron v. Wichita*, 54 F. 3d. 652, 655 (10th Cir. 1995); citing, *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199 (1947).

The regular rate of pay cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee [;] it must be drawn from what happens under the employment contract.” *Bayridge Operating Co. v. Aaron*, 334 U.S. 446, 464 (1942). 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.” Sec. 207(e). The regular rate “must reflect all payments which the parties have agreed shall be received regularly during the work week, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact.” *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945). While employers and employees are free to establish the regular rate at any point above the minimum wage as they see fit, “this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner. . . “ *Baker v. Barnard Construction Company, Inc.*, 863 F. Supp. 1498, 1500 (D.N.M. 1993), citing, *Walling*, supra.

II. The City’s Motion for Summary Judgment

The City claims that it is calculating and paying overtime correctly and asks for summary judgment as a matter of law. The City’s position is that there is “a fundamental misconception of the law by plaintiffs as to the proper method for calculating overtime pay.” City’s Summary Judgment Memorandum (henceforth “City Memo”) at p. 1. Plaintiffs contend that the City underpays its employees who work overtime by miscalculating overtime pay, improperly taking “credits” against owed overtime wages, and failing to add required elements of compensation to the regular rate calculation.

An issue implicit in this case is the City's contention that it may properly calculate contractual overtime, i.e., overtime agreed to in collective bargaining agreements, separately from statutory overtime, i.e., overtime pay required by the FLSA, and chose the higher of the two. City Memo, at p. 3. The question of whether the City includes in its calculations of the employees' "regular rate of pay" all remunerations required under the law, is barely addressed by the City. Whether the City must pay *any* overtime compensation to its Fire Department or other employees deemed "exempt" by the City is skipped over altogether. City Memo at p. 2, fn1.

For its "facts," the City relies almost entirely on the deposition testimony of its expert witnesses, Janet Hollyfield and Lloyd Hill. All these issues relating to the City's payment (or non-payment) of overtime wages to its employees will be addressed in this Response brief.

III. Plaintiffs' Response to City's Statement of Material Facts

Plaintiffs do not contest the City's statement of material facts except in the following respects:

1. Fact 27 is disputed in that it is an issue in this case whether the City is correctly calculating its employees' FLSA overtime premiums at one and one-half times the employee's "regular rate." (See, Section V, (C)).

2. Fact 28 is disputed as to whether "all non-discretionary bonuses . . . are included" in determining an employee's regular rate for purposes of the FLSA overtime premium. (See, Section V, (D)).

3. Fact 30 is disputed in that it is not "(a)nother correct method of performing the same calculation as both the calculations in Fact 29 and Fact 30 are incorrect. (See, Section V, (C)).

4. Fact 31 is disputed in that the statement, “if the employee has already been paid an amount greater than that required under the Act, no further payment is required” is incorrect.

(See, Section V, (A)).

IV. Plaintiffs’ Statement of Additional Material Facts

1. Plaintiffs’ expert witness, Judith A. Wagner is an accountant with a college degree in Mathematics who is qualified to testify as an accountant about the method used by the City of Albuquerque to calculate overtime pay to assist in determining whether or not that is consistent with the FLSA. (EXHIBIT 1; Wagner Deposition, at pp. 5, 50)

2. Rule 302.2 of the City’s Personnel Rules and Regulations provides that:

As a condition of employment, employees may be required to work overtime. . . . (W)hen 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.

A non-exempt employee shall not work more than the regularly scheduled forty (40) hour workweek without prior approval of the department director . . . Working overtime without prior approval is considered just cause for disciplinary action up to and including termination.

(Complaint, para. 6; Answer, para. 6. (Emphasis added). Rule 302.2. Overtime Work).

3. The normal work week of most City employees is set out in collective bargaining agreements. The normal work week is generally 40 hours per week, consisting of five eight-hour days or four ten-hour days, except for employees covered by Sec. 7(k) of the FLSA.

(Complaint, para. 7; Answer Para. 7).

4. Under the City’s calculation of overtime wages, “the bonus that is paid on a non-overtime basis is reduced . . . incrementally for every hour of overtime that an employee works.”

(EXHIBIT 1; Wagner Deposition, at pp. 64, 73).

5. The City's methodology in determining overtime pay is not consistent with Section 7(a) of the FLSA which requires payment of overtime compensation for hours worked in excess of the applicable maximum hours standard at a rate not less than one and one-half times the regular rate. (EXHIBIT 2; Wagner Expert Report at p. 7).

6. The methodology employed by the City in the calculation of overtime due has resulted in an underpayment of City Employees. This is, in part, because the City's methodology has yielded a rate that is less than "not less than one and one-half times the regular rate." (EXHIBIT 2; Wagner Expert Report at p. 7).

7. The City considers that pursuant to the FLSA a bonus is considered to cover all hours that an employee works, so the more hours that an employee works, the lower his bonus per hour will be. (EXHIBIT 3; Hollyfield Deposition, at p. 20).

8. The contracts between the Albuquerque Police Officers Association and the City state that the "normal workweek will be forty hours." The contracts also state that "for the purpose of computing overtime, paid leave shall be considered time worked, as per Section 34 (FLSA)." The contracts further 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.*

(EXHIBIT 4).

9. The City of Albuquerque does not perform calculations of Police Department employees' overtime pursuant to the FLSA. (EXHIBIT 1; Wagner Deposition, at p. 42).

10. The City not only calculates overtime under the FLSA, but a recalculation of the non-overtime pay is forced, resulting in an incremental reduction of the bonuses paid to the employees. (EXHIBIT 1; Wagner Deposition, pp. 60, 64, 69-73).

11. When calculating overtime due under the FLSA, the City has not considered paid leave as hours worked for purposes of calculating overtime. (EXHIBIT 2; Wagner Expert Report at p. 8).

12. When calculating overtime due under the respective collective bargaining agreements, the City has not included bonuses, such as longevity or other incentive pay in the calculation of the base rate upon which overtime rate is calculated. (Id.).

V. ARGUMENT AND AUTHORITIES

In this case there are few disputes as to the material facts. However, Plaintiffs, not the City Defendants, are entitled to judgment as a matter of law. This is so because the City's method of calculating its employees' overtime pay is not in accordance with law in a number of respects: 1) the City makes two calculations of overtime wages due to its employees and then selects one of the calculations; 2) the City improperly takes "credits" against the FLSA wages it owes to its employees; 3) the City erroneously calculates overtime pay by dividing by the total hours worked rather than the "normal, non-overtime hours" in the workweek and by multiplying by one-half rather than one-and-one-half; 4) when calculating overtime due under the respective collective bargaining agreements, the City does not include bonuses, such as longevity or other incentive pay in the calculation of the regular rate of pay; and 5) the City has failed to calculate overtime for a substantial number of employees it deems "exempt."

A. Two Calculations: Contract vs. FLSA

The Defendant City makes two calculations of overtime wages for each City employee: one under the provisions of the collective bargaining agreement (CBA); the other under the provisions and requirements of the FLSA. The City then purports to pay the higher of the two calculations. However, because the City employees' "regular rate "*must reflect all payments which the parties have agreed shall be received* regularly during the work week," *Walling*, 325 U.S. at 424, the FLSA and the City's rules and agreements with its unions require it to pay overtime that includes both the requirements of the FLSA and the terms of the contracts.

The City's Merit System Ordinance, Section 3-1-11, provides that overtime pay "be paid by the city for work performed outside of established work hours in accordance with the Fair Labor Standards Act." And Rule 302.2 of the City's Personnel Rules provides that:

(W)hen 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.

(Underlining added). The City must pay its employees "in accordance with the FLSA and any applicable collective bargaining agreement." Since the City does not do that, it violates both the FLSA and its agreements with its employees.

The Collective Bargaining Agreements between the City and all except one of its unions expressly state that paid leave (i.e., vacation, sick leave, holidays, etc.) shall be counted as days worked and clarify that employees working over 40 hours in a week "shall be compensated for all such time at a rate equal to one and one-half times their regular pay." The Management union contract specifies that "(p)aid time will be considered hours worked for purposes of calculating overtime" and that overtime compensation "must be in accordance with the FLSA and this Agreement." Local 3022 Agreement, at p. 16, section 14.1; City Facts 6 and 15.

Despite these provisions the City makes two separate calculations and chooses the higher of the two. The Police union contract goes even further, trading the proper calculation under the FLSA of the regular rate in exchange for the City's agreement to pay for leave time as if it were "time worked." As stated in the contracts in effect between 2001 and the present:

The parties hereto 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.

Section 34, APOA 2002-2003 Contract; underlining added). Additional Facts Nos. 10, 11.

In testing the validity of a wage agreement under the Act "the courts are required to look beyond that which the parties have purported to do." *Herman v. Anderson Floor Company*, 11 F. Supp. 2d 1038, 1041-42 (E.D. Wisc. 1998), quoting *149 Madison Ave.*, at 204, (citing, *Walling*, 325 U.S. at 424). An agreement by the parties to treat certain payments differently than as compensation for hours of employment within the meaning of the [FLSA] does not comply with the FLSA. *Herman*, at 1042, citing *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 432 (1945).

In *Wheeler v. Hampton Township*, 399 F.3d 238 (3rd. Cir., 2005), the Township's police officers made the same deal as the Albuquerque Police officers: no additional remunerations would be included in the regular rate calculation but non-work pay would count as days worked.

The officers subsequently contended

that the Township's method of calculating overtime short-changed them under the FLSA, even though they agreed to that method in a collective bargaining agreement. The Township argues that, while the officers bargained away in the agreement one of their rights under the FLSA, the Township over-compensated the officers by bargaining away a more valuable right under the FLSA and thus offset the Township's liability under the Act.

Wheeler, 399 F.3d at 240. The Township “argued that the Officers traded their right to have incentive/expense pay added . . . in the CBA’s overtime calculation in exchange for the inclusion of non-work pay. . . which” the Township contended “is not required under the FLSA.”

The Township’s contention in *Wheeler* was exactly the same as the City of Albuquerque’s argument that it picks the higher of the bargaining agreement calculation and the FLSA calculation so the scheme benefits the employer and the employees. In *Wheeler* the appellate court questioned the basis for the Township’s defense:

We agree that under Sec. 207(e)(2), the Township did not have to agree to a CBA (collective bargaining agreement) that included non-work pay in its regular rate. Assuming, as do the parties, that such pay already is included in the CBA, however, we disagree that under Sec. 207(e)(2) the Township does not have to include non-work pay in its regular rate. The CBA requires the Township to do so, and Sec. 207(e) nowhere suggests that we should relieve the Township of that obligation.

Wheeler, at 243.

Section 207(e) states that an employee’s “regular rate” of pay “*shall not be deemed to include . . . payments made for occasional periods when no work is performed.*” The Third Circuit Court held that the “pivotal language is ‘shall not be deemed.’”

The function of Sec. 207(e)(2) is to forbid this Court from deeming that the CBA include non-work pay. We will follow that injunction, for the parties agree that the CBA already contains non-work pay in the regular rate. There is thus nothing for this Court to “deem.” The deed is already done by the parties’ own hands. . . . Consequently, we see no textual reason to “credit” the Township for including such pay in its regular rate.

Wheeler, at 244.

In *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) the Court addressed whether the provisions of a collective bargaining agreement could overcome an individual’s right to sue under the FLSA. The Court noted:

This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to . . . overtime pay under the Act. Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate. . . .

The law requires the City to pay overtime wages at a rate that includes both the provisions of the applicable CBA and the requirements of the FLSA. As a result of the City's mistaken reading of "and" to mean "or" the City selects the higher of the two, rather than the total of the agreed upon provisions and the statutory requirements. The court should not overturn what the employees bargained for with the City in good faith; at the same time, the court should not condone the City's violations of the requirements of the FLSA.

B. Improper Taking of "Credits"

The City is incorrectly and impermissibly taking "credits" or "offsets" against overtime pay for vacation time, sick time, and other pay which is provided in a union agreement or which is otherwise properly not creditable or chargeable against overtime pay under the provisions of the FLSA. According to the City:

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....

City Memo at p. 14. The City admits that it "takes credits for hours paid but not worked, such as holiday pay, call-in pay, longevity pay, to offset overtime liability." City Memo at p. 21, citing Hollyfield Deposition at 10, 22, and Hill Deposition at 24-25. Under its dual calculation system the City unilaterally takes "credits" against its overtime pay liabilities, The result is that the employees have no idea what they are actually paid for and what the City takes away in "credits."

The City is not entitled to the credit allowed under Sec. 207(h)(2) for anything other than what it has actually paid as a premium, at a rate no less than time-and-a-half of the regular rate of

pay. The pay for which the City takes credits against owed overtime pay, i.e., vacation, sick leave, and other paid leave time, is not creditable because the City did not provide any extra, or premium, pay for those hours. See 29 U.S.C. Sec. 207(e)(5)-(7). Furthermore, these payments are not themselves related to the performance of overtime, and instead are payments that were bargained for and “were not intended to compensate the employees in lieu of overtime compensation.” *DuPlessis v. Delta Gas, Inc.*, 640 F. Supp. 891, 897 (E.D. La. 1986).

In *Dunlop v. Gray-Goto, Inc.*, 528 F.2d 792, 793 (10th Cir. 1976) the court addressed a contention that there was no overtime compensation due to employees whose employer “had paid its employees certain fringe benefits, including paid vacations . . . the value of which equaled or exceeded the amount of overtime compensation otherwise due under the Act.” The Tenth Circuit Court disagreed, holding that while the paid leave benefits “in the form of paid vacations, six holidays with pay each year, biannual bonuses, and the extension of benefits of a group insurance policy would appear to be included” in 29 U.S.C. Sec 207(e) “as we read 29 U.S.C. Sec. 207(h) such benefits . . . may not be credited toward overtime compensation due under the Act.” 528 F.2d at 794; See, *Alexander v. United States*, 28 Fed. Cl. 475, 479, 480 (Ct. Fed. Cl., 1993)

A case cited by the City, *Kohlheim v. Glynn County, Georgia*, 915 F.2d 1473 (11th Cir. 1990) discusses “‘credit’ for excessive overtime premiums paid.” The court held that the defendant would only be entitled to credit for overtime premiums paid that were equal or greater than one and one half times the regular rate. Here, none of the pay for vacation or sick time was paid at an overtime rate. Except for a few holidays paid at time-and-a-half rates, there is no “premium pay” against which the City can properly claim credit for vacation time, sick leave, or other ordinary paid leave time.

C. Incorrect Calculation of Overtime Pay

At the start of its argument “The City’s Mathematical Formula Is Proper,” the City states:

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.

City Memo, at p. 15. In their Second Amended Complaint, at page 4, paragraphs 13-15, Plaintiffs very clearly set out their concerns, contending that the City erroneously uses a higher divisor (including overtime hours instead of just the “employees’ regular, non-overtime work-week hours) and a lower multiplier (0.5 rather than 1.5) to calculate the “regular rate.”

In all cases where the City is calculating overtime pay for its employees it is incorrectly calculating that hourly “regular rate” by dividing the employees’ hourly pay and additional compensation by the number of hours worked in the particular week for which calculations are made, which includes overtime hours. This results in a lower “regular rate” and a lower “overtime adjustment” than the correct calculation method, which requires dividing the hourly pay and additional compensation for the “normal, non-overtime workweek” by the number of hours in that week. In each such case, the City is also then incorrectly multiplying the incorrectly calculated “regular rate of pay” by 50% rather than 150% as required by the FLSA. The result is that the City is paying its employees significantly less overtime pay than required by the FLSA.

The regular rate is the hourly rate an employer pays the employee “for the normal, non-overtime workweek for which he is employed.” *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) (underlining added). In *Newmark v. Triangle Aluminum Industries, Inc.*, 277 F. Supp. 480 (N.D. Ga., 1967), the Court addressed the calculation of damages where the employee has a fixed salary and held that it is the agreed upon compensation for the “normal, non-overtime workweek” that is the base salary amount.

In *Newmark*, the Court rejected the employer's argument that total compensation received divided by all hours worked should be used to determine the regular rate and that half of that should then be multiplied by the overtime hours in order to determine overtime wages. 277 F. Supp. at 481-82. The Court stated:

(D)efendant has overlooked 29 C.F.R. Sec. 778.113 . . . which in describing the method for computing the "regular rate" for salaried employees, reiterates that the "regular hourly rate is computed by dividing the salary by the number of hours which the salary is intended to compensate."

It is obvious that the phrase "hours actually worked," the divisor sought by defendant, is not synonymous with "hours for which the agreed-upon salary is intended to be compensation." If the agreed-upon hours are less than those actually worked, the divisor would be smaller and the resulting "agreed rate per hour" would be correspondingly larger.

Newmark, 277 F. Supp. At 481-82; also see, *Cowan v. Treetop Enterprises, Inc.*, 163 F. Supp. 2d 930, 938-941 (M.D. Tenn. 2001) ("the Court concludes that the agreed-upon work hours for Plaintiffs' work . . . controls on the number of hours that will be divided into the weekly compensation here to determine the employees' regular hourly rate of pay"); *Dingwall v. Friedman Fisher Associates*, 3 F. Supp. 2d 215 (N.D. N.Y. 1998)

The regulations defining the regular rate of pay provide that the regular rate is "determined by dividing his total remuneration for employment . . . in any workweek by the total number of hours actually worked by him in that workweek *for which such compensation was paid.*" 29 C.F.R. Sec 778.3. See, *Hernandez v. 65 de Infanteria Thom McAn, Inc.*, 516 F.2d 1293, 1296 (1st Cir. 1975). This necessarily involves making such a calculation prior to adding overtime pay to the amount of compensation.

Since the amount divided is the normal amount of pay for a regular, non-overtime workweek, which in this case and most other cases is a 40-hour workweek, it is erroneous to

divide by the total hours worked including overtime, which in extreme examples can be more than twice that number.² As a result of dividing by the hours worked in the particular work week, including overtime hours, rather than dividing by the normal, non-overtime hours in employees' work weeks, the City arrives at a lower hourly "regular rate of pay" than required by the FLSA. The City then compounds its error by multiplying by one-half rather than one-and-a-half.

The City's justification for using a multiplier that is one-third the correct multiplier is based on its assumption of fluctuating or variable work week covered by the employee's salary no matter how many hours are worked by the employee in the workweek.

1. The Fluctuating or Variable Workweek Exception

. . . the overtime compensation regulations . . . provide two methods by which to calculate an employee's "regular rate" of pay. The first applies if the employee is paid a fixed weekly salary for a specific number of hours to be worked each week. 29 C.F.R. Sec. 778.113(a). The second applies if the employee is paid a fixed weekly salary regardless of how many hours the employee may work in a given week. *Id.* at Sec 114(a).

By its own terms, Section 114 applies only if there is "a clear mutual understanding of the parties" that the fixed salary is compensation for however many hours the employee may work in a particular week, rather than for a fixed number of hours per week.

Valerio v. Putnam Associates, Inc., 173 F.3d 35, 39 (1st Cir., 1999).

While neither of these two calculation methods applies precisely to City employees paid by the hour (rather than by a salary) for a normal 40-hour workweek, the first, where "the employee is paid a fixed weekly salary for a specific number of hours to be worked each week," is far more applicable to employees employed at a fixed rate for a 40-hour workweek than the

² See, for example, the pay statements of Michael Toya, one of the named Plaintiffs, who worked many hours of overtime as a bus driver, attached as EXHIBIT 5.

fluctuating or variable workweek method of calculation utilized by the City. This is especially true when the normal workweek is fixed by agreement or law at 40 hours and there is no contrary agreement that covers any more or less hours. Additional Fact No. 4. Applying the 40-hours per week and set wages to the law, and vice-versa, it is apparent that the City is short-changing its employees on their overtime wages.

The City calculation error is based on two false assumptions. One is that City employees are paid by the second of the two methods described in *Valerio*: “the employee is paid a fixed weekly salary regardless of how many hours the employee may work in a given week.” This is plainly inapplicable to the City employees in this case who are paid a set hourly for a normal, 40-hour workweek.

The second erroneous assumption by the City is that the add-on pay for longevity and other pay “bonuses” is intended to cover the entire number of hours worked, no matter how many. According to the City’s expert, Janet Hollyfield, the City considers “that pursuant to the FLSA a bonus is considered to cover all hours that an employee works, so the more hours that an employee works, the lower his bonus per hour will be.” Additional Fact No. 5; Hollyfield Deposition, at p. 20.

In *Bell v. Iowa Turkey Growers Coop*, 407 F.Supp.2d (S.D. Iowa, (2006) the Court discussed shift differentials and a sixth working day premium. These differentials are spread across the hours worked and have little in common with the pay issues in this case. Here the employee gets his longevity pay, for example, for each pay period he works, regardless of whether or not he works overtime. In *Wisnewski v. Champion Healthcare Corp.*, 2000 WL 1474414 (D.N.D. 2000), another case cited by the City, the issue was production bonuses.

Again, this is a pay incentive that is spread through the time worked, not limited to a regular workweek.

The exception incorrectly employed by the City to calculate City employees' overtime rate of pay is found in 29 C.F.R. Sec. 778.114:

An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid to him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period . . . the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

Sec. 778.114(a). Remarkably, even though the City admittedly uses this method to calculate the overtime wages of all City employees, none of the prerequisites are met.

First, for the City's hourly employees, such as Transit, Blue Collar, White Collar, and Corrections, there is no established annual or monthly salary, as opposed to a set hourly wage. Second, for all the City employees in this case except Fire Department employees there is a set regular workweek set by City rule and contract at forty hours per week. Third, even if there were a "salary," which there isn't, there is no "clear mutual understanding that the fixed salary is compensation for the hours worked each workweek, whatever their number." *Heder v. City of Two Rivers, Wisconsin*, 295 F.3d 777, 779-80 (7th Cir. 2002). The City does not allege, and surely cannot demonstrate, its qualification for the exception. See, *Troutt v. Stavola Brothers, Inc.*, 905 F. Supp. 295, 300 (M.D. N.C. 1995) (Section 778.114 inapplicable because "Defendant

has failed to establish that there was any ‘clear mutual understanding’ regarding fluctuating hours.”).

2. Contrary to Public Policy

In addition to the clear inapplicability of the method used by the City to calculate its employees’ overtime pay, there is a “public policy” concern that the City should have considered. Under the City’s scheme of calculating the “regular rate” by dividing by the number of hours worked in the workweek, the more the employee works the lower the hourly rate of pay he earns. This is contrary to the intent of the FLSA and is plainly regressive for the employees, while unreasonably benefitting employers who use employees for long workweeks.

In *New Mexico Department of Labor v. Echostar Communications Corporation*, 2006 NMCA 47; 134 P.3d 780, the New Mexico Court of Appeals invalidated a contract which called for a fixed weekly salary plus an overtime factor of one-half the hourly rate, calculated so the hourly rate decreases as the number of hours worked increases. The New Mexico court held that New Mexico’s wage and hour law “does not permit such agreements, which conflict with the Act’s prohibition against overtime paid at less than time and a half.” *Echostar* at 781. The Court reasoned that Echostar’s contractual provisions were invalid because:

(1) the statute provides for time and a half; (2) the intent of the statute is to adequately compensate for overtime, to discourage overtime, and to encourage the employment of more workers; (3) a specific provision of the statute provides for basing overtime on fluctuating rates of pay for one limited category of employees; and (4) the Supreme Court authorities relied upon addressed a differently worded statute. Accordingly, we hold that the contract between Wendt and Echostar violates the public policy set forth in the Minimum Wage Act.

Echostar, at 783. Other state courts have had the same concern. In *Dresser Industries v. Alaska Department of Labor*, 633 P.2d 998, 1006 (1981) the Alaska Supreme Court upheld a State regulation prohibiting use of the flexible work week exception: “This contravenes the policies of

requiring increased overtime compensation and promoting the spreading of employment.” See also, *Skyline Homes, Inc. v. Department of Industrial Relations*, 165 Cal. App. 3d 239; 211 Cal. Rptr. 792 (Ct. App. 4th Dist., Div. 2, 1985) (“the rate must be computed by dividing the weekly straight time salary by no more than 40 hours regardless of how many hours . . . worked.”).

The word “regular” in “regular rate” should also give a clue as to what is intended. Having a different rate of pay each week for each employee, depending on the number of hours worked, would be far from “regular.” With the City including two workweeks in each pay period, the City’s calculation method, which could provide separate and different rates of pay for each of the two weeks, adds an additional irregularity. The City’s argument for dividing by the total hours worked, including overtime hours, and multiplying by a half rather than time-and-a-half to calculate overtime pay is irregular and erroneous as a matter of law.

3. Miscalculation Examples

The regular hourly rate of pay for a 40-hour-a-week public employee is derived by first taking the employee’s wage rate (e.g. \$15.00/hour) and adding to that the total of additional remuneration (such as longevity pay and other such “bonuses” (for example \$60.00) for the week, divided by 40, the number of hours in the workweek. The result, (e.g., \$16.50) is the “regular rate of pay for that employee for that week. If the employee works 60 hours in a particular workweek, his overtime pay is \$24.75 (16.50 times 1.5) times 20 (overtime hours) or \$495.00 which, added to his base pay of \$600.00 pays him \$1095.00 for the week. Assuming the add-ons remain the same, the rate is the same for each week, regardless of how many overtime hours are worked.

Using the City’s calculation method, however, the employee’s rate of pay is \$15.00/hr times 60 hours (\$900) plus \$60.00 (\$960.00), which divided by 60 (total hours worked in the

workweek) results in \$16.00 as the “regular rate,” and overtime pay (.5, not 1.5) is \$8.00, times 20, or \$160.00 which added to the base pay of \$900.00 pays the employee \$1060.00 for the week. The rate of pay then varies for each week for each employee, depending on how many hours are worked in the week.

Plaintiffs attach as EXHIBIT 5, four earnings statements (the accounting that comes with each paycheck) of one of the named-Plaintiffs, Michael Toya. Mr. Toya is a bus driver who has worked many hours of approved overtime. Each of the statements reflects regular hours for the two-week pay period (80), the base rate of pay (e.g., \$15.00 per hour) and the overtime figured at time-and-a-half of the base rate of pay, without additional remunerations. Each of Mr. Toya’s pay statements also reflects his longevity pay (\$87.70 per pay period). Divided by 80 (the number of hours in the “normal, non-overtime” pay period), the add on pay amounts to about \$1.10 per hour. Mr. Toya’s regular rate of pay, including the longevity pay, is thus \$16.10 per hour. Time and a half comes to \$24.15.

On July 3, 2003, he worked 96.85 hours of overtime. Mr. Toya should have received \$2,338.92 for his overtime work, which is \$159.79 more than the amount the City figured without adding in the longevity pay. The City paid an “FLSA Overtime Adjustment” of only \$24.72. The City owes Mr. Toya an additional \$135.07 for that pay period. The City paid Mr. Toya only 0.15 (or less than 1/6) of what he should have been paid for his longevity add-on.

Similarly, on April 9, 2004, Mr. Toya received overtime pay of \$1,983.38, instead of the \$2,128.82 he should have received. The City paid him an “overtime adjustment” of \$22.23 instead of the \$145.44 he was owed. The same is true, and has been true for each of the City’s

calculations of pay for Mr. Toya over at least the last seven years. Again, the City paid only 0.15 of what it owed Mr. Toya.

D. Failure to Include Add-Ons

The City contends that “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.” City Memo, at p. 2 and City Fact No. 28. On the other hand, Plaintiffs EXHIBITS 6, 7, 8, 9, and 10 demonstrate the City’s failure to include additional compensation factors in the employees’ regular rate of pay for purposes of calculating overtime. This presents an issue of disputed fact which precludes summary judgment on the question of whether or not the City applies required additional compensation to the regular rate and subsequent overtime rate of pay.

The City of Albuquerque has failed to include all the properly applicable “other compensation” in calculating the “regular rate of pay” of many of its employees, with the result that these employees receive less overtime pay than required by the FLSA. The pay statements of Fire Department employees, for example, show assignment pay, incentive pay, longevity pay, superlongevity pay, bilingual pay, and temporary upgrade pay. In addition there is a “FIRE PAY EQL” which is generally in amounts varying from \$200 to \$400 that appears to be pay for shift exchanges. None of these incentives or elements of compensation are included in the Fire employees’ regular rates or overtime compensation. Copies of four such Fire Department employees’ pay statements are attached as EXHIBIT 6.

Police employee pay records show a similar pattern, which is hardly surprising in view of the agreement to waive inclusion of add on remuneration for Police Department employees. The pay statements of four Police Department employees, attached as EXHIBIT 7, show pay add-ons

for incentive pay, longevity pay, superlongevity pay, shift differential pay, temporary upgrade pay, bilingual pay, hazard pay, and indicate that overtime payments are made for “OT EVENT,” “OT TACT PLAN,” “OT-INVESTGAT,” “OT METRO CT,” “OT MVD HEAR,” “OT CHIEF,” “OT GRAND JY” “OT TRAINING,” “OT FOR TIME,” “OVRTM UPGRAD.”

Curiously, these overtime payments appear to be made at different rates of pay, only some of which are figured at time-and-a-half of the base rate of pay (not the regular rate) which does not include any add-on remuneration. The “OT-CHIEF” overtime is especially problematic, as it is paid at the rate of \$24.25 per hour, regardless of the base pay of the officer working the overtime. Clearly, with respect to both Police and Fire Department overtime compensation there are disputed material fact issues concerning the City’s application of add-on pay to the regular rate.

These failures to properly compensate employees for their additional remuneration and failures to properly calculate “overtime adjustments” are not limited to Transit, Police, and Fire Department employees. At the Water Utility Division of the Public Works Department, for example, an employee who had longevity pay of \$75 per pay period, trainor (sic) pay, utility tech pay of \$60 per pay period, and overtime pay of \$1,402 over almost six months of the year had an “FLSA overtime adjustment” of only \$11.74 for the nearly six month period. “Skill pay,” which is the category in which “utility tech pay” falls, is apparently not added by the City to the base rate of pay to calculate overtime based on a “regular rate.” See EXHIBIT 8.

The City has, applicable to various bargaining units, a vacation buy-back and sick-leave buy-back program. When the City converts an employee’s sick leave or “buys back” vacation time, that adds a substantial amount of money to the employees’ pay and it must be included in the “regular rate.” *Acton v. City of Columbia, Missouri*, 2004 U.S. Dist. LEXIS 19004 (W.D.

Mo., 2004). However, as reflected in EXHIBIT 9, that pay never becomes part of the regular rate calculation, and hence does not enhance the employees' overtime rate.

The City paid a "bonus" to all active City employees at the end of October, 2003. This across-the-board payment was billed as being in lieu of a pay raise, yet it was not factored in to the regular rate. The City did not include these payments, which were in the amount of \$1,257.33 per employee, for an after tax benefit of \$750.00 per employee (\$250 per year of employment in the prior three years), in the employees' regular rate of pay. See, EXHIBIT 10, which includes a Memorandum of Understanding signed by the New Mexico Transportation Union and a pay record showing the bonus pay.

The foregoing examples demonstrate factual disputes concerning the City's failure to comply with the terms of the Fair Labor Standards Act with respect to calculation and inclusion of pay incentives and bonuses in the employees' regular rate of pay.

E. "Exempt" Employees

Finally, an issue that has been addressed and denied as the subject of proposed amendments, but not yet resolved, is the issue of employees in this lawsuit who have been deemed by the City to be "exempt" from the overtime requirements of the FLSA. There are about 100 such plaintiffs. In its summary judgment motion, the City states that it does not address, because it has not conducted discovery on, these employees and their entitlement to correctly calculated overtime wages.

The City has the burden of proving that each of its exemptions from the FLSA is appropriate. *Department of Labor v. City of Sapulpa*, 30 F.3d 1285, 1287 (10th Cir. 1994); *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). Overtime exemptions are narrowly construed against the employer. *Avery v. City of Talladega*, 24 F.3d 1337, 1340 (11th

Cir. 1994). The employer's burden of proof must be proven by clear and affirmative evidence. *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984). The Fire Department lieutenants and captains that the City claims are "exempt" must fit "plainly and unmistakably" within the terms of the applicable "bona fide executive" exemption. *Bennett v. City of Albuquerque*, 1995 U.S. App. LEXIS 8901, at *6, 7 (10th Cir., 1995); citing *Reich v. Wyoming*, 993 F.2d 739, 741 (10th Cir. 1993).

Since the City has the burden of proving the propriety of the exemptions at trial, it is only entitled to summary judgment if it can meet the heavy burden of showing sufficient undisputed material facts to entitle it to judgment as a matter of law. With respect to these plaintiffs, the propriety of the exemptions must be determined before the issue of the correctness of the calculations can be addressed. Accordingly, summary judgment as to these employees, without additional consideration of their status, would be pre-mature and inappropriate.

F. Willfulness and Good Faith

The City asks the Court to summarily accept its "good faith belief that its actions did not violate the FLSA," and decline to apply a three-year statute of limitations or award liquidated damages. City Memo, at p. 19. The claims that it has relied on "a manual issued by the Department of Labor as a guideline" and that the City's expert witnesses support the conclusion that "(t)he City's calculation was established in good faith. Id.

Certainly, an employer may be acting in good faith and yet make errors in its calculations and methodology. On the other hand, as a governmental employer the City had an obligation to inquire, discover, and comply with the law. The employer will be liable for liquidated damages unless it was acting in good faith and reasonably believed that its conduct was consistent with the law. *Shea v. Galaxie Lumber & Construction Co., Ltd.*, 152 F.3d 729, 733 (7th Cir. 1998). A

three-year statute of limitations will apply where it appears the employer's conduct was willful. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988).

This case is at the stage where the issues are those of liability, not damages. The City's claim of good faith and lack of willfulness is not properly before the Court at this time, and it is far from ripe for summary determination. Plaintiffs respectfully suggest that consideration of this issue be deferred until after the Court's decision on liability.

VI. Conclusion

The regular rate of pay under the provisions of the FLSA is "drawn from what happens under the employment contract." *Bayridge Operating Co.* 334 U.S. at 464. The "regular rate" "must reflect all payments which the parties have agreed shall be received. . . . it is an actual fact." *Walling*, 325 U.S. at 424. The City's view of the terms and provisions of the FLSA is far different, based on the notion that the City and its unions can agree to violate the law. The City claims that it is calculating and paying overtime correctly and asks for summary judgment as a matter of law. Although the City claims that plaintiffs have "a fundamental misconception of the law," it is actually the City that is misguided. For all the reasons set out in this Response to the City's Motion for Summary Judgment, the motion should be denied.

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 April 6, 2007:

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