

**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.
§ 207(a)(1),**

Plaintiffs,

vs.

No. CIV 02-0562 JH/ACT

CITY OF ALBUQUERQUE,

Defendant.

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT**

MOTION

Plaintiffs present the following Motion for Summary Judgment, stating as grounds that the material facts in this case are undisputed and that Plaintiffs are entitled to partial judgment in their favor pursuant to Rule 56, Fed. R. Civ. Proc., as a matter of law.

MEMORANDUM

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. In addition to the named-Plaintiffs, about 750 employees and former employees who worked overtime for the City of Albuquerque have opted in to this collective action. The employees have been subjected to a common scheme, with variants, to avoid or diminish their

payments for overtime work. The employees work or worked in the Fire, Police, Transit, Corrections, Public Works, and other Departments, Divisions, and offices of the City of Albuquerque. This case presents some important and previously unresolved issues concerning overtime compensation and the interface between the law and collective bargaining and agreements between the City and its employees who work overtime.

I. Introduction

The Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq., is one of the most important laws governing the relationship between employees and employers. The law sets out minimum wage standards and rules for the payment of overtime wages at a rate of time-and-a-half of the employees' regular rate of pay. Congress deliberately left many key terms of the FLSA, such as the definition of "work," for the courts to interpret and define, and a substantial body of employment law has developed from the efforts of employers and employees to do just that.

In this case, Plaintiffs contend that the City miscalculates their overtime pay, improperly takes "credits" against owed overtime wages, and fails to include required elements of compensation in the regular rate and overtime pay calculation. The City denies Plaintiffs' contentions. There are no disputes over the material factual issues and the matter is ripe for summary adjudication; Plaintiffs assert that they are entitled to summary judgment as a matter of law.

"Paid Leave"

Days of "paid leave," when employees are paid but do not work, are the crucial and variable factor in this case. The primary types of paid leave for most City employees are vacation, sickness, injury, and holidays. Some paid leave (vacation and sick time) "accrues" and some can be "sold back" or donated. Although it would appear that the application of the law to

the work and pay of the City of Albuquerque's public employees would be direct and relatively simple, that is far from the case.

That is because the FLSA requires an employer to pay overtime wages, calculated at "time-and-a-half of the regular rate of pay for the normal, non-overtime workweek" after forty hours of "work." Thus, in a normal forty-hour week when an employee has a day off with pay, he must work another full day before becoming meeting the FLSA's forty-hour overtime threshold.

However, the City and each of its unions have a negotiated clause in their contract that states: "Paid leave will be counted as days worked for the purpose of calculating overtime." For employees working under those contracts, overtime pay, at least under the collective bargaining agreement, starts after forty hours of "normal, non-overtime" pay, regardless of whether or not they actually "worked" all forty hours.¹

"Regular Rate of Pay"

Overtime pay is calculated at the rate of time-and-a-half of the regular rate of pay for each hour worked after forty in a week. The "regular rate" is not just the employee's base rate of pay (e.g., \$15.00 per hour), but it also includes any additional pay such as longevity pay, hazardous duty pay, or any other bonus or incentive pay related to the work. The way the City calculates the regular rate and the amount of overtime pay employees receive are issues in this case.

"Contractual Overtime"

The City calculates overtime owed to its employees, with the likely exception of Police Department employees, making two calculations for each employee: once for "contractual

¹ Two exceptions are the Transit drivers' union, which has no "leave time counts as work" provision in its contract and Fire Department employees, who work three different work periods, rather than standard 40-hour workweeks.

overtime” and once for “statutory overtime.” Contractual overtime is based on the terms set out in the collective bargaining agreements between the City and its employee unions. Contractual overtime is calculated by the City in accordance with the contract, but not necessarily in accordance with the provisions of the FLSA.

The situation is even more extreme for Police Department employees. Members of the bargaining unit represented by the Albuquerque Police Officers Association (APOA) have expressly traded their right to a rate of overtime pay governed by the FLSA (which includes bargained for pay incentives and bonuses) for consideration of their days of paid leave as if they were days worked. For Police Department employees there is apparently only one calculation and it is based on the contractual overtime provision. There is no “overtime adjustment” on the checks of Police employees; all overtime for Police Department employees is calculated at one-and-a-half times their base rate of pay.

Two Calculations: One Contractual; One Statutory

Most of the other City employees are in a somewhat different situation. These are the employees for whom the City performs two calculations, one under the collective bargaining agreement’s terms, which includes paid leave as days worked but does not include pay incentives in the “regular rate,” and the other under the terms of the FLSA, which does include pay incentives but does not include any days or hours the employee does not actually go to work. The City makes two calculations of overtime pay: one under the collective bargaining agreement which essentially ignores the requirements of the FLSA; the other under the FLSA which ignores the provisions of the bargaining agreement. This procedure is unauthorized and unprecedented. Neither the City nor the Plaintiffs have found any other case in which this procedure is utilized; nor has it been considered or approved by any court.

II. PLAINTIFFS' STATEMENT OF UNDISPUTED 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. (Plaintiffs' Response Brief 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.

(2nd Amended Complaint, ¶ 6; Answer, ¶ 6. (Emphasis added). Rule 302.2: Overtime Work).

3. The normal work week of most City employees is set out in the City's rules and 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 § 7(k) of the FLSA. (2nd Amended Complaint, ¶ 7; Answer ¶ 7).

4. The AFSCME, Local 624, Local 2964, Local 3022, Local 1888, Albuquerque Police Officers Association, and Albuquerque Firefighters Association contracts include provisions stating that "(f)or the purpose of computing overtime, paid leave will be considered time worked." (City's Summary Judgment Memorandum, Facts 5-9, 13-19, and Exhibits);

5. The contracts between the APOA and the City also 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. . . .

(Plaintiffs' Response Brief, EXHIBIT 4)

6. For each of the bargaining unit employees except the APOA bargaining unit, the City performs two calculations of overtime pay, one under the contractual provisions, the other under the requirements of the FLSA. The City then chooses and pays the employee according to the higher of the two calculations. (EXHIBIT 11; City's Summary Judgment Memorandum, Facts No. 10-12, 21-31).

7. When calculating overtime due under the FLSA, the City has not considered paid leave as hours worked for purposes of calculating overtime. (EXHIBIT 11; City's Summary Judgment Memorandum, Facts Nos. 22 and 23).

8. 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 rate upon which overtime rate is calculated. (EXHIBIT 11; City's Summary Judgment Memorandum, Facts Nos. 20 and 21).

9. The City of Albuquerque does not perform calculations of Police Department employees' overtime pursuant to the FLSA. (EXHIBIT 11; p. 51; Plaintiffs' Response Brief, Wagner Deposition, at p. 42).

10. 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." (Plaintiffs' Response Brief, EXHIBIT 1; Wagner Deposition, at pp. 64, 73).

11. The City considers that pursuant to the FLSA any bonus or incentive pay 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. (Plaintiff's Response Brief, EXHIBIT 3; Hollyfield Deposition, at p. 20).

12. 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. (Plaintiff's Response Brief, EXHIBIT 1, Wagner Deposition, pp. 60, 64, 69-73).

13. For all employees for whom overtime pay is calculated, the City divides the total basic compensation, including incentive and bonus pay, by the number of hours worked in the workweek, including overtime hours, to get the regular rate of pay and then multiplies by one-half times the number of hours of overtime to get the overtime compensation. (City's Summary Judgment Memorandum, Facts 28-30).

14. The City's methodology in determining overtime pay is not consistent with § 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. (Plaintiffs' Response Brief, EXHIBIT 2; Wagner Expert Report at p. 7).

15. 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 "one and one-half times the regular rate." (Plaintiffs' Response Brief, EXHIBIT 2; Wagner Expert Report at p. 7).

III. ARGUMENT AND AUTHORITIES

Plaintiffs are entitled to judgment as a matter of law because the City's method of calculating its employees' overtime pay is not in accordance with the FLSA, in that the City of Albuquerque:

- 1) makes two calculations of overtime wages due to its employees, one under the terms and provisions of the collective bargaining agreements, the other under the FLSA, and then selects only one of the calculations;
- 2) calculates overtime due under the respective collective bargaining agreements without including pay bonuses and incentives, such as longevity pay or other remuneration in the calculation of the regular rate of pay;
- 3) calculates overtime due under the FLSA without including paid leave in the total of time or days worked;
- 4) improperly takes “credits” for contractual payments against both the FLSA and the contractual overtime pay it owes to its employees;
- 5) 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; and
- 6) fails to include certain bonuses and incentive pay in its calculation of the “regular rate.”

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,” for hours worked in excess of their normal workweeks. 29 U.S.C. § 207(a)(1). 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” 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.”

§ 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.”

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.” 29 C.F.R. § 778.108; *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 462-63 (1942). 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). The rule is that the regular rate “shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee.” § 297(e). The City of Albuquerque has illegally evaded or diminished its obligations under the FLSA, with the result that City employees receive less overtime compensation than they are entitled to under the law.

The City’s contends that it may properly calculate contractual overtime separately from statutory overtime, and then chose the higher of the two. EXHIBIT 11, pp. 35, 42, 50, 52; City Summary Judgment Memo, at p. 3. This raises the question, however, of whether the City violates the law while calculating according to the contractual terms and violates the contracts when it calculates according to the law. Neither is permissible, yet both are happening under the City’s overtime pay scheme.

A. Two Calculations: Contract vs. FLSA

With only a few exceptions, the City makes two calculations of overtime wages for each City employee in each pay period: one under the provisions of the collective bargaining agreement (CBA); the other under the provisions and requirements of the FLSA. The City then pays 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, § 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, § 14.1; City Facts 6 and 15.

Despite these provisions the City makes two separate calculations and chooses the higher of the two. See, EXHIBIT 11; Hollyfield Deposition, pp. 34-36, 42, 50-54. This has the general effect of substituting the collectively bargained provisions for the requirements of the FLSA.

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 APOA contracts in effect between at least 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.

Fact No. 5: § 34, APOA 2002-2003 Contract; (underlining added).

In testing the validity of a collectively bargained agreement under the FLSA, "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, bonuses, or pay incentives, 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 § 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 § 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 § 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 § 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.

Another appellate court addressed whether the FLSA requires inclusion of contractual benefits "in the officers' 'regular rate' for purposes of overtime calculation under the FLSA." *O'Brien v. Town of Agawam*, 350 F.3d 279, 294 (1st Cir. 2003). Because the regular rate "must be discerned from what actually happens under the governing employment contract" the court held that the contractual add-on incentive pay must be included in the regular rate calculation.

Id.

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 City argues that "Plaintiffs err in trying to overlap contractual overtime and statutory overtime." City's Summary Judgment Memo at p. 13. However, any citation to authority or other support for the City's "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)," City's Summary Judgment Memorandum, Fact 11, "for each employee for each pay period," *Id.*, Fact 12, is noticeably missing.

The definition of "regular rate of pay" is the wage actually paid to the employee. The employees' regular rates "must be drawn from what happens under the employment contract." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. at 464. "(I)t is an actual fact." *Walling* 325 U.S. at 424 (1945). The City simply ignores the prescription of the FLSA that requires the employees' regular rate of pay to be based on what it actually pays them. Under the *facts* of this case, that necessarily includes the provisions of the collective bargaining agreements. The reason the City finds no authority or other support for its "dual method of pay calculations" is that it is illegal because it violates the letter and intent of the law.

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 cannot 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. These “credits” are ostensibly for vacation time, sick time, and holidays that the City pays at regular, non-overtime pay rates, pursuant to its collective bargaining agreements. These “credits” are not properly 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 § 7(e) excludes, among other things: (2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness....

City Summary Judgment 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. These “credits” are not limited to holiday pay, which the City frequently compensates at time-and-a-half or even double-time rates, but also includes other paid leave, such as vacation and sick leave compensated at only base rates of pay. 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 § 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 under the FLSA because the City did not provide any extra, or premium, pay for those hours. See 29 U.S.C. § 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). Furthermore, when the City takes “credit” for paid leave against “contractual overtime,” it does so without any justification in either the law or the contract.

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. § 207(e) “as we read 29 U.S.C. § 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)

The City argues that courts have frequently approved schemes like the City to “credit” other payments against its employees earned overtime payments. To the contrary, 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 in its summary judgment memorandum:

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 pursuant to the provisions of the FLSA, 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. § 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”); also see, *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. § 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. 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.

1. The Fluctuating Workweek Provision

The City's purported justification for its calculation errors is that the employees are paid under the FLSA's fluctuating workweek exception. § 778.114(a). This method is intended to cover cases in which "a salaried employee whose hours of work fluctuate from week to week [reaches] a mutual understanding with his employer that he will receive a fixed amount as straight-time pay for whatever hours he is called upon to work in a workweek, whether few or many . . ." *Agawam*, at 287, citing *Condo v. Sysco Corp.*, 1 F.3d 599, 601 (7th Cir. 1993)

. . . 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. § 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 § 114(a).

By its own terms, § 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 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. Facts Nos.2 and 3. 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 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. A related error is the notion that “payment for overtime hours at one-half the regular 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.” *Agawam*, citing § 778.114(a).

The exception incorrectly employed by the City to calculate City employees’ overtime rate of pay is found in 29 C.F.R. § 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.

§ 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 an hourly wage. Second, for all the City employees in this case except Fire Department employees there is a fixed 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) (§ 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.").

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 Plaintiffs’ Response Brief, 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 Pay Augmentations

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’ Response Brief 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 to Plaintiffs' Response Brief.

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 to Plaintiffs' Response Brief 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 City's calculation of its police officers' overtime violates the express requirements of the FLSA and Plaintiffs are entitled to summary judgment as a matter of law.

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 Plaintiffs’ Response Brief, 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 Plaintiffs’ Response Brief, 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, Plaintiffs’ Response Brief, EXHIBIT 10, which includes a Memorandum of Understanding signed by the New Mexico Transportation Union and a pay record showing the bonus pay. These failures to include required pay augmentations in the regular rate and overtime pay calculations are deliberate, willful, and in violation of the FLSA as a matter of law.

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 “no discovery has been done on any exempt status issue,” these employees and their entitlement to correctly calculated overtime wages. City’s Memo, at p. 2, fn. 1.

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 met 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).

The City has arbitrarily deemed a class of Fire Department regular and paramedic lieutenants and captains “exempt.” Since the City has the burden of proving the propriety of the exemptions at trial, it is required to make a showing of the reasons it considers the employees exempt. Throughout the course of this case that issue has been pending. The City has not said anything to justify its exemption of these employees from the terms and provisions of the FLSA and Plaintiffs are entitled to summary judgment on this issue as a matter of law.

IV. Conclusion

The regular rate of pay under the provisions of the FLSA is “drawn from what happens under the employment contract.” *Bay Ridge 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 unavoidable “actual fact” in this case is that the City pays its employees for leave time as if it were paying for “work.” However, when it calculates its employees’ overtime pay pursuant to the FLSA the City disregards the “actual fact” and leaves that pay and those days out of its regular rate calculations.

The undisputed facts in this case show that the City derives its employee payments primarily from the terms of its collective bargaining agreements with its employees. As such, the terms and payments made by the City form the “regular rate payments,” and the City cannot rely on a constricted view of the FLSA and manipulation of the terms of the union contracts to change that. Nor do the law or the contracts provide for the City’s end-run around first one and then the other, combined with the refusal to calculate overtime with regard for both.

Disregarding its anomalous methodology, the City insisted that it was calculating and paying overtime correctly and asked 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 in its view of what the FLSA provides and requires. For all the reasons set out herein, the Plaintiffs’ cross-motion for partial summary judgment should be granted.

Respectfully submitted,

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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 9, 2007:

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