

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

PATRICK CHAVEZ, et al.,

Plaintiffs,

vs.

No. CIV 02-0562 JH/ACT

CITY OF ALBUQUERQUE,

Defendant.

**PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE (DOC. 238)
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs present the following reply to the City's response (Doc. 238) to Plaintiffs' cross-motion for summary judgment. (Doc. 236). In its response, the City claims that "this case involves Plaintiffs' misunderstanding of not only the City of Albuquerque's position but also basic tenants (sic) of the FLSA." City's Response at p. 1. Accusing Plaintiffs of "attempts at misdirection," the City states that Plaintiffs "fail to understand" that the City may make payments "above and beyond those required by the FLSA" and that the law "specifically permits the City to offset (i.e. credit) these additional premium payments against its FLSA obligations." *Id.*, at p. 2.

The "credits" and "offsets" taken by the City go far beyond what the law allows. The City uses a novel "dual calculation" method that substantially short changes its employees and miscalculates the overtime wages it owes. Even though the collective bargaining agreements between the City and the unions representing most of the employees establish the wages and benefits the employees are entitled to, the City incorrectly claims that the contract provisions do not affect either the amount of overtime wages or the City's duty to pay overtime wages in accordance with the law.

I. Reply to City Response to Plaintiffs' Statement of Facts

The City erroneously contends that "Plaintiffs additionally attempt to misdirect this Court through improper reliance upon the legal conclusions of their purported legal expert in direct contradiction to this Court's prior order." *Id.* The City first asks the Court to disregard "references to Judith Wagner," incorrectly claiming that despite the Court's Order to the contrary, Plaintiffs cite to Wagner "to assist in determining whether or not [the City's calculations of overtime pay] is consistent with the FLSA." *Id.*, at p. 3; brackets in original. The City claims that Plaintiffs are relying on Ms. Wagner's "legal opinions." *Id.* In fact, what Plaintiffs stated in their Fact No. 1 is correct:

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' Summary Judgment Memorandum, at p. 5; emphasis added.

The City's contentions concerning Ms. Wagner's testimony are wrong on all counts. First, Plaintiffs do not rely "almost exclusively" on Ms. Wagner. Only five {Facts 9, 10, 12, 14, and 15) out of Plaintiff's fifteen "Undisputed Facts" are supported by Ms. Wagner's testimony. Second, none of the five are "legal opinions;" rather, each of the Facts refers to how the City "calculates overtime."¹ Only one, Fact No. 14 even refers to inconsistency with the FLSA. Third, the City's contention that the Court ordered that Ms. Wagner "would not be permitted to proceed as an FLSA expert at trial" is incorrect.

¹ Fact 9 (City does not calculate police overtime), Fact 10 ("Under the City's calculation" non-overtime bonus reduced incrementally," Fact 12 (Calculation and recalculation results in reduction); Fact 14 (City's methodology not consistent with FLSA); and Fact 15 (City underpays).

Actually, the Court concluded “that Wagner will be allowed to testify” as her “expert testimony in the field of accounting will be both relevant and reliable, and will assist the jury in understanding information that may be technical and require specialized knowledge.” (Doc. 197, at p. 2). As for whether Ms. Wagner may testify at trial concerning consistency with the FLSA, the City is wrong again, as the Court “reserv[ed] ruling on whether or not Wagner will be allowed to testify as to her understanding of the requirements of the FLSA.” (Id.). Throughout her deposition, Ms. Wagner made it clear that (like the City’s “experts” in this case) she is not a lawyer and cannot render “legal opinions.” The City’s contention that Ms. Wagner’s opinions concerning the City’s miscalculations of overtime pay for City employees are improper legal opinions is without merit and should be disregarded.

II. Reply to City’s Contentions on “Dual Calculations” and Collective Bargaining Agreements

The City argues in its response to Plaintiffs’ motion for summary judgment that “Plaintiffs utterly misstate the legal relationship between collective bargaining agreements and the FLSA.” City’s Response at p. 6. To start with, the City falsely contends that Plaintiffs are seeking a ruling of the court on “(w)hether the City is in violation of an applicable collective bargaining agreement.” Id. This is simply untrue. Plaintiffs readily agree that remedies for breach of a union contract must be sought before the City’s Labor-Management Relations Board, not before a federal court in a collective action under the FLSA.

Moreover, what prompted Plaintiffs’ simple reference to violations of contracts are provisions in the City’s Merit System Ordinance, Section 3-1-11, that require 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 “when overtime is required for non-exempt employees, compensation must be in accordance with the Fair Labor Standards Act (FLSA) and any applicable collective bargaining agreement. These two personnel (not labor-management) provisions support Plaintiffs’ reasonable contention that:

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.

Ptffs’ Summary Judgment Memorandum, at p. 5. This contention is a long way from asking the Court to rule on “breach of contract or violation of collective bargaining agreement claims,” as the City now argues. See, City’s Response, at pp. 6, 7. Of course, Plaintiffs are fully aware that this is a case brought solely under the provisions of the FLSA; it is not a vehicle for other claims.

What is more troubling, however, is the City’s contention that “collective bargaining agreements do not alter an employer’s FLSA obligations.” City’s Response at pp. 7-10. This goes to the heart of the case, and is an incorrect statement of the law. The point the City misses is that while contractual provisions cannot *diminish* rights under the federal statute, they certainly can *expand* the payments required by setting a higher than minimum standard for setting the “regular rate of pay” and payment of overtime wage.

Plaintiffs’ thesis, set out plainly in their Motion and Memorandum for Summary Judgment, is that the very basis of the “regular rate of pay” used to calculate overtime pay is the hourly rate of pay established by the collective bargaining agreements between the City and its employee-unions. As stated in Plaintiffs’ Motion and Memorandum for Summary Judgment:

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.”

Ptffs’ Summary Judgment Memo, at pp. 8, 9. The “regular rate of pay” then, must reflect “all payments which the parties have agreed” will be received, “exclusive of overtime payments.” At least one of the cases cited by the City in its Response, *Walling v. Youngerman-Reynolds Harwood Co.*, 125 U.S. 419, 424, 425 (1945), actually stands for the opposite of what the City says it does. In *Walling*, the Supreme Court held that:

once the parties have decided upon the amount of wages and the mode of payment. . . . determination of the regular rate becomes a matter of mathematical computation . . . unaffected by any designation of a contrary “regular rate” in the wage contracts.

Thus, once the parties have agreed to (“decided upon the amount”) a set amount of wages, the regular rate of pay is “unaffected by any designation of a contrary regular rate in the wage contracts.” That being true, the City’s argument that employment contracts do not alter an employer’s FLSA obligations makes no sense.

An obvious reference here is to the police union contract, where the City and the union expressly agreed to include paid leave time in the contract pay, but exclude proper calculation of the regular rate (and hence, overtime pay) in accordance with the FLSA. In *Wheeler v. Hampton Township*, 399 F.3d 238, 243 (3rd. Cir., 2005), a case the City finds “wholly inapposite and not controlling precedent,” City’s Response at p. 20, the court pointed out that although “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,” once it did agree to that “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.”

Nor does anything in this case suggest or require that the City be relieved of its obligation to pay overtime wages in accordance with the law and on the wage and benefit basis established in its negotiations and documented in its collective bargaining agreements. The Supreme Court has consistently stated that the regular rate of pay “must be drawn from what happens under the employment contract.” *Bayridge Operating Co. v. Aaron*, 334 U.S. 446, 464 (1942). The City’s present contentions that the provisions of the collective bargaining agreements “cannot alter the City’s obligations under the FLSA,” City’s Response, at p. 8, are incorrect.

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’s Summary Judgment Memorandum at p. 21, see, fn. 3. citing Hollyfield Dep. At 10, 22; Hill Dep. at 24, 25, 44.² As apparent justification for doing what the FLSA does not allow, the City argues that: “Many employers, like the City of Albuquerque here, use their premium credits by performing a dual calculation in every pay period for each employee.” City’s Summary Judgment Memo at p. 21. The City cites *Iowa Turkey Growers Cooperative*, 407 F. Supp. 2d at 106, for the proposition that the “defendant was entitled to a credit for the overtime payments it had previously paid its employees for working a sixth day per week.” However, “working a sixth day per week” is one of the statutory exemptions to inclusion in the “regular rate” and is permitted as a “credit” against owed overtime pay. On the other hand, most of the “credits” the City takes, “holiday pay, call-in pay, longevity

² Although the quoted passage appears in the City’s Summary Judgment Memorandum at page 21, the references to the Hollyfield deposition (pages 10 and 22) and the Hill deposition (pages 24-25 and 44) do not contain the referenced material.

pay” are not considered “premium pay” under the FLSA for which credit may be taken. See, 29 U.S.C. Sec. 207(h)(1).³

The City even briefly argues *against* the same agreements (or “trades”) that it admittedly uses in carrying out its dual calculation methodology:

The FLSA’s general prohibition against waivers (or “trades”) was echoed by the City’s expert, who explained that a collective bargaining agreement’s requirements cannot alter an employer’s obligations under the FLSA. On account of this fundamental FLSA tenet, and in order to ensure compliance with the FLSA, the City calculates FLSA overtime separate and apart from contractual overtime under collective bargaining agreements for each and every pay period.

Id., at pp. 8, 9. The City does not hesitate, moreover, to assert that “certain payments made pursuant to collective bargaining agreements may offset the amounts otherwise due to an employee pursuant to the FLSA.” Id., at p. 9. This is also incorrect, unless the “amounts otherwise due” are offset by premium payments for one of the three specific purposes set out in the law. See, 29 U.S.C. Sec. 207(e)(5),(6), and (7) and 207(h).

In summarizing its response on the subject of “the interplay between collective bargaining agreements and the FLSA,” id., at p. 10, the City states that 1) the FLSA does not provide a vehicle for employees to pursue breach of collective bargaining agreements; 2) collective bargaining agreements do not alter an employer’s obligations under the FLSA; and 3) the FLSA does permit certain offsets for premium payments under the FLSA. Plaintiffs agree with the first proposition, firmly disagree with the second, and conditionally agree with the third, even though it is inapplicable to the City’s claims for “offsets” or “credits” in this case.

³ “Except as provided in paragraph (2) sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward . . . overtime compensation required under this section.”

The City admits that it 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. However, City employees' overtime pay must be based on a "regular rate of pay" that includes "all payments which the parties have agreed shall be received regularly during the work week," *Walling*, 325 U.S. at 424. Accordingly, 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, not just one or the other.

Defendant contends that "many employers, like the City of Albuquerque here, use their premium credits by performing a dual calculation in every pay period for each employee." Plaintiffs have suggested that the City has no precedent or legal justification for its "dual calculation" method of figuring its employees' overtime wages. In its Response, the City fails to identify *any* other public or private entity that uses the "dual calculation" methodology, nor does any case cited by Defendants describe any such method. In the introduction to the City's Response, the City states that this is "not a case . . . involving novel interpretations of the Act." The City's calculation of overtime "under both the FLSA and the applicable negotiated union agreements," comparison of the two, and choice of "the greater amount between the two," is not only a "novel interpretation of the Act," but it violates the FLSA and short-changes the employees who are entitled to both the benefits of their negotiated agreements and their statutory rights under the FLSA.

III. Reply to the City's Claim it Includes "All Required Remunerations"

The City claims that "(d)espite Plaintiffs' red herrings, the types of remunerations that the City includes in calculating regular rates of pay pursuant to the FLSA remains undisputed."

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, what the City adds to the “regular rate” calculation, and what the City takes away in “credits.”

Mayor’s Bonus

Although the City denies it, a bonus like that declared by Mayor Chavez, is properly characterized as payment for work performed. A memorandum from Mayor Martin Chavez to the President of the City Council explained the purpose of the pay bonus:

There are two main ways an employer, whether public or private, can reward employees for good work. *One is a pay raise, the other a bonus.* The money that pays for them can dictate which method is most practical and prudent, depending on its source or nature. . . . the responsible way to reward employee sacrifices during the last three years is through a bonus plan. Unfortunately, at the present time, the City financial staff does not see sufficient recurring revenue to support a permanent raise, but have identified sufficient nonrecurring funds to support a bonus plan.

City’s Response, Exhibit (Doc. 237-2), at p. 18, emphasis added. The City’s explanation, carried over into the Memorandum of Understanding signed by the unions and the City, states the “Rationale for Program:”

To recognize and reward those eligible employees who have made the commitment to stay with the City despite the fiscal challenges over the last three fiscal years, they will receive a single net bonus of \$250 per year for a maximum of three years (\$750). Because of significant downsizing and hiring freezes, many employees have had to assume additional duties and responsibilities without reducing service levels or responsiveness to resident’s needs. In addition, many employees have received no adjustment in pay during the period and promotional opportunities have been limited.

Plaintiffs’ Summary Judgment Ex. 10; City’s Response Exhibit (Doc. 237-2), at p. 24. This is one example of the kind of pay enhancement that the City should have included, but did not include in the regular rate of pay of its employees when calculating overtime.

In *Lopez v. Art Kraft Containers, Corp.*, 660 F.Supp. 404 (E.D. Pa., 1987), the court ruled that the FLSA “obligates defendant employers to include lump sum payments in the regular hourly rate of compensation for the purpose of calculating overtime pay.” *Id.*, at 405. The Lopez court held that “the lump sum payment’s character as compensation for employment supports including them in the employee’s regular rate of employment. The evidence supports the finding that the payments were made in lieu of wage increases. *Id.*, at 407. See, also, *Dovovan v. Two “R” Drilling Company, Inc.*, 581 F. Supp. 526, 530 (E.D. La., 1984).

At his deposition, one of Defendant’s expert witnesses, Lloyd Hill, was asked, “If such a bonus were characterized as in lieu of pay raises, would that go into calculating the regular rate of pay?” His answer was, “That is a very technical legal question. That would take a lot of research to determine if it would or not.” The City’s glib contention that the “mayoral bonus was purely discretionary” is contradicted by the flat-rate across-the-board bonuses and the agreements signed by each of the City’s unions to assure their entitlement to the benefit and, most importantly, that the bonus was given to City employees in lieu of a pay raise. For those reasons, the “mayor’s bonus” should be included in the regular rate calculations.

Attached Pay Records

In its Response, the City criticizes Plaintiffs’ use of some City pay records attached to Plaintiffs’ memorandum, Exhibits 6-8, as being “incomplete, unauthenticated” and attended by “circular, incomprehensible arguments.” Far from being “unauthenticated,” these are copies of City pay records, being the “pay stub” or accounting of the employees’ pay given each pay period at the time of payment. Only the individual employee’s name is blocked out. These were intended not as admissible evidence, but as examples of some of the pay concerns raised by the

City's payment of pay enhancements, benefits, and bonuses and failures to include them in the "regular rate" calculations; if they were used at trial they would be used to support the employees' testimony.

IV. Reply to the City's Response on Division and Multiplication

The City agrees that "it is undisputed that the City divides an employee's total remuneration by the total number of hours he or she actually worked during the workweek at issue." This divisor includes overtime hours. City's Response, at p. 14. Plaintiffs contend that the proper divisor is 40, "the number of hours" in the scheduled workweek for which "such compensation was paid." 29 CFR 778.109. Similarly, it is undisputed that the City then multiplies its calculated pay rate by one-half rather than one-and-a half to determine the overtime pay rate. City's Response, at p. 16. There are, as Plaintiffs point out in their initial summary judgment brief, a number of exceptions to the rule that 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). The City denies Plaintiffs' assumption that the City is mistakenly using the "flexible workweek exception" to justify its division by the total time worked, including overtime hours. Another exception applies when there is a "production bonus." Sec. 778.110(b). This is so because the production bonus is earned over the entire period worked, not just the first 40 hours.

Here, however, nearly all of the pay enhancements are, like longevity pay, earned in the regular, non-overtime workweek, without regard to whether or not the employee works additional hours. In other words, employees receive the same longevity payment each pay period, based on their seniority, regardless of whether or not they work any overtime hours and regard-

less of the number of overtime hours worked. There is thus no excuse or justification for dividing by the number of hours worked, including overtime work, to determine the regular rate of pay. The City denies it uses the flexible work week exception, and City employees are not receiving “production bonuses,” yet the City fails to identify any other justification for using the incorrect divisor and multiplying by a half instead of time-and-a-half..

That dividing by a higher number results in a lower “regular rate” requires no citation to authority; the proposition is obvious. Nor do the public policy considerations that disparage paying an employee a lower “regular rate” the more hours he works depend on application of any particular exception, e.g., fluctuating work week or production bonus. Without explaining how it applies the “hours for which such compensation was paid” clause, the City stubbornly includes the overtime hours worked in its calculation of employees’ regular rates of pay. The result of that, of course, is that the employees are given multiple and constantly varying “regular” rates of pay, based on the number of hours worked in the week.

Far more reasonable, however, is the use of the fixed number of hours in the employees’ “regular, non-overtime workweek.” With respect to longevity payments, for example, which are set based on seniority and are the same for each employee at the same seniority level, an \$80.00 longevity payment results in a \$1.00 per hour addition to the base rate of pay, regardless of how many hours the employee worked in the two week (80-hour) pay period. By the City’s calculation method each employee would have a different rate of pay for each pay period, depending on the number of hours worked, including overtime, in that period. Since the City cannot point to anywhere in the statute or regulations that says that division by a constantly varying number of hours makes sense or has any beneficial effect, the Court should find that the correct way of

calculating the regular rate of pay is to divide by the number of hours in the “regular, non-overtime workweek,” which is the period which the employees’ base rates of pay “are intended to compensate.”

The City’s second calculation error flows from the first. If the initial compensation is considered to include the overtime hours, such as when the divisor, as in the City’s example at pages 16 through 18 of its Response brief, is 48 rather than 40, then the calculation of the regular rate should only include an additional .5 rather than the legally required 1.5 multiplier. This is to avoid the “double pay” syndrome that the City invokes, where “the employee is compensated twice for the overtime hours, and for the portion of bonus pay attributable to the overtime hours.” This supports Plaintiffs’ contention that the correct way to calculate the overtime pay is to conduct two separate computations, one for the initial 40-hour (or, in the City’s case, 80-hour pay period) workweek, and the other for the overtime pay.

For example, in the case of an employee paid \$15.00 per hour with an \$80.00 longevity bonus who works 96 hours in the 80-hour pay period, the first computation would be the pay for the first 80 hours each pay period, or \$15.00/hour times 80 hours, totaling \$1,200.00 plus the longevity bonus of \$80.00 for a total of \$1,280.00 for the non-overtime hours. The employee’s “regular rate of pay” in this example is \$16.00/hour, as \$1,280 divided by 80 is \$16.00, or, taking it the other way, \$15.00 plus \$1.00 per hour is \$16.00 per hour. To figure the overtime payment, then, the computation is simply to multiply the 16 hours of overtime by \$16.00 times 1.5 (time-and-a-half) or \$24.00 times 16, which equals \$384.00, adding that amount of overtime pay to the pay for the base 80 hours of pay to total **\$1,664.00**.

The City’s calculation for the same employee would be significantly different. The City would first multiply \$15.00 times 96 (total hours worked in the pay period) totaling \$1,440 and

adding the \$80 longevity payment for a total of \$1,520. The City would then divide by 96 to determine the regular rate, \$15.83 per hour, times .5, or \$7.92, times 16 (the number of hours of overtime) totaling \$126.72, which added to \$1,520 totals **\$1,646.72**.

Plaintiffs' example divides the calculation into two parts, one for the regular workweek (or pay period) and the other for the overtime hours. There is surely no duplication of pay in the overtime calculation. The regular rate of pay stays the same no matter how many hours the employee works. If he works 120 hours in the pay period his regular rate is \$16.00 per hour; if he works 96 hours, his rate is still \$16.00. Even if he works no hours of overtime, his regular rate of pay is the same \$16.00 per hour. That is the "regular rate" that was bargained for. The overtime pay is calculated as the FLSA requires, at a rate of time and a half, or \$24.00 per hour for each of the overtime hours worked. Again, there is no "double pay," since the two components, regular pay and overtime pay, are completely separate.

The City's method of calculating overtime pay, on the other hand, short-changes the employee without justification. The "regular rate" varies depending on the number of hours worked. If the employee works 120 hours in the pay period, his regular rate is \$15.66 per hour; if he works 96 hours, as in the example above, his rate is \$15.83; and if he works no hours of overtime, his regular rate of pay is the same \$16.00 per hour that Plaintiffs use.

Going back to the basic premise behind the calculation of overtime under the FLSA, "the 'regular rate' under the Act is a rate per hour." 29 C.F.R. Sec. 778.109. "The Supreme Court has described it as the hourly rate actually paid to the employee for the *normal, non-overtime workweek* for which he is employed – an 'actual fact.'" 29 C.F.R. Sec. 778.108 (The "regular rate"); citing *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419.

Section 7 of the Act requires inclusion in the “regular rate” of “all remuneration for employment paid to, or on behalf of, the employee” except payments specifically excluded by paragraphs (1) through (7) of that subsection. As stated by the Supreme Court in the *Youngerman-Reynolds* case cited above: “Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation . . .

29 C.F.R. Sec. 778.108. Again, the “regular rate” “must be drawn from what happens under the employment contract.” *Id.*, citing *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446. Here the City and each of the many employees who have opted in to this case operate under employment contracts negotiated for the most part by the City unions) with the City. The “parties have decided on the amount of wages and the mode of payment.”

Surprisingly, after the close of their briefing, the City submitted a letter to Judge Herrera attaching a “courtesy copy” of a Florida district court’s unpublished opinion, *Powell v. Carey International, Inc.*, 2007 WL 419442 (S.D. Fla. 2007). The City argues in its off-the-record letter to the Court that “the Powell decision is part of the overwhelming authority explaining that in cases such as the one at hand, the proper divisor in calculating an employer’s regular rate of pay is ‘total hours worked.’” Review of the *Powell* case, however, reveals that the court had to choose between whether the plaintiffs were “paid in multiple ways, which results in time and [a] half overtime pay” or whether “plaintiffs were paid by the job, which results in half overtime pay.” Because the plaintiffs in *Powell* were paid by the job, the resulting method of calculating the regular hourly rate of pay is hardly relevant to this case, where Plaintiffs are paid a regular hourly wage for a regular workweek.

The “regular rate” by definition must be “regular.” An employee whose base rate is \$15.00 per hour and who has add-on pay of \$1.00 per hour has a “regular rate” of \$16.00 per hour. That is the rate agreed upon for that employee, and it is the same week after week. Under

the City's pay scheme, that same employee would have a "regular rate" of \$15.66 per hour one week, \$15.83 another week, and numerous other "regular rates" for other weeks. That makes little sense, and certainly does not reflect a "regular rate" agreed upon by the parties.

There is no ambiguity in the law or the regulations. The "regular rate" as defined by the law is the rate agreed upon by the parties. It does not vary from one week to the next, depending on the number of hours worked by the employee in the particular week. It is not different for each employee, depending on the number of hours worked. While there are certainly differences from one employee to the next, for example because one employee has more seniority and is thus entitled to a higher longevity payment, there is no way the collective bargaining agreements would contemplate endlessly variable rates of pay for similarly situated employees. On the issue of calculation of overtime pay based on the "regular rate" rules, Plaintiffs are entitled to judgment in their favor as a matter of law.

V. Reply to City's Response Concerning Credits and Offsets

With respect to taking "credits" and applying "offsets" against owed wages, the City now contends that it only takes such credits and offsets as allowed by law. These allowable credits are set out in 29 U.S.C. Sec. 207(e)(5), (6), and (7). They are for employee compensation in the form of "premium pay" paid for work in excess of regular work hours, in excess of eight hours a day; or work in excess of the applicable maximum work week or on weekends or holidays. City's Response at p. 20. The City now "acknowledges that payments for time not worked cannot be creditable towards FLSA overtime compensation." *Id.*

The basis for this aspect of Plaintiffs' summary judgment claim against the City, however, is that the City is actually "taking 'credits' or 'offsets' against overtime pay for

vacation time, sick time, and other pay which is provided in a union agreement and which is 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 Section 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. While some such pay (holiday, but not vacation or illness) may, under the FLSA, be excluded from the “regular rate” calculation, it may not be taken as a credit against overtime owed. The federal regulation is explicit and 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. Much of 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 both because it is not allowed under the FLSA and 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); *Dunlop v. Gray-Goto, Inc.*, 528 F.2d 792, 793 (10th Cir. 1976)

In *Gray-Goto, Inc.*, 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 “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)

That is exactly the situation here, as the City claims credit for payments for “hours paid but not worked.” The goes far beyond the taking of permissible credits for any of the three reasons credits are allowable under the FLSA. The City admitted that it “takes credits for hours paid but not worked, such as holiday pay, call-in pay, longevity pay, to offset overtime liability.” City Summary Judgment Memo at p. 21; also, see fn. 2. Nonetheless, the City now acknowledges that “payment for time not worked cannot be creditable towards FLSA overtime compensation.” Accordingly, Plaintiffs are entitled to summary judgment on the City’s taking of credits and offsets against owed FLSA wages “for hours paid but not worked,” such as holiday pay, longevity pay, sick days, vacation pay, and other remunerations not properly creditable under the FLSA.

VI. Reply to City’s Response on “Exempt” Employees

Finally, the City contends in its Response that “This Case Does Not Concern Exempt Status,” citing “four essential facts.” Two of those so-called essential facts are untrue and two are irrelevant. The two facts that are untrue are that “this case has, by agreement of counsel, proceeded exclusively on the issue of the calculation of overtime due non-exempt employees” and that there was a requirement that only “non-exempt” employees would be added to the case. The two “essential fact” that are irrelevant are that the court “denied Plaintiffs’ motion to amend the complaint to add exempt status as an issue,” and that “a motion for summary judgment challenging exempt status was denied as to Fire Command personnel” in *Staeden v. Albuquerque* (Civ. 87-1226 JB, 12/11/89 Memorandum Order. City’s Response, at pp. 24, 25.

Instead of meeting Plaintiffs' motion for summary judgment on this issue with responsive evidence or argument, Defendants merely state without further explanation that "at the very least, Plaintiffs have waived this issue at this stage of the litigation." City's Response at p. 25. The City agrees that it has the "ultimate burden of proving exemptions," but refuses to present anything beyond that admission. *Id.*

The City contends that Plaintiffs' allegedly "exempt" status is not an issue in this case. However, on May 17, 2002, Plaintiffs filed this lawsuit, with Fire Lieutenant Patrick Chavez as the named-Plaintiff. From the start, the City has claimed that Patrick Chavez is "exempt." The issue of payment of overtime to allegedly misclassified employees has been in the case from the start.⁴

The City's acknowledgment of this issue could hardly be more explicit. On February 26, 2004, the Defendant's counsel advised the court that:

an issue has developed throughout the proceeding, as to whether a group of plaintiffs within the Fire Department and perhaps other city departments. . . are exempt or non-exempt from FLSA requirements based on their job classifications and duties. Further discovery . . . is needed on that issue.

(Doc. 79, page 2, paragraph 4). On March 22, 2004, at a hearing before Magistrate Judge Torgerson, one of Defendant's attorneys, Jerry Walz, informed the Court that:

⁴ City's Answer to Complaint, Doc. 20, p. 2, paragraph 10: "The City denies that Plaintiff Chavez, as an exempt lieutenant, is entitled to overtime compensation" and page 3, Second Affirmative Defense, "Plaintiff Chavez is exempt from the requirements of the Fair Labor Standards Act." In the first Initial Pretrial Report, formulated on July 29, 2002, and again in the Initial Pretrial Report filed on June 10, 2003 (doc. 61; emphasis added), Defendant's contentions include "3. Certain Plaintiffs are exempt from the requirements of the FLSA." Also, see city's Answers to First and Second Amended Complaints.

A sub-issue that has kind of evolved in the proceedings . . . is whether fire lieutenants, captains and others of similar rank are exempt or nonexempt from the requirement of the FLSA.

(Transcript, March 22, 2004, pp. 20, 21; attached as EXHIBIT 1 to Doc. 151).

On September 27, 2005, the parties discussed the discovery that remained outstanding and the “expert” witnesses that would be needed on the subject of “exempt” employees:

THE COURT: Well, . . . *isn't the exempt or non-exempt status at issue in this lawsuit?*

MR. BERGMANN: *It is certainly an issue in this lawsuit . . .*

(Transcript of Hearing, September 27, 2005, at pp. 20 - 22; emphasis added; attached as EXHIBIT 2 to Doc. 151).

From the start the City has contended that Plaintiff Patrick Chavez and many other employees who have opted in to this lawsuit are not entitled to overtime pay under the FLSA solely because the City considers them “exempt.” Plaintiffs have promulgated extensive discovery requests on the subject and the City has not only refused to address the purportedly “exempt” status of many Plaintiffs in its responses to discovery, it also refuses to provide a meaningful response to this motion for summary judgment on the subject of these “exemptions.” Because the City has failed to meet its burden, Plaintiffs are entitled to summary judgment on the issue of “exemptions,” deeming the Plaintiffs “non-exempt,” at least for the purposes of this lawsuit and their entitlement to properly calculated overtime wages.

VII. 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 make a deal and then the City can violate the law.

The City has claimed 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 Plaintiffs’ Motion and Memorandum for Summary Judgment and in this Reply to the City’s Response, the Plaintiffs’ Motion for Summary Judgment on the basis of undisputed facts as a matter of law should be granted.

Respectfully submitted,

Electronically signed and filed

Paul Livingston
Attorney for Plaintiffs
P.O. Box 250
Placitas, NM 87043
(505) 771-4000

and

THE BREGMAN LAW FIRM, P.C.

Electronically signed

Sam Bregman
Attorney for Plaintiffs
111 Lomas Blvd. NW, Suite 230
Albuquerque, NM 87102
(505) 761-5700

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 May 16, 2007:

Michael I. Garcia: migarcia@cabq.gov
Ed Bergmann: ebergmann@seyfarth.com
Jerry Walz: jerryawalz@walzandassociates.com

Electronically signed

Paul Livingston