

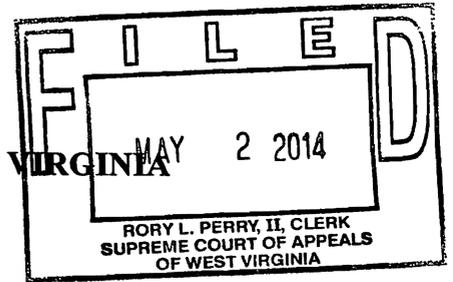
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-1261

MYRON BOGGESS, et al.
Plaintiffs Below, Petitioners

v.

**CITY OF CHARLESTON, A WEST VIRGINIA MUNICIPAL
CORPORATION; MATTHEW P. JACKSON, ERIC E. KINDER,
AND VICTOR E. SIGMON, IN THEIR CAPACITY AS
COMMISSIONERS OF THE FIREMEN'S CIVIL SERVICE
COMMISSION OF THE CITY OF CHARLESTON**
Defendants Below, Respondents



**PETITIONERS' REPLY TO RESPONDENT CITY
OF CHARLESTON'S RESPONSE TO PETITIONERS' APPEAL BRIEF**

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REPLY TO STATEMENT OF THE CASE

The City of Charleston's ("City") opening remarks in its Response Brief Statement of the Case Introduction are diversionary attempts to justify its breach of its contractual duty under federal and state law by unilaterally changing the calculation of the Petitioners'/Firefighters' regular rate of hourly pay.

REPLY TO RELEVANT FACTS

The City accurately admits that the terms and conditions of the Petitioners are governed by federal law (Respondent's Response Brief p. 2.), but fails to acknowledge that federal law preempts state and local law, and the Rules and Regulations of the Firemen's Civil Service Commission. See Anderson v. Sara Lee Corp., 508 F.3d 181 (4CCA 2007.) (Fully discussed in Petitioners' Brief pp. 22-23.)

The City states that it relied on a misinterpretation of the holding of the 1992 case Aaron v. City of Wichita, 797 F.Supp. 898 (D.Kan. 1992), decided on June 17, 1992, and clarified on March 9 and April 26, 1993, in arriving at the divisor method to calculate the hourly rate of pay. This is totally inaccurate since the City and the Firefighters had agreed to the calculation of the hourly rate of pay by reducing the work week by subtracting vacation hours and Kelly Days to arrive at the divisor in late 1990, which came effective on January 1, 1991, and which remained in effect until November 2011. (App. 303-326, Affidavits of Beaver, Legg and Perry, p. 5.) (Fully discussed in Petitioners' Brief pp. 8-11.) The method agreed to was a full two years prior to the Aaron case.

REPLY TO PROCEDURAL HISTORY

The Fair Labor Standards Act ("FLSA") allows workers to bring actions for violation of the Act in "state or federal court to recover unpaid wages, liquidated damages and costs and attorney fees." See 29 U.S.C. §§ 215-217. [Emphasis added.] Anderson v. Sara Lee at 193,

citing 29 U.S.C. §§ 215-217. West Virginia employment law acknowledges and adopts the FLSA Act as the controlling law for firefighters. Adkins v. City of Huntington, 191 W.Va. 317 (1994).

The City attempts to assert collateral estoppel based on its filing for declaratory judgment in the U.S. District Court under 28 U.S.C. 2201, et seq. The Firefighters opposed the declaratory judgment procedure and the Court found no controversy existed because under federal law, the City's calculation of the baseline hourly rate was correct between 1991-2011 (App. 497-499, Memo. Opinion and Order, September 7, 2012), and dismissed the case for lack of jurisdiction. The District Court found that the firefighters elected to file in state court rather than federal court, which they can do under 29 U.S.C. § 215-217, and dismissed the City's case for declaratory judgment finding there was no controversy under FLSA regarding the City's calculation of the base hourly rates between 1991 through 2011, and held:

“V. Conclusion

Because I FIND that there is no ‘case of actual controversy’ under the FLSA for the court to decide, I FIND that the court does not have subject-matter jurisdiction over this matter under 28 U.S.C. § 2201. Accordingly, I do not reach any other issues argued by the parties, and the defendants' Motion to Dismiss is GRANTED.” [Emphasis added.] (App. 499.)

The case here involves wages and overtime after November 2011. Collateral estoppel applies only if the issue decided is identical to the one presented in the act in question and there is a final adjudication on the events of the prior action. Christian v. Sizemore, et al., 185 W.Va. 409 (1991); Haba v. Big Arm Bar & Grill, 196 W.Va. 129 (1996).

REPLY TO SUMMARY OF ARGUMENT

The City admits that the FLSA and the regulations of the U.S. Department of Labor apply to the Petitioners (Respondent's Response Brief p. 17.), and that the City as the employer, and the employee firefighters can agree to a higher rate than the minimum under FLSA.

(Respondent's Response Brief p. 18.). The City has not responded to the well settled federal and state case law, and U.S. Department of Labor regulations control the method of calculation of the hourly rate of pay. Walling v. Youngerman-Reynolds Hardwood, 325 U.S. 419 (1945); Bay Ridge Operating v. Aaron, 334 U.S. 446 (1948); Adkins v. City of Huntington, Id.; Haney v. County Commission of Preston County, 212 W.Va. 824 (2002); and West Virginia Code § 21-5C-3 and § 8-15-10 and 10a.

The firefighters in their Complaint allege that the City violated the employment laws of West Virginia, which under Adkins adopts FLSA. The firefighters' brief filed on May 3, 2012, in District Court clearly stated in the argument section that FLSA applied citing Walling v. Youngerman-Reynolds Hardwood, 335 U.S. 419 (1945); Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1943); Blanton v. City of Murfreesboro, 856 F.2d 731 (1988); 29 U.S.C. § 207; 29 C.F.R. § 778; and Chapters 32 of the Field Operations Handbook, U.S. Department of Labor. (App. 486-491.) The statement in the City's brief that "May 28, 2013 . . . marked the first instance of the Petitioners making any allegation against the City regarding violation of FLSA or U.S. Department of Labor Regulations" is simply not correct. (Respondent's Response Brief, pp. 5.) Petitioners' brief in federal court also stated that this Court applies the FLSA to firefighter overtime in West Virginia citing Local 313, International Association of Firefighters v. City of Morgantown, 174 W.Va. 122 (1984), Ingram v. City of Charleston, 180 W.Va. 313 (1988), and Pullano v. City of Bluefield, 176 W.Va. 198 (1986). (App. 488.)

REPLY TO ARGUMENT

1. CIRCUIT COURT DID ERR IN FINDING NO CONTRACT AND FLSA DOES NOT APPLY

The City asserts in its Response that there were no employment contracts between the firefighters and the City. (Respondent's Response Brief pp. 10-13.) As stated in Petitioners'

Brief, this defies all legal logic since an employer-employee relationship can only exist by a contract, oral or written, or a combination of the two, and ignores the holding of Lipscomb v. Tucker County, 206 W.Va. 627 (1999) and Adkins v. City of Huntington, 191 W.Va. 317 (1994), as to FLSA. See Walling v. Youngerman-Reynolds Hardwood, 325 U.S. 419 at 425; 29 U.S.C. § 207(e)(7)(f)(g) and 29 C.F.R. § 778.210; and Petitioners' Brief pp. 25-28. An employment agreement is a contract. Davis v. Fire Creek Fund, 144 W.Va. 537 at 545 (1959). Also see 12B M.J. Master Servant § 3.

In Lipscomb, this Court held that a unilateral employment contract exists between a county employee and the Tucker County Commission as the employer, and "...that any ambiguity in the terms of the employment agreement would be decided against the employer, because the employer has great latitude in dictating the terms of employment and ...have usually often has employed major law firms full of capable and intelligent attorneys with... schooling in the nuances of our employment law, [while] the employee, who usually does not have the benefit of professional legal training or advice, merely goes to work under the guidelines of the policy....the employers, who give life to their policies, must also live up to their policies."¹ Lipscomb at 630-631. While in this case there is no collective bargaining agreement in place, West Virginia case law recognizes that governmental agencies may freely enter into agreements with labor organizations and governmental agencies, may freely meet with representatives of its employees and discuss employment matter, and adopt or reject the representative's request. See Local 313 IAFF v. City of Morgantown, Id., Adkins v. City of Huntington, Id., and Pullano v. City of Bluefield, Id. In Adkins, the Supreme Court of Appeals held that where 80% of the municipal firefighters are subject to the overtime provisions of the

¹ City of Charleston has often used outside counsel on employment issues. Flaherty Sensabaugh Bonasso PLLC, and Heenan, Althen and Roles both on labor issues in addition to the City's full-time in-house legal staff.

Fair Labor Standards Act. 29 USC 201, et seq., the federal law applies. Also see Haney v. County Comm'n, Id. [Emphasis added.]

The City first asserts that the FLSA does not afford relief (Respondent's Response Brief p. 14), and states on Page 17 of its brief that "the FLSA unquestionably applies." Clearly FLSA 29 U.S.C. § 207 applies to the Petitioners, and does offer the relief sought. The long line of federal and West Virginia cases cited leave no question on this issue. Walling v. Youngerman-Reynolds, Id., Bay Ridge v. Aaron, Id., Adkins v. City of Huntington, Id., Pullano v. City of Bluefield, Id., and Local 313 v. City of Morgantown, Id.

29 C.F.R. § 778.407 The nature of the section 7(f) contract, states:²

"Payment must be made 'pursuant to a bona fide individual contract or pursuant to an agreement made as a result of collective bargaining by representatives of employees.' It cannot be a onesided affair determinable only by examination of the employer's books. The employee must not only be aware of but must have agreed to the method of compensation in advance of performing the work. Collective bargaining agreements in general are formal agreements which have been reduced to writing, but an individual employment contract may be either oral or written. While there is no requirement in section 7(f) that the agreement or contract be in writing, it is certainly desirable to reduce the agreement to writing... Furthermore, the contract must be 'bona fide.' This implies that both the making of the contract and the settlement of its terms were done in good faith." [Emphasis added.]

32g01(b) of the U.S. Department of Labor Field Operations Handbook further states:

"(b) A contract cannot be a one-sided affair. Therefore, the employee must not only be aware of, but must have agreed to, the method of compensation in advance of his performance of the work." [Emphasis added.]

The Handbook also states employment contracts may be either written or oral employment contracts, and the employer's duties as to written memorandum covering more than one employee. Chapter 12, 32f82; 32g01; and 32g03.

² 29 C.F.R. § 778.405 "The type of employment agreement permitted under section 7(f) [28 USC 207(f)] can be made only with (or by his representatives on behalf of) an employee whose "duties * * * necessitate irregular hours of work."... Some examples of the types of employees whose duties may necessitate irregular hours of work would be ... firefighters"...

Department of Labor regulations for the Fair Labor Standards Act explicitly condemn employer efforts to adjust or recalculate regular rates of pay so as to evade the overtime requirements of the Act. (29 C.F.R. 778.500). Blanton v. City of Murfreesboro, 856 F.2d 731 at 734 (6 CA 1988). [Emphasis added.]

In this case, the City freely met with members of Local 317 discussing employment issues which resulted in individual contracts with each Firefighter which are just as binding as Collective Bargaining Agreements. Bay Ridge Operating Co. v. Aaron, Id. at 464, holds any exemptions and exceptions to the FLSA are to be narrowly construed against the employer asserting them. Fourth Circuit sitting *en banc* Johnson v. City of Columbia, 949 F.2d 127 (1991). [Emphasis added.]

In Local 313 v. City of Morgantown, Id., this Court adopted the mutual agreed upon rate of regular pay stating:

"In order to comply with the [Fair Labor Standards Act], an employment contract³ must provide for (1) a regular rate of pay, and (2) overtime compensation at the rate of at least one and one-half times the regular rate. Both of these requirements must be met, it having been held that a contract which provided for overtime compensation at one and one-half times the regular rate, but which designated no hourly rate, was invalid, as was a pay plan in which employees were paid on a fixed salary basis which contemplated overtime, but there was no explicit agreement between the employer and the employee as to the designated rate of compensation. However, in order to satisfy the statutory requirements, the contract need not express the regular hourly rate in dollars and cents, so long as it provides a formula by which the regular rate can be computed. It has been held that a proper formula is provided where the contract specifies a fixed weekly salary inclusive of regular and overtime compensation for overtime workweeks and provides an upper limit on total nonovertime hours to be worked, thereby allowing the derivation of the appropriate hourly rate.' (Footnotes and citations omitted).

"...Furthermore, federal law imposes on the employer the burden of establishing the existence of an express agreement as to how the lump sum

³ Recognition that the personnel rules of the City of Morgantown constituted an employment contract.

payment is broken down into regular and overtime pay. Marshall v. Chala Enterprises, Inc., supra; Mumbower v. Callicott, supra; Brennan v. Elmer's Disposal Service, 510 F.2d 84, 86-87 n.1 (9th Cir. 1975).

“We believe that these same principles govern the operation of W. Va. Code, 21-5C-3(a), so that where employees are compensated on a lump sum basis, absent explicit proof of another mutually agreed upon rate of pay, a court must infer that the regular rate actually paid was that obtained by dividing the weekly wage paid by the number of hours actually worked.” Local 313 at 126-127. [Emphasis added.]

Under West Virginia contract law, “When the parties, dealing at arm’s length, carefully and intelligently prepare and execute a written contract; it is not subject to material, unilateral modification.” Syllabus 1, Kanawha Valley Bank v. United Fuel Gas, 121 W.Va. 96 (1939).

A modification of a contract requires the assent of both parties to the contract and a mutual assent is as much a requisite element in effecting a contractual modification as it is in the mutual creation of a contract. Syllabus 2, Wheeling Downs Racing Association v. West Virginia Sportservice, 157 W.Va. 93 (1973). The party asserting a modification of a contract carries the burden of proof and must demonstrate that the minds of the parties definitely met on the alteration. 4A M.J. Contracts § 55 at 550, citing Monto v. Gillooly, 107 W.Va. 151 (1929); Bischoff v. Francesa, 133 W.Va. 474 (1949); and Troy Mining v. Itmann, 176 W.Va. 599 (1986).

The Firefighters did not assent, nor has the City shown by any evidence that the Firefighters assented to the changing of the method of determining the regular hourly rate of pay which is a material, unilateral modification of their employment contract. The City’s assertion that providing the firefighters with reasonable notice of the unilateral change in the hourly rate of pay calculation is without merit, and in clear violation of settled West Virginia contract law and employment law.

In the employment context, there likely is no right both more central to the contract’s inducement and on the existence of which the parties more especially rely than the right to

compensation at the contractually specified level. The salary reductions of between \$1.68 to \$2.70 per hour at issue constituted a substantial impairment of the firefighters' contract.

Employment contracts with fixed hourly and overtime rates enable individuals to arrange their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

It is clear that under federal law and West Virginia employment law there must be a contract specifying the regular rate of hourly pay which cannot be unilaterally modified, and that under West Virginia law there is set by statute that 112 hours is the maximum number of regular hours that a Firefighter can be required to work within a 14 day period, West Virginia Code § 8-15-10, and 106 hours under federal law, 29 C.F.R. § 553.230(c), which cannot be unilaterally modified by either party.

Neither of Mr. Lane's Affidavits refutes nor rebuts the Affidavits of Retired Chief Beaver, Assistant Chief Perry, and Captain Legg, and Mr. Lane's first Affidavit of July 19, 2012, in fact, supports the firefighters' position that the methods of calculating the hourly rate established after deducting Kelly Days and vacation days were considered and approved by Council since 1991 to November 2011. (App. 396-403, ¶¶ 13, 16 and 17.)⁴ Mr. Lane now files an Affidavit which states otherwise.

The first Lane Affidavit of July 19, 2012, provides, in part, as follows:

"13. In or around 1991 ... the City Council passed a resolution modifying the means and methodology under which the City of Charleston calculated its overtime compensation for its firefighters, by, as best I can recall, reducing the hours for base salary and establishing what is called a Kelly day.

⁴ Resolutions for Wage Progression Schedules from 1990 to 2012. (App. 148-176.)

16. In or around 1994... the City Council...again passed a resolution modifying the means and methodology for the calculation of overtime compensation, by reducing the number of base hours for regular pay to the benefit of the firefighters.

17. In or around 1997... the City Council again...passed a resolution modifying the means and methodology for the calculation of overtime compensation a third time, once again by reducing the hours for regular pay to the benefit of the firefighters.”

It is important to note that Thomas Lane is an attorney with 40 years of legal experience (App. 414-415.), and has served on City Council since 1987, President since 2003, and was on the Finance Committee from 1987 to 1991 when the original method of calculating overtime was agreed to, and 1995 to present time. (App. 410-413, ¶¶ 1, 2 and 3.)

Since January 1991, the base hourly rate for the Firefighters was arrived at by reducing the hours the Firefighters were on duty from 2910 hours per year by their vacation and Kelly Days by Resolutions, with the final reduction on January 21, 1997, by City Council Resolution 613-97 with a 49-hour regular per work week. (App. 146-147, 156.) For over twenty (20) years, the City and Firefighters have lived under this contractual agreement. The U.S. Supreme Court has set the test for determining the regular hourly rate under the Fair Labor Standards Act as the actual “words and practices” under the contract are the determinative facts in finding the regular rate for each individual. Bay Ridge Operating Co. v. Aaron, *Id.* at 463. Additionally, David Molgaard,⁵ who served on City Council from 1999-2003 and was on the Finance Committee, and City Manager since June 3, 2003, in Paragraph 24 of his Affidavit dated July 20, 2012, references City Attorney Thomas Hayes’ memo to Mayor Kent Hall which also show that the

⁵ City Manager Molgaard, a former labor attorney with 15 years’ experience, states in Paragraphs 1, 2, 21 and 26-29 of his July 20, 2012, Affidavit that in 2011 “I noticed a footnote I had not paid much attention to [referring to the Wages Progress Schedule] before that declared that the annual salary was ‘based on 2,272 hours for less than 15 years of service, 2,224 for 15 years or more.’” The explanation on the Wage Progress Schedules of the City’s yearly budgets between 1991 to 2011 was not a footnote, but a prominently displayed explanation as to how the regular hourly rate was calculated. (App. 148-176.)

Kelly Day and vacation day reductions were in place in 1991, and stating that the “method of determining the regular rate of compensation was covered by the agreement.” (App. 230-238, Molgaard Affidavit July 7, 2012; and App. 208-209, Hayes Memo.)

2. REPLY AS TO ESTOPPEL AND *RES JUDICATA*

The Circuit Court Order did not address the estoppel issue, nor has the City cross appealed on this issue. However, the City also attempts to assert collateral estoppel based on its filing for declaratory judgment in the U.S. District Court under 28 U.S.C. 2201, et seq. The Firefighters opposed the declaratory judgment procedure and the District Court found no controversy existed because under federal law, the City’s calculation of the baseline hourly rate was correct between 1991 to November 2011 (App. 499), and dismissed the case for lack of jurisdiction. (Respondent’s Reply Brief, Id. at p. 2.) The case here involves wages and overtime after November 2011.

Collateral estoppel, as does *res judicata*, applies only if the issue decided is identical to the one presented in the action in question and there is a final adjudication by a court raising subject matter jurisdiction of the prior action. Christian v. Sizemore, et al., 185 W.Va. 409 (1991); Haba v. Big Arm Bar & Grill, 196 W.Va. 129 (1996). The issue in the federal action was a declaratory judgment under 28 U.S.C. §§ 2201-2202 which the District Court dismissed for lack of subject matter jurisdiction, and there was not final judgment over the issue involved in this action. The District Court found that the Firefighters elected to file in state court rather than federal court which it can do under FLSA 28 U.S.C. § 216.

The City now, for the first time, asserts that the federal court Order is *res judicata* under State ex rel. Small v. Clawges, 745 S.E.2d 191 (2013). There is a huge distinction in the facts of the Clawges case and the issue here. Here, the City, not the Petitioners, brought an action for

declaratory judgment under 28 U.S.C. 2201, which the federal court dismissed stating it “did not have subject matter jurisdiction under 28 U.S.C. § 2201.” (App. 499.) There is no *res judicata* when a court dismisses for lack of subject matter jurisdiction. State ex rel. Barden v. Hill, 208 W.Va. at 166 (2000). (Citations omitted.) Also see 8B M.J. Former Adjudication §§ 11 and 12.

3. REPLY THAT FLSA DOES NOT AFFORD ANY RELIEF

The City’s assertion that under 29 U.S.C. § 207(k) and 29 C.F.R. § 553.210(a), it may adopt a 212 hour 28 day work period. 29 U.S.C. § 207(k) is subject to the further provision that if the work period is at least seven but less than 28 days, there is a ratio to be applied. The City uses a 14 day work period. Under 29 C.F.R. § 553.230(c), if the work period is 14 days, then the maximum work period before overtime is 106 hours. (Fully discussed in Petitioners’ Appeal Brief, pp. 23-25.) The City has misstated 29 U.S.C. § 207(k)(2) and 29 C.F.R. § 553.230. Under FLSA 29 U.S.C. § 218, the employer and the employee can agree to a higher regular rate or to a lesser work week which was agreed to by the City and the firefighters beginning in late 1990 and effective January 1, 1991. West Virginia Code § 21-5C-3(c) and ϵ , also recognizes that the employer and employees may agree to a higher rate of pay or to a lesser work week. Local 313 v. City of Morgantown, Id.; and Pullano v. City of Bluefield, Id. The Petitioners are entitled to relief under 29 U.S.C. § 216(b) and West Virginia Code § 21-5C-8.

4. REPLY TO CITY’S POSITION THAT CIRCUIT COURT DID NOT ERR IN FINDING THAT THE CITY RELIED ON AARON v. CITY OF WICHITA

The City relies on Mr. Lane’s second Affidavit which states that in 2011 the City learned through its City Manager (David Molgaard)⁶ it erroneously relied upon and acted upon the formula set forth 18 years ago upon a misapplication of federal law which resulted in the unintentional inflation of the overtime rate for firefighters. (App. 236-237, Molgaard Aff. ¶¶ 25-

⁶ See Footnote 5.

27.) As previously referenced, the City is referring to the case of Aaron v. City of Wichita, 797 F.Supp 898 (D.Kan. 1992), from the District Court of Kansas decided on June 17, 1992, and clarified on March 9, 1993, and April 26, 1993. (Respondent's Response Brief pp. 3 and 19.) This assumption (presumably made by David Molgaard) is totally incorrect since as shown by Affidavits of former Chief Beaver, Assistant Chief Perry, Captain Legg, and Council President Lane, the City entered into an agreement with the Firefighters in November 1990, which became effective January 1, 1991, and did not use the 1992 Aaron case as the basis for the agreement with the Firefighters. (App. 302-326, Beaver, Perry and Legg Affidavits.)

Mr. Lane, who served on the Finance Committee in 1991 when the regular rate was first established, and has served on Council since that time, and Mr. Molgaard, a labor lawyer, served on the Finance Committee between 1999-2003, and City Manager since that time, stating that Mr. Molgaard first noticed the Aaron case in 2011 is totally without merit.

The facts of the Aaron case are totally different from the agreement the City has with the Firefighters in this case. In Aaron, the City of Wichita and firefighters had a signed Memoranda of Agreement which set forth a set formula that the regular hourly rate would be determined by dividing the average number of hours the firefighters are in "pay status" during a bi-weekly period (112 hours) into the bi-weekly salaries, which included overtime pay, paid vacation, and "Kelly Days." The City's agreement for calculation of the regular hourly rate with its Firefighters was established by Council Resolution in November 1990 to become effective January 1, 1991, and remained unchanged until November 2011, by dividing the annual salary, without overtime, using a 51.7, 50.4 and 49 hour work week, and reduced by vacation and "Kelly Days." (App. 302-326, Affidavits of Beaver, Legg and Perry.)

In March 2001, with Mr. Lane and Mr. Molgaard on Council, the City had its overtime policy reviewed by Forrest Roles, Esquire, of the law firm of Heenan, Althen and Roles, where he opined with the full knowledge of the method employed for the regular hourly rate, that the City violated the FLSA by underpaying its firefighters \$220,000.00. (App. 404-409, Roles to Mayor Goldman.)

While the Circuit Court stated in Number 64 of its Order (App. 796-797, ¶ 64) that plaintiff's (Firefighters) argument is *non sequitur*, then erroneously stated in Number 66 (App. 796) that "the City erroneously believed, until 2011, that Aaron prevented any change in its method of calculation" and stated "The calculations used by the City to arrive at these divisors historically excluded vacation hours, a practice which was supported by the City's interpretation of federal case law. See Aaron v. City of Wichita, 797 F.Supp. 898 (D.Kan. 1992)." (App. 787, ¶ 9.) Yet in Paragraph 67 (App. 796), the Circuit Court stated "In short, any question as to the City's reliance on the Aaron decision is unrelated to the actual matter in dispute, namely the City's legal ability to unilaterally modify its method of calculating overtime compensation for its employees." Firefighters address this issue since the Circuit Court discussed it in the Order, and apparently erroneously relied on the City's interpretation for its ruling.

5. THE CIRCUIT COURT AND CITY'S RELIANCE ON COLLINS v. CITY OF BRIDGEPORT IS ERRONEOUS

The holding by the Circuit Court that rulings of Hogue v. Cecil Walker Machinery, 189 W.Va. 348 (1993), and Collins v. City of Bridgeport, 206 W.Va. 475 (1999),⁷ allow a municipality to unilaterally change the methods of calculation of the hourly rate of pay is simply

⁷ The Collins Court was composed of Judges Wilkes, Canady and Risovich sitting by special assignment, and Justices Maynard and McGraw. Chief Justice Starcher and Justice Davis deemed themselves disqualified, and did not participate, and Judge Scott did not participate.

a misunderstanding and misapplication of the holdings of these cases as to the Firefighters' individual contracts, which are protected by FLSA and the civil service laws of West Virginia.

The facts and law of Collins are totally distinguishable from this case. In Collins, the city modified a discretionary policy of its personnel manual using vacation pay, holiday compensation time, and sick pay in calculation of overtime. Collins at 475. The Collins case relied on Hogue v. Cecil I. Walker Machinery, Id., which held that an employer may revoke or modify personnel policies or manuals and change the relationship to an employee at will. The Court in Hogue referred to Cook v. Heck's Inc., 176 W.Va. 368 (1986), stating "that employment relationship that is not based on a contract or governed by statutory provisions is ordinarily an at will employment." Id. at 350. [Emphasis added.] Here, the Firefighters and the City have individual contracts governed by the FLSA and are covered by civil service, and cannot be unilaterally modified. The Firefighters are not at will employees since they are protected under the civil service provisions of West Virginia Code §§ 8-15-12, 8-15-15, and 8-15-25. This Court in Williams v. Brown, 190 W.Va. 202 (1993), specifically held that:

...“A **person** covered under a civil service system is afforded certain statutory protections surrounding his employment and is, therefore, not an at-will employee. We discussed the status of a civil service employee in Waite v. Civil Service Commission, 161 W. Va. 154, 241 S.E.2d 164 (1977), and stated in Syllabus Point 4: ‘A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment.’...” Id. at 205. [Emphasis added.]

Here, the City of Charleston, by oral agreements and resolutions passed by council on November 19, 1990, in 1994, and on January 21, 1997, and every year to November 2011, established by written contract the number of regular hours in the work week for the Fire Suppression Division. In Collins, the Court erroneously held that the City of Bridgeport was, like a private employer, could treat the employees as at will and modify a discretionary policy in its

personnel manual. This is a misapplication or misunderstanding of settled federal and state employment law which led the Circuit Court here to arrive at an erroneous holding by applying Issue 3 of Collins and should be reversed.

In Darlington, et al. v. Mangum, Sheriff of Raleigh County, et al., 192 W.Va. 112 (1994), this Court, speaking about personnel manuals, stated:

“More recently, in Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993), we dealt with the question of whether statements in a public agency's employment manual could override a statutory provision. We decided that such statements were not binding and quoted from Fiorentino v. United States, 221 Ct.Cl. 545, 552, 607 F.2d 963, 968 (1979), *cert. denied*, 444 U.S. 1083, 100 S.Ct. 1039, 62 L.Ed.2d 768 (1980):

“It is unfortunately all too common for government manuals, handbooks, and in-house publications to contain statements that were not meant or are not wholly reliable. *If they go counter to governing statutes . . . , they do not bind the government, and persons relying on them do so at their peril.*” [Emphasis in opinion.]

Here, the City of Charleston, by oral agreements and resolutions passed by council on November 19, 1990, in 1994, and on January 21, 1997, and every year to November 2011, established by written contract the number of regular hours in the work week for the Fire Suppression Division and is governed by FLSA 29 U.S.C. § 207, 29 C.F.R. § 778.407, and Chapters 32ao(e), 32f00, 32f01, and 32f02 of the Field Operations Handbook of the U.S. Department of Labor Wage and Hour Division and West Virginia Code 21-5C-3(c) as previously stated. (Reply Brief, Id. at 5-6.)

The FLSA does preempt the acts of the City, and as held in Darlington, the discretionary policy cited in the Collins case cannot override the statutory provision of the FLSA.

29 C.F.R. § 778.407, section 7(f) employment contract states:

“Payment must be made ‘pursuant to a bona fide individual contract or pursuant to an agreement made as a result of collective bargaining by representatives of employees.’ It cannot be a onesided affair determinable

only by examination of the employer's books. The employee must not only be aware of but must have agreed to the method of compensation in advance of performing the work...." [Emphasis added.]

The Circuit Court of Kanawha County erred in applying the ruling from Issue 3 of Collins v. City of Bridgeport, 206 W.Va. at 475 (1999). The Firefighters respectfully say that the ruling in 1999 by the Collins Court in Issue 3 misapplied settled West Virginia case law by holding that a Firefighter who is a civil service employee is an employee at will, and that an employee to have a property interest must show that he has a legitimate claim of entitlement under state or federal law, and have shown a legitimate entitlement under FLSA. Firefighters, under existing state case law, will address their property interests in the following section of this reply. This misapplication or misunderstanding of settled federal and state law by the Collins Court regarding the issue of calculation of the hourly rate led to the erroneous findings by the Circuit Court. Issue 3 of Collins should be overruled. The rule of *stare decisis* does not apply where the former decisions have misinterpreted or misapplied a rule or principle of law, and cannot perpetuate incorrect or misapplications of laws or legal principles. 17 M.J. *Stare Decisis* § 9 FN 9, citing Long v. City of Weirton, 158 W.Va. 741 (1975); Janasiewicz v. Bd. of Educ., 171 W.Va. 423 (1982). (Fully discussed in Petitioners' Brief pp. 31-33.)

6. CIRCUIT COURT ERRED IN FINDING THAT FIREFIGHTERS DO NOT HAVE A LIBERTY AND PROPERTY INTEREST AND NOT ISSUING A WRIT OF MANDAMUS COMPELLING THE CIVIL SERVICE COMMISSION TO HOLD A FULL HEARING

The Firefighters have a liberty and property interest in their employment contracts. It is well established that a civil service classified employee has a property interest in his continued uninterrupted employment and that he cannot be deprived of his employment unless procedural due process safeguards have been afforded. This Court found in Barron v. Board of Trustees of Policemen's Pension, 176 W.Va. 480 (1985), that city employees have a liberty and property

interest in their employment. An employee's hourly rate of pay is clearly within the holding of the Court. Chief Justice Miller, speaking for a unanimous court in Barron, held:

“The Fifth and Fourteenth Amendments to the Constitution of the United States and Article III, Section 10 of the Constitution of West Virginia, require procedural safeguards against state action that affects a liberty or property interest. We spoke of this concept at some length in Waite v. Civil Service Comm'n, 161 W.Va. 154, 241 S.E.2d 164 (1977), and we concluded in Syllabus Points 1 and 3:

“‘1. The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest.’

“‘3. A “property interest” includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings.’” Id. at 482. (Citations omitted. See Petitioners' Brief, p 36.)

Also see Syl. pt. 1, Fraley v. Civil Service Commission, 177 W.Va. 729 at 732 (1987), quoting Waite v. Civil Service Commission, 161 W.Va. 154 (1977), Stull v. Firemen's Pension and Relief of the City of Charleston, 202 W. Va. 440 (1998), and Williams v. Brown, Id.

West Virginia Code § 8-15-11(b), Civil Service for Paid Fire Departments, and Rule 7.01 of the Rules and Regulations of the Firemen's Civil Service Commission for the City of Charleston, provide, in part, as follows:

“...(b) No individual may be appointed, promoted, reinstated, removed, discharged, suspended, or reduced in rank or pay as a paid member of any paid fire department regardless of rank or position, in any manner or by any means other than those prescribed in this article.” [Emphasis added.]

The actions stated in 8-15-11(b) and Rule 7.01 are in the disjunctive, not conjunctive. The unilateral action by the City in changing the method of calculation of the hourly rate of pay result in a reduction of between \$1.68 to \$2.70 per hour depending on the Firefighter's rank and years of service, ranging from 6.45% to 10.8% loss of their hourly overtime rate. Firefighters

being on a 24 hour on, off 48 hour schedule with a two week pay cycle requires the Firefighters to work 22 hours overtime after every second shift.

Rules 7.02.2 and 7.02.3 of The Rules and Regulations of the Civil Service Commission further provide that in every case of a reduction in pay, the member shall be entitled to a hearing with the burden on the City to show just cause resulting from wrongful misconduct by the member.

Chapter 8-15-25(a) provides that a firefighter may only be reduced in pay for good cause, and 8-15-25(d) further provides:

“If for reasons of economy or other reasons it is deemed necessary by any such municipality to reduce the number of paid members of its paid fire department, the municipality shall follow the procedure set forth in this subsection....” [Emphasis added.]

The Firemen’s Civil Service Commission is mandated under Chapter 8-15-25 to hold a full hearing with the burden on the City to show that it is suffering from financial hardship, and if it is, the City’s remedy is to layoff firefighters and not unilaterally reduce the pay of the remaining members.

In Dougherty v. City of Parkersburg, et al., 138 W.Va. 1 (1952), this Court held:

“Both the police civil service act...and the act relating to the policemen's and firemen's pension or relief funds, Code, 8–6–20... are remedial in their nature. And being read in pari materia, both statutes should be liberally construed in order to effectuate the underlying purposes thereof. An underlying purpose of the police civil service statute is to give security to members of paid police departments of municipalities having a population of five thousand or more against the vicissitudes which always attend, in the absence of protective statutes, such as the police civil service act, political municipal elections. [Citations omitted. Emphasis added.] Id at 9.

In Pugh v. Policemen’s Civil Service, 214 W.Va. 498 (2003), speaking on the issue of jurisdiction of municipal civil service commission, this Court stated that under West Virginia Code § 8-14-6 through 24 for police officers, which is similar to §§ 8-15-11 through 25 for

firefighters, the Commission has a broad mandate to investigate and develop a factual record on the issues involved. Pugh at 504. The Commission failed to investigate to determine whether the City's action was or was not discriminatory, was made in good faith, and not motivated by any political or other improper objectives, and failed to require the City to show affirmatively that it was suffering from financial hardships, and then if so, could proceed with layoffs done in accordance with West Virginia Code § 8-15-25, requiring the City to make equitable adjustments with all City employees, exempt and non-exempt, so that there is no discriminatory action as to any employee in the reduction of their hourly rates of pay.

The City's and Commission's reliance on Darlington v. Mangum, 192 W.Va. 112 (1994), Hartman v. Board of Education, 194 W.Va. 539 (1995), and Hutchinson v. City of Huntington, 198 W.Va. 139 (1996), that it has no jurisdiction is unfounded, for here the members of the Fire Suppression Unit are being reduced in pay, while in Darlington, the deputy sheriffs' salaries were not being reduced, but those who wanted healthcare were to pay a portion of their premium costs.

The refusal of the Commission to assume jurisdiction denied the Firefighters their constitutional rights to protect their property interest under the Due Process Clause, Article III, Section 10, of the West Virginia Constitution. The Firemen's Civil Service Commission is the appropriate venue to accomplish all of the protective requirements of Waite and Barron.

CONCLUSION AS TO CITY AND CIVIL SERVICE COMMISSION

WHEREFORE, Petitioners/Firefighters respectfully request that the Court reverse the judgment of the Circuit Court of Kanawha County and find the Fair Labor Standards Act applies, and order the City to account for all overtime hours worked since the effective dates of Resolution 037-11, pay Firefighters any overtime due at the prior regular rate of hourly pay, find

that the judgment of the Circuit Court affirming the final order of a Civil Service Commission was based on a mistake of law and be reversed and order the Circuit Court to issue a Writ of Mandamus compelling the City of Charleston Firemen's Civil Service Commission to assume jurisdiction under West Virginia Code § 8-15-25 finding that the Firefighters have contractual property rights under Article III, Section 10, of the Constitution of West Virginia, and further order that the Commission make an investigation and findings of fact and conclusion that the City has unilaterally violated its employment contract under the FLSA, and award costs and attorney's fees.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Maroney', is written over a horizontal line.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-1261

**MYRON BOGGESS, et al.
Plaintiffs Below, Petitioners**

v.

**CITY OF CHARLESTON, A WEST VIRGINIA MUNICIPAL
CORPORATION; MATTHEW P. JACKSON, ERIC E. KINDER,
AND VICTOR E. SIGMON, IN THEIR CAPACITY AS
COMMISSIONERS OF THE FIREMEN'S CIVIL SERVICE
COMMISSION OF THE CITY OF CHARLESTON
Defendants Below, Respondents**

CERTIFICATE OF SERVICE

I, Thomas P. Maroney, counsel for Petitioners herein, do hereby certify that I served a true and accurate copy of **PETITIONERS' REPLY TO RESPONDENT CITY OF CHARLESTON'S RESPONSE TO PETITIONERS' APPEAL BRIEF** upon counsel for the respondents on this the 2nd day of May 2014, as follows:

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