

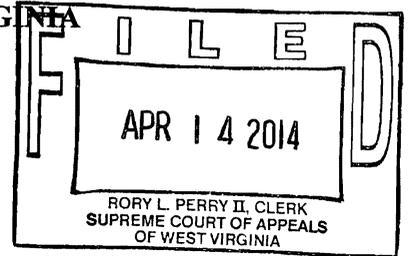
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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



---

**CITY OF CHARLESTON'S  
RESPONSE TO THE BRIEF OF PETITIONERS**

---

Thomas V. Flaherty (W.Va. State Bar No. 1213)  
Caleb P. Knight (W.Va. State Bar No. 11334)  
Flaherty Sensabaugh Bonasso PLLC  
200 Capitol Street (P. O. Box 3843)  
Charleston, West Virginia 25338-3843  
Telephone: (304) 345-0200  
[TFlaherty@fsblaw.com](mailto:TFlaherty@fsblaw.com)  
[CKnight@fsblaw.com](mailto:CKnight@fsblaw.com)

*Counsel for the City of Charleston*

**TABLE OF CONTENTS**

<b>TABLE OF CONTENTS .....</b>	<b>i</b>
<b>TABLE OF AUTHORITIES .....</b>	<b>ii</b>
<b>STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....</b>	<b>7</b>
<b>SUMMARY OF ARGUMENT.....</b>	<b>7</b>
<b>ARGUMENT.....</b>	<b>8</b>
<b>1. THE CIRCUIT COURT DID NOT ERR WITH REGARD TO THE PETITIONERS’ FAILURE TO PRESENT ANY EVIDENCE OF AN UNDERLYING CONTRACTUAL OBLIGATION ON THE PART OF THE CITY .....</b>	<b>8</b>
<b>2. THE CIRCUIT COURT DID NOT ERR WITH REGARD TO THE APPLICATION OF THE FLSA TO THIS MATTER.....</b>	<b>13</b>
<b>a. The Petitioners are estopped from arguing that any controversy exists with regard to the City’s application of the FLSA to its firefighters.....</b>	<b>15</b>
<b>b. The FLSA unquestionably applies to the City’s calculation of its overtime rate-of-pay, but does not afford the firefighters any relief.....</b>	<b>17</b>
<b>3. THE CIRCUIT COURT DID NOT ERR WITH REGARD TO THE CITY’S RELIANCE ON ITS INTERPRETATION OF <u>AARON V. CITY OF WICHITA</u> TO SUPPORT ITS PREVIOUS OVERTIME RATE-OF-PAY CALCULATION .....</b>	<b>19</b>
<b>4. THE CIRCUIT COURT DID NOT ERR WITH REGARD TO THE APPLICABILITY OF <u>COLLINS V. CITY OF BRIDGEPORT</u> TO THE CITY’S ABILITY TO UNILATERALLY MODIFY ITS OVERTIME RATE-OF-PAY CALCULATION .....</b>	<b>20</b>
<b>a. The Petitioners’ contractual claim fails as a matter of law because the City properly notified the Petitioners prior to correcting the method of calculation..</b>	<b>22</b>
<b>b. The Petitioners’ alleged property interest claim also fails as a matter of law because no statute or local laws granted the firefighters any property interest in the City’s historical method of calculation .....</b>	<b>23</b>
<b>5. THE CIRCUIT COURT DID NOT ERR IN DISMISSING THE COMMISSIONERS OF THE FIREMEN’S CIVIL SERVICE COMMISSION ON JULY 9, 2013.....</b>	<b>25</b>
<b>CONCLUSION .....</b>	<b>26</b>

## TABLE OF AUTHORITIES

### West Virginia Supreme Court Cases:

<u>Adkins v. City of Huntington</u> , 191 W.Va. 317, 445 S.E.2d 500 (1994).....	17, 24
<u>Collins v. City of Bridgeport</u> , 206 W.Va. 467, 525 S.E.2d 658 (1999).....	7, 8, 20, 21, 22, 23, 24
<u>Darlington v. Mangum</u> , 192 W.Va. 112, 450 S.E.2d 809 (1994).....	25
<u>Edwards v. Hylbert</u> , 146 W.Va. 1, 118 S.E.2d 347 (1960) .....	12
<u>Hartman v. Board of Educ.</u> , 194 W.Va. 539, 460 S.E.2d 785 (1995) .....	23
<u>Hogue v. Cecil I. Walker Machinery Co.</u> , 189 W. Va. 348, 431 S.E.2d 687 (1993) .....	20, 22
<u>Hutchison v. City of Huntington</u> , 198 W. Va. 139, 479 S.E.2d 649 (1996).....	23
<u>Lipscomb v. Tucker County Commission</u> , 206 W.Va. 627, 527 S.E.2d 171 (1999) .....	12
<u>Pugh v. Policeman Civil Service Commission</u> , 214 W.Va. 498, 590 S.E.2d 691 (2003) .....	25
<u>State ex rel. Billy Ray C. v. Skaff</u> , 190 W. Va. 504, 438 S.E.2d 847 (1993).....	25
<u>State ex rel. County Comm'n v. Cooke</u> , 197 W. Va. 391, 475 S.E.2d 483 (1996).....	13
<u>State ex rel. Deputy Sheriff's Ass'n v. County Com'n</u> , 180 W. Va. 420, 376 S.E.2d 626 (1988).....	24
<u>State ex rel. Small v. Clawges</u> , 745 S.E.2d 192 (2013)(per curiam) .....	15
<u>Williams v. Precision Coil, Inc.</u> , 194 W.Va. 52, 459 S.E.2d 329 (1995) .....	12

### Other Jurisdictions:

<u>Aaron v. City of Wichita</u> , 797 F.Supp. 898 (D.Kan. 1992).....	2, 7, 19, 20
<u>Aaron v. City of Wichita</u> , 54 F.3d 652 (10 CA 1995).....	3, 19, 20
<u>Anderson v. Phoenix Inv. Counsel of Boston, Inc.</u> , 387 Mass. 444, 440 N.E.2d 1164, 1167 (Mass. 1982).....	15
<u>Jefferson Marine Towing, Inc. v. Kostmayer Constr., LLC.</u> , 32 So. 3d 255 (La. Ct. App. 2010).....	15
<u>Ohio Valley Env'tl. Coal. v. Aracoma Coal Co.</u> , 556 F.3d 177 (4th Cir. 2009).....	16

**West Virginia Constitutional Provisions:**

Article V, Section 1, Constitution of West Virginia.....13  
Article X, Section 8, Constitution of West Virginia.....13

**West Virginia Code Provisions:**

W.Va. Code § 8-5-12 ..... 24  
W.Va. Code § 8-11-1 .....13  
W.Va. Code § 11-8-26.....12

**United States Code Provisions:**

28 U.S.C. § 2201 .....3  
29 U.S.C § 201 ..... *passim*  
29 U.S.C. § 206.....17  
29 U.S.C. § 207 .....17  
29 U.S.C. § 218.....18

**Other Authorities Cited:**

29 C.F.R. § 553.210(a).....18  
51 Op. Att’y Gen. 47 (1964) .....13  
51 Op. Att’y Gen. 683 (1964) .....9  
Charleston City Code § 54-101.....9  
Rules and Regulations of the Firemen’s Civil Service Commission .....2, 4, 6, 15  
Rule 57 of the Federal Rules of Civil Procedure .....3  
Rule 12(b)(6) of the West Virginia Rules of Civil Procedure .....5  
Rule 54(b) of the West Virginia Rules of Civil Procedure .....6  
Rule 59(e) of the West Virginia Rules of Civil Procedure .....6

Rule 19(a) of the Revised West Virginia Rules of Appellate Procedure.....7

Rule 20 of the Revised West Virginia Rules of Appellate Procedure .....7

## STATEMENT OF THE CASE

### 1. Introduction.

The Petitioners, all of whom are dedicated and loyal members of the City of Charleston's Fire Suppression Division, have nonetheless brought this appeal in hopes of advancing their factually and legally impossible claim – that the City of Charleston (the “City”) is contractually bound to calculate its overtime rate-of-pay for its shift firefighters in a particular manner into perpetuity. The Petitioners' arguments in this regard are fraught with factual and legal errors that the City will endeavor to correct or dispel in the following pages. Perhaps most troublesome among these errors, however, is the Petitioners' oft-repeated assertion that the City has unilaterally changed the regular, hourly rate-of-pay (as opposed to the overtime rate-of-pay) for its firefighters – it has not. Instead, the action which prompted the Petitioners' complaint to the Circuit Court of Kanawha County consisted only of a correction made to the City's method of calculating the hourly rate-of-pay for overtime compensation and had no effect, whatsoever, on any individual firefighter's regular, hourly rate-of-pay. Moreover, the City's action taken was well within the boundaries of a municipal employer's discretionary authority pursuant to settled West Virginia law. The City provided its firefighters with reasonable notice of the correction, which was adopted and implemented in a public forum and in full compliance with applicable state and federal law, and the Petitioners plainly failed to demonstrate any evidence indicating otherwise before the Circuit Court of Kanawha County. For this reason, and because the Petitioners failed to state a claim upon which relief could be granted against the Firemen's Civil Service Commission, the City denies that the Circuit Court erred, in any regard, in rendering its decisions on July 9, 2013 and October 7, 2013, and requests that those two orders be affirmed by this Court.

## 2. Relevant Facts.

The Petitioners, which constitute the City's shift firefighters, were each hired by the City at different times over a period reaching back several years through the present day, on terms and conditions of employment that are largely governed by federal, state and local law, discretionary policy, and the Rules and Regulations of the Firemen's Civil Service Commission. (Stipulation and Agreed App., Feb. 10, 2014, 4, Pet'rs' Compl., Feb. 24, 2014, ¶ 4; App. 272, Pet'rs' Memo. in Supp. Mot. for Summ. J., 11.) The Petitioners have historically been, and continue to be, paid an annual salary that is set forth on wage progression schedules contained within the City's annual budget. (App. 11-12, Pet'rs' Compl., Exs. 2, 3). These salaries have been modified from year-to-year as a matter of fiscal responsibility and public policy, based on the City's financial condition and other factors. (App. 463, Aff. J. Thomas Lane, Dec. 28, 2012, ¶¶ 9, 10.)

For the period January 1991 through November 7, 2011, the City calculated the hourly rate-of-pay for purposes of overtime compensation by dividing the annual salaries of its firefighters by a certain number of hours for members with less than 15 years' service, and a different number of hours for members with more than 15 years' service. (App. 269, Pet'rs' Memo. in Supp. of Mot. for Summ. J., 8.)<sup>1</sup> The calculations used by the City to arrive at these divisors historically excluded vacation hours, a longstanding practice which was supported by the City's interpretation of federal case law which, in turn, interpreted the federal law Fair Labor Standards Act, 29 U.S.C § 201, *et seq.* (the "FLSA"). See Aaron v. City of Wichita, 797 F.Supp. 898 (D.Kan. 1992).

---

<sup>1</sup> The divisors used to calculate the hourly rate for purposes of overtime compensation were 2,412 hours for members with less than 15 years' service and 2,364 hours for members with more than 15 years' service for the period January 1991 through June 31, 1995. For the period July 1, 1995 through June 31, 1996, these divisors decreased to 2,344 hours for members with less than 15 years' service and 2,296 hours for members with more than 15 years' service. For the period February 1997 through November 2011, these divisors decreased again to 2,272 hours for members with less than 15 years' service and 2,224 hours for members with more than 15 years' service. (App. 269-270, 302-326; Pet'rs' Memo. in Supp. of Mot. for Summ. J., 9; Exs. 2-4.)

However, in 2011, the City realized that the method of calculation in the Aaron case, namely the exclusion of vacation hours from the divisor, had been reversed and/or clarified by a subsequent decision. See Aaron v. City of Wichita, 54 F.3d 652 (10th Cir. 1995). The City immediately took steps to implement a corrected method of calculation pursuant to the FLSA and, on November 7, 2011, through Resolution No. 037-11, amended the City's 2011-12 annual budget to implement this correction. (App. 465, Aff. J. Thomas Lane, ¶¶ 17-19.) This corrected method of calculation has reduced the hourly rate-of-pay used to calculate the Petitioners' overtime compensation since its implementation in 2011 and is the unilateral modification that prompted the firefighters to file their complaint in the Circuit Court of Kanawha County. (App. 5, Pet'rs' Compl., ¶ 6.)

### **3. Procedural History.**

The Stipulated and Agreed Appendix in this matter reveals a complex procedural history that is nevertheless important in light of certain of the Petitioners' arguments. On February 2, 2012, the City filed a Request for Declaratory Judgment and Relief, pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2201, in the United States District Court for the Southern District of West Virginia.<sup>2</sup> The stated purpose of that declaratory judgment action was "to ensure that all of [the City's] firefighters are paid hourly and overtime wages in full compliance with the applicable provisions of the [FLSA] as well as any and all related state laws." (App. 709, City's Resp. and Objection, 5, Sept. 11, 2013.) Subsequent to the City filing its declaratory judgment action, the Petitioners filed their two-count Complaint and Petition for Writ of Mandamus on February 24, 2012.<sup>3</sup> (App. 3-19, Pet'rs' Compl.)

---

<sup>2</sup> The City's Request for Declaratory Judgment and Relief was assigned Civil Action No. 2:12-cv-00225.

<sup>3</sup> The Petitioners' Complaint contains **not a single allegation as to any alleged violations of the FLSA or U.S. Department of Labor Regulations by the City.** (App. 3-19, Pls.' Compl., ¶¶ 1-10.)

Rather than proceeding concurrently in both state and federal court, the parties agreed to stay the Petitioners' action before the Circuit Court of Kanawha County pending the outcome of the City's declaratory judgment action in the United States District Court for the Southern District of West Virginia. (App. 29-30, Agreed Ord. Staying All Proceedings, May 23, 2012.) The Petitioners (who were captioned as the defendants in the City's declaratory judgment action) promptly moved to dismiss the City's action by arguing that the issues presented therein were "purely a question of West Virginia contract and employment law..." as opposed to a controversy under the FLSA. (App. 709, City's Resp. and Objection, 5.) Judge Joseph R. Goodwin relied on such allegations in both the firefighters' Circuit Court complaint and their motion to dismiss when he dismissed the City's declaratory judgment action from federal court, saying as follows:

[I]f the firefighters believed that the new methodology adopted by the City that took effect in 2012 violated the FLSA, they could have brought a claim in federal court. They did not do so; **rather, they brought a claim in State court, alleging only violations of State law and [Firemen's Civil Service] Commission rules, and nowhere have the firefighters even suggested that the new methodology violates the FLSA.** Thus, there is no controversy as to whether the new methodology satisfies the requirements of the FLSA.

(App. 499, Memo. Opinion and Order of Judge Joseph R. Goodwin, Sept. 7, 2012, 8) (emphasis added).

Thereafter, the stay was lifted and the parties proceeded to address the merits of the Petitioners' allegations before the Circuit Court. (App. 36-38, Order Lifting Stay, Dec. 27, 2012.) 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 (the "Commissioners"), filed a motion to dismiss the Petitioners' petition for writ of mandamus against them on or around May 3, 2012. (App. 20-28, Commissioners' Mot. to Dismiss, May 3, 2012.) The City

filed an Answer and Response to Petition for Writ of Mandamus on January 28, 2013, and included therein a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. (App. 39-44, City's Ans., Jan. 28, 2013.) The City also: (i) moved to join in the motion to dismiss of the Commissioners (App. 61-63, City's Mot. To Join, Jan. 28, 2013); (ii) moved to bifurcate the Petitioners' complaint from the Petitioners' petition for writ of mandamus (App. 64-69, City's Mot. to Bifurcate, Jan. 28, 2013); and (iii) filed a memorandum of law in support of its own motion to dismiss, including a supporting affidavit from J. Thomas Lane, one of the City's longtime councilmen (App. 45-60, Memo. in Supp. of City's Mot. to Dismiss, Jan. 28, 2013.)

On April 22, 2013, the Circuit Court heard arguments regarding the Commissioners' motion to dismiss, and granted the same. (App. 634-638, Order Grant. Commissioners' Mot. to Dismiss, July 9, 2013.)

Thereafter, the Petitioners filed a motion for summary judgment. (App. 249-258, Pet'rs' Mot. for Summ. J., May 28, 2013; App. 259-424, Pet'rs' Mem. in Supp. Mot. for Summ. J., May 28, 2013.) That motion marked the first instance of the Petitioners making any allegations against the City regarding violations of the FLSA or U.S. Department of Labor Regulations. (Id at 9, 19, 22.)

The City agreed that this matter was suitable for summary judgment as to the arguments advanced in its previously filed motion to dismiss and moved, on June 14, 2013, that its previously filed motion be converted to a motion for summary judgment. (App. 425-440, City's Mot. to Convert, June 14, 2013). Soon thereafter, the City responded in opposition to the Petitioners' motion for summary judgment. (App. 441-499, City's Resp. to Pet'rs' Mot. Summ. J., June 21, 2013.)

The parties appeared before the Honorable Judge James C. Stucky on June 26, 2013, to argue their respective motions for summary judgment. At the conclusion of the hearing, Judge Stucky requested that the parties prepare proposed findings of fact and conclusions of law which were provided to the Circuit Court on August 26, 2013. (App. 639-659, City's Prop. Findings of Fact and Conclusions of Law, Aug. 26, 2013; App. 660-694, Pet'rs' Prop. Findings of Fact and Conclusions of Law, Aug. 26, 2013.)

The Petitioners also moved the Circuit Court to take judicial notice of certain federal statutes, municipal ordinances, City of Charleston Firefighters Civil Services Rules, and U.S. Department of Labor Regulations. (App. 695-704, Pet'rs' Mot. for Judicial Not., Aug. 26, 2013.) This prompted the subsequent filing of the following: (i) the City's Response and Objection to Motion for Judicial Notice on the grounds that the Petitioners were estopped from litigating violations of the FLSA before the Circuit Court after moving to dismiss the City's declaratory judgment action in federal court on the basis that no such violations had occurred (App. 705-718, City's Resp. and Objection, Sept. 11, 2013.); (ii) the Petitioners' reply thereto (Pet'rs' Reply to City's Resp. and Objection (App. 719-734, City's Resp. and Objection, Sept. 17, 2013); (iii) the City's surreply (App. 735-758, City's Surreply Regarding City's Resp. and Objection, Sept. 30, 2013); and (iv) the Petitioners' surresponse (App. 759-781, Pet'rs' Surreesponse to City's Surreply Regarding City's Response and Objection, Oct. 3, 2013.).

Those various pleadings were effectively rendered moot when, on October 7, 2013, the City's converted motion for summary judgment was granted by order of the Circuit Court of Kanawha County. (App. 782-797, Order Grant. City's Mot. for Summ. J., Oct. 7, 2013.) The Petitioners filed a Motion to Revise, Alter or Amend Judgment under Rule 54(b) and 59(e) on October 17, 2013, which was denied by Order of the Circuit Court on October 30, 2013. (App.

798-808, Pet'rs' Mot. to Revise, Alter or Amend J. Under Rule 54(b) and 59(e), Oct. 17, 2013; App. 842-845, Order Den. Pet'rs' Mot. to Revise, Alter or Amend J. Under Rule 54(b) and 59(e), Oct. 30, 2013.) The Petitioners' Notice of Appeal to this Court followed on November 26, 2013. (App. 846-879, Pet'rs' Not. of Appeal, Nov. 26, 2013.)

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The City respectfully requests oral argument on the grounds that this matter meets the criteria set forth in Rule 19(a) of the West Virginia Rules of Appellate Procedure and involves, among other assignments of error, an assignment of error related to the Circuit Court of Kanawha County's application of settled federal and state law. See W.Va. R. App. P. 19(a) and W.Va. R. App. P. 20.

#### **SUMMARY OF ARGUMENT**

The orders entered by the Circuit Court of Kanawha County on July 9, 2013 and October 7, 2013 should be affirmed by this Court because the Petitioners failed to state a claim upon which relief could be granted against the Commissioners and plainly failed to demonstrate the existence of any genuine issues of fact with regard to their allegations against the City. Moreover, as explained in the following pages, the Petitioners' predominant argument that the City is contractually bound to continue calculating its overtime rate-of-pay for its firefighters in a particular manner into perpetuity is wholly without any factual or legal support. As the following pages will explain: (i) the City is not contractually obligated to calculate its overtime rate-of-pay for its firefighters in any particular manner; (ii) Sections 206 and 207 of the FLSA do not prohibit the City from making any changes to the terms and conditions of employment of its firefighters; (iii) the City's interpretation of Aaron v. City of Wichita, 797 F.Supp. 898 (D.Kan. 1992), has no material relevance to the legal issues decided by the Circuit Court in this matter;

(iv) this Court's well reasoned and binding precedent set in Collins v. City of Bridgeport, 206 W. Va. 467, 525 S.E.2d 658 (1999), applies to and controls the outcome of this matter; and (v) the Commissioners correctly dismissed this matter for lack of jurisdiction.

The Petitioners would have this Court believe that an indefinite employment contract exists between the City and its firefighters, despite the telling lack of any evidential support for that proposition. The Petitioners would also have this Court believe that this matter is governed by Sections 206 and 207 of the FLSA, despite the fact that those sections afford them no relief. In fact, Section 207 of the FLSA is the very same provision upon which the City based its correction to its overtime rate-of-pay calculation in 2011. And, that correction was clearly permitted under the settled West Virginia law expressed in Collins, which allows a municipal employer to unilaterally change terms and conditions of employment with reasonable notice.

The Circuit Court did not err in granting the City's motion for summary judgment and in denying the Petitioners' motion for summary judgment on the evidence before it. The Petitioners have continually failed to demonstrate the existence of any evidence with regard to their untenable contract allegations, first before the Circuit Court of Kanawha County, and now before this Court. For this reason, the relief sought in the Petitioners' brief should be denied, and the decisions of the Circuit Court of Kanawha County on July 9, 2013 and October 7, 2013, should be affirmed by this Court.

#### **ARGUMENT**

**1. THE CIRCUIT COURT DID NOT ERR WITH REGARD TO THE PETITIONERS' FAILURE TO PRESENT ANY EVIDENCE OF AN UNDERLYING CONTRACTUAL OBLIGATION ON THE PART OF THE CITY.**

Despite continually insisting that some employment contract between the City and its firefighters requires a particular overtime rate-of-pay calculation, the Petitioners have not

presented any evidence in support of that underlying proposition. Telling in this regard is the irrefutable fact that the Petitioners have not offered any individual or collective employment contracts as evidence that the City is contractually bound to calculate overtime compensation in a particular manner into perpetuity, nor do any such contracts exist. A closer inspection of the Petitioners' arguments reveals that the terms and conditions of these alleged employment contracts are indefinite and indeterminable at best. By way of example, the Petitioners have sometimes asserted that their alleged contracts are individual in nature, and that "[w]hen each of the [Petitioners] were initially employed by the City, they all accepted an employment contract with the City, which established a designated number of regular hours in the work week with a stated annual salary, and established the number of regular work hours for the entire year." (App. 267, Pet'rs' Memo. in Supp. of Mot. for Summ. J., 6.) However, at other times, the Petitioners have alleged that their employment contracts were negotiated by Local 317 of the International Association of Firefighters ("Local 317"), despite the absence of any formal authority or a collective bargaining agreement. (App. 270, 279, Pet'rs' Memo. in Supp. of Mot. for Summ. J., 9, 18; Pet'rs' Br. 18.) The Petitioners have similarly alleged that their employment contracts include terms related to pensions, holiday pay, vacation pay and sick leave, despite the fact that these "additional terms" are all discretionary policies codified in Charleston City Code § 54-101. (Pet'rs' Br. n. 8, 17.)

While it is generally true that governmental agencies can meet with representatives of labor organizations to discuss terms and conditions of employment, the Petitioners have not offered any evidence to suggest that Local 317 was legally capable of negotiating an employment contract between the firefighters and the City. In fact, just the opposite is true, and the Petitioners concede that "there is no collective bargaining agreement in place." (Pet'rs' Br.

18; App. 274, Pet'rs' Memo. in Supp. of Mot. for Summ. J., 13); see also 51 Op. Att'y Gen. 683 (1964) (opining that, while public employees have the right to join union organizations, “[t]he final determination of wages, hours, working conditions and the like, rests with the particular governmental unit and cannot be delegated away.”). In this matter, there has never been any collective bargaining agreement between the City and any collective bargaining unit. (App. 58, Aff. J. Thomas Lane, ¶ 8.)

Lacking such an agreement, the Petitioners' allegation instead is that each of the firefighters has an individual employment contract with the City. (Pet'rs' Br. 19.) However, even the Petitioners' own affidavits do not contain any evidence of these alleged employment contracts. (App. 302-326, Pet'rs' Memo. in Supp. of Mot. for Summ. J., Exs. 2-4.) The terms “contract” or “agreement” are not apparent in the affidavits of Carl Beaver, Douglas Martin Legg or Eugene Earl Perry, Jr., nor do the affiants discuss any of the terms and conditions related to these alleged employment contracts. Id. Instead, the Petitioners' affidavits only serve to demonstrate the historical influence of Local 317 as a lobbying organization on behalf of the firefighters. Id. The City has no reason to question this perspective, which is consistent with the affidavits of City Councilman J. Thomas Lane.<sup>4</sup> (App. 58, Aff. J. Thomas Lane, ¶ 7.) Councilman Lane agrees that “[t]he firefighters have been affiliated with an association that has generally advocated on their behalf through political and other similar means.” In fact, Councilman Lane's affidavit generally agrees with the historical perspective in the Petitioners' affidavits, which trace the City's history of discretionary changes to the terms and conditions of employment for its firefighters throughout several mayorial administrations over the past several

---

<sup>4</sup> Councilman Lane has provided two affidavits related to this matter. The first, dated July 19, 2012, was filed when these matters were pending in the United States District Court for the Southern District of West Virginia. (App. 469-476, Aff. J. Thomas Lane, July 19, 2012.) The second, dated January 28, 2013, was filed in this action in support of the City's Motion to Dismiss. (App. 59-60, Aff. J. Thomas Lane, January 28, 2013.)

decades. (App. 59-60, Aff. J. Thomas Lane, ¶¶ 13-18.) It is noteworthy that many of the historical concessions and changes to the terms of the City's employment relationship with its firefighters took place in election years for both the City's mayor and City Council. (Id.)

Although the Petitioners' affidavits are lacking in any mention or description of an employment contract between the City and its firefighters, Councilman Lane's affidavit is not lacking in that regard, and states as follows:

11. Any individual firefighter's contract would have had to have been authorized by a resolution or ordinance adopted by a majority vote of the City Council to be valid, and would have been limited in duration to the then-current budget year, and no resolution or ordinance of this nature has been considered during my tenure.

12. At no time has the existence of any contract containing an obligation on the part of the City to calculate hourly wages for the City's firefighters according to any particular methodology been brought to my attention or formally discussed, considered or approved by the City Council.

(App. 59, Aff. J. Thomas Lane, ¶¶ 11-12.) Though the Petitioners attempt to manufacture some inconsistency between Councilman Lane's two affidavits, his undisputed testimony clearly demonstrates that no contract "containing an obligation on the part of the City to calculate hourly wages for the City's firefighters according to any particular methodology" has been discussed, considered or approved by the City." (App. 59, Aff. J. Thomas Lane, ¶ 12.)

Absent any other indicia of an employment contract, the Petitioners seem to suggest that the City's annual wage progression schedule express "a mutually agreed upon rate of hourly pay which was in written form..." (Pet'rs' Br. 20.). In addition to the affidavits of Carl Beaver, Douglas Martin Legg and Eugene Earl Perry, Jr., the Petitioners included wage progression schedules, committee reports and station log books, presumably in an attempt to illustrate this point. (App. 327-393, Pet'rs' Memo. in Supp. of Mot. for Summ. J., Exs. 5-33.) However, these exhibits are only indicative of the year-to-year exercise of the City's discretion with regard to the

terms and conditions of employment for its firefighters and are not indicative of any contractual obligation on the part of the City. In addition, the Petitioners' attempts to rely on these exhibits as their only evidence of an individual employment contract is factually dissimilar from the situation in Lipscomb v. Tucker County Commission, 206 W.Va. 627, 527 S.E.2d 171 (1999). In Lipscomb, this Court addressed the lower court's denial of a motion in limine and, in doing so, cited Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995) for the premise that "[a]n employee handbook may form the basis of a unilateral contract **if there is a definite promise therein by the employer** not to discharge covered employees except for specified reasons." Lipscomb, 206 W.Va. at 630 (emphasis added). Accordingly, Lipscomb does not stand for the proposition for which the Petitioners cite it and actually cuts entirely against their arguments. No "definite promises" with regard to the calculation of the firefighters' overtime rate-of-pay have been expressed by the City in an employee handbook or elsewhere.

Moreover, the Petitioners' suggestion that the City has assumed some kind of perpetual obligation is factually impossible for other, more practical reasons. To accept the Petitioners' proposition would be to dictate that each new mayor and each new city council be bound by terms and conditions of employment established in January 1991. In other words, the terms and conditions allegedly agreed to in 1991 would presumably apply to each new firefighter hired by the City, whether hired today, tomorrow, or on any date in the future – a plainly absurd and illegal notion. Adopting Petitioners' assertion that the City must forever pay its firefighters in a particular manner not otherwise required by federal or state law would force the City to violate the prohibition against expending money or incurring future obligations in excess of those funds available in the current budget. W.Va. Code § 11-8-26; see also Edwards v. Hylbert, 146 W.Va. 1, 118 S.E.2d 347 (1960) (holding that no contract is valid which will bind the levies of future

years, without authority from the people); 51 Op. Att’y Gen. 47 (1964) (opining that all local fiscal bodies, including municipalities, are forbidden from obligating funds available in future budgets). Similarly, Article X, section 8, prohibits municipalities from incurring certain future debts in order to protect the fiscal integrity of West Virginia's governmental entities. State ex rel. County Comm'n v. Cooke, 197 W. Va. 391, 475 S.E.2d 483 (1996).

The City’s decision to modify its employment practices with regard to its firefighters is also a matter of municipal law. The City Council, as the governing body of the City, is vested with the plenary power and authority to make and pass all needful ordinances, orders, bylaws, acts, resolutions, rules and regulations not contrary to the constitution and laws of the State of West Virginia. See W.Va. Code § 8-11-1. Article V, section 1 of the Constitution of West Virginia provides that “[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.” This constitutional provision prohibits any one department of government from exercising the powers of the others and limits the ability of any court to substitute its own judgment into a matter of municipal discretion.

For these reasons, there is simply no evidence to support the Petitioners’ underlying proposition that the City is contractually bound to perpetually calculate overtime compensation in a particular manner, and the Circuit Court did not err in granting the City’s motion for summary judgment.

**2. THE CIRCUIT COURT DID NOT ERR WITH REGARD TO THE APPLICATION OF THE FLSA TO THIS MATTER.**

The Petitioners’ arguments regarding the application of the FLSA to this matter have evolved since the filing of their complaint on February 24, 2012. That complaint, to borrow from

the Petitioners' own pleadings, concerned "purely a question of West Virginia contract and employment law..." (App. 566, Brief in Supp. of Mot. To Dismiss, 9, May 3, 2012.) Illustrative of this point is the difference between the two excerpts that follow. The first is taken from the Petitioners' complaint, and the second is taken from the Petitioners' Proposed Findings of Fact and Conclusions of Law which were submitted to the Circuit Court on August 26, 2013:

"The unilateral change in the employment contract by the City of Charleston is a breach of the employment contract between the parties."

(App. 5, Pet'rs' Compl., ¶ 6.) Contrast that allegation with the following:

"The City's unilateral change of the terms of the employment agreement, lowering the regular hourly rate is a violation of the Fair Labor Standards Act."

(App. 687, Pet'rs' Proposed Findings of Fact and Conclusions of Law, Aug. 26, 2013, 28.)

Notwithstanding the factual inaccuracy of the Petitioners' allegation (no regular hourly rates or salaries were affected by the City's correction), the Petitioners only recast their allegations as including violations of the FLSA and/or U.S. Department of Labor Regulations after the City's declaratory judgment action had been dismissed from federal court on the basis that no controversy existed under federal law. This readily-apparent change of course by the Petitioners left the City with no choice but to assert that the Petitioners were estopped from arguing that a controversy existed regarding the City's application of the FLSA to its firefighters in state court only months after arguing in federal court that no such controversy existed. Yet, even if the Circuit Court would have accepted the Petitioners' arguments regarding some controversy arising under the FLSA, the FLSA sections and Department of Labor regulations cited by the Petitioners do not entitle them to the relief sought in their complaint. For these reasons, the Circuit Court did not err regarding the application of the FLSA to this matter.

**a. The Petitioners are estopped from arguing that any controversy exists with regard to the City's application of the FLSA to its firefighters.**

As explained in the City's recitation of facts above, the City's declaratory judgment action was dismissed from federal court when Judge Joseph R. Goodwin relied on the Petitioners' representations, saying as follows:

[I]f the firefighters believed that the new methodology adopted by the City that took effect in 2012 violated the FLSA, they could have brought a claim in federal court. They did not do so; rather, they brought a claim in State court, alleging only violations of State law and Commission rules, and nowhere have the firefighters even suggested that the new methodology violates the FLSA. **Thus, there is no controversy as to whether the new methodology satisfies the requirements of the FLSA.**

(App. 499, Memo. Opinion and Order of Judge Joseph R. Goodwin, Sept. 7, 2012, 8) (emphasis added).

Notwithstanding their previous position and Judge Goodwin's order, the firefighters claimed in the latter stages of the proceedings before the Circuit Court and complain again here that "[t]he City's unilateral changing the method of calculation of the hourly rate of pay violates the FLSA and U.S. Department of Labor regulations." (App. 270, Pet'rs' Memo. in Supp. of Mot. for Summ. J., 9.; Pet'rs' Br., 29.) The firefighters are estopped from making such an argument by the doctrine of res judicata.

This Court has recently recognized that "[t]he preclusive effect of a prior federal court judgment is controlled by federal res judicata rules." State ex rel. Small v. Clawges, 745 S.E.2d 192 (2013)(per curiam)(applying res judicata to bar a state court complaint arising under the same operative facts as a matter dismissed from federal court); citing Jefferson Marine Towing, Inc. v. Kostmayer Constr., LLC., 32 So. 3d 255, 259 (La. Ct. App. 2010); Anderson v. Phoenix Inv. Counsel of Boston, Inc., 387 Mass. 444, 440 N.E.2d 1164, 1167 (Mass. 1982) ("When a State court is faced with the issue of determining the preclusive effect of a [f]ederal court's

judgment, it is the [f]ederal law of res judicata which must be examined.”). The Fourth Circuit has held the following regarding res judicata under federal law:

Res judicata or claim preclusion bars a party from suing on a claim that has already been litigated to a final judgment by that party or such party's privies and precludes the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action. For res judicata to prevent a party from raising a claim, three elements must be present: (1) a judgment on the merits in a prior suit resolving (2) claims by the same parties or their privies, and (3) a subsequent suit based on the same cause of action. In finding that the second suit involves the same cause of action, the court need not find that the plaintiff in the second suit is proceeding on the same legal theory he or his privies advanced in the first suit. As long as the second suit arises out of the same transaction or series of transactions as the claim resolved by the prior judgment, the first suit will have preclusive effect.

Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 210 (4th Cir. 2009) (internal quotations and citations omitted).

In this matter, the foregoing elements have all been satisfied by the pleadings and by Judge Goodwin's order. The issues raised by the City in its declaratory judgment action are the same as those raised in the Petitioners' subsequent suit and arise out of the same transaction, namely the City's correction made pursuant to the FLSA. Judge Goodwin's order was a final adjudication on the merits of that earlier matter, and the parties are the same. The firefighters had a full and fair opportunity to litigate any perceived violation(s) of the FLSA in the United States District Court for the Southern District of West Virginia and, instead, expressly represented that no such violations had occurred. The firefighters are estopped from making any arguments regarding such violations now before this Court by the doctrine of res judicata and the relief sought in their petition should be denied for that reason.

**b. The FLSA unquestionably applies to the City's calculation of its overtime rate-of-pay, but does not afford the firefighters any relief.**

The FLSA establishes a national minimum wage, governs the payment of overtime wages in certain occupations and generally ensures the minimum standard of living necessary for the health, efficiency and general well-being of workers. 29 U.S.C. § 201, *et seq.* It applies to the City in accordance with Adkins v. City of Huntington, 191 W.Va. 317, 445 S.E.2d 500 (1994), and generally sets forth certain standards for the calculation of overtime compensation. 29 U.S.C. § 206 and 207.<sup>5</sup> However, the FLSA does not entitle the firefighters to any relief under these facts.

The FLSA provides an exception to the standard 40 hour, seven day work period in 29 U.S.C. § 207(k) for purposes of calculating overtime for employees engaged in “fire protection services.” 29 C.F.R. § 553.210(a). Pursuant to 29 U.S.C. § 207(k), a public agency may adopt a 212 hour/28 day work period for purposes of calculating overtime entitlements. This is precisely what the City did through its corrective action taken in late 2011 – it expressly adopted the 212 hour/28 day work period as permitted by 29 U.S.C. § 207(k). (App. 60, Aff. J. Thomas Lane, ¶ 17-20.)

Pursuant to 29 C.F.R. § 553.230, if a public agency adopts the 28 day work period in accordance with the exception stated in 29 U.S.C. § 207(k), an employee engaged in “fire protection activities” may work up to 212 hours per work period before he/she accrues overtime and becomes eligible for overtime compensation paid at one and one-half the regular rate of pay.

---

<sup>5</sup> The City notes that House Bill 4283, which was signed into law by Governor Earl Ray Tomblin on April 1, 2014, will serve to remove the City and other, similarly situated employers from those exempted from the application of state law. Previously, the definition of an “employer” in W.Va. Code § 21-5C-1(e) expressly provided an exemption under state law so that the FLSA could dictate minimum wage and maximum hours for certain employees. The enrollment of House Bill 4283 removes that exemption and, unless modified, will subject the City to West Virginia’s minimum wage and overtime requirements beginning on June 6, 2014.

Thereafter, and in accordance with 29 C.F.R. § 553.230, for any and all hours worked over the 212 hour threshold, overtime compensation must be calculated and paid. (Pet'rs' Br. 23-24.) Again, this is the precise formula that the City adopted and has applied to the calculation of its overtime rate-of-pay since 2011, in full compliance with the FLSA.

The City does not dispute that an employer and its employees can agree to a higher regularly hourly rate or to a lesser work week than those required by the FLSA. 29 U.S.C. § 218. The City does dispute, however, that any such extraneous agreement has ever been reached between the City and its firefighters for the reasons cited hereinabove, namely the lack of any evidence whatsoever in support of such a proposition. Yet, stemming from this untenable proposition, the Petitioners make the equally indefensible allegation that “the City’s unilateral changing of method of calculation of the hourly rate of pay violates the FLSA and U.S. Department of Labor regulations.” The Petitioners argue, on one hand, that the FLSA “controls the overtime provisions” for firefighters, yet also argue that individual employment contracts control the overtime provisions. (Pet'rs' Br. 7.) The Petitioners attempt to reconcile these arguments by stating, correctly, that an “employer and employee are free to enter into a wage agreement which may exceed the requirements” of the FLSA. (Pet'rs' Br. 25.) Even assuming, *arguendo*, that any collective or individual employment agreement does exist, however, the City’s alleged noncompliance with the terms of that agreement (or agreements) would violate the employment agreement itself, not the FLSA. For this reason, and despite the Petitioners’ blanket assertion that certain FLSA violations have occurred, the Petitioners’ arguments in this regard must fail. The Circuit Court did not err through its silence with regard to the applicability of the FLSA to this matter, and its orders on July 9, 2013 and October 7, 2013, should be affirmed by this Court.

**3. THE CIRCUIT COURT DID NOT ERR WITH REGARD TO THE CITY'S RELIANCE ON ITS INTERPRETATION OF AARON V. CITY OF WICHITA TO SUPPORT ITS PREVIOUS OVERTIME RATE-OF-PAY CALCULATION.**

The Petitioners continue to allege that the City has somehow misstated its reliance on two related decisions from the State of Kansas, Aaron v. City of Wichita, 797 F.Supp. 898 (D.Kan. 1992), and Aaron v. City of Wichita, 54 F.3d 652 (10th Cir. 1995). (Pet'rs' Br. 7.) This argument is a *non sequitur* and had no bearing on the Circuit Court's decisions, a fact that even the Petitioners seem to implicitly acknowledge.<sup>6</sup> The Petitioners' contractual and other claims against the City do not depend, to any degree, on whether the City historically relied (or did not rely) on the earlier of the two Aaron decisions. Although the Petitioners allege that the Circuit Court erroneously "applied" the ruling of the earlier Aaron decision, the order granting the City's motion for summary judgment bears no evidence of such an "application." (Pet'rs' Br. 11.) Instead, the Circuit Court's order merely state as follows:

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, Order, Oct. 7, 2013, 6.) In other words, the Circuit Court did not "apply" the Aaron decision to the detriment of the Petitioners, but acknowledged instead that the City understood its previous calculation as being supported by the earlier of the two Aaron decisions. (App. 787, Order, 6.)

This is an important distinction for at least two reasons. First, the City does not contend that its historical overtime rate-of-pay calculation was adopted because of the earlier Aaron decision, or that the facts of the earlier Aaron decision are analogous to this matter – they are not. Second, although the City's historical overtime rate-of-pay calculation pre-dated the Aaron

---

<sup>6</sup> The Petitioners seem to concede that they are only addressing the Circuit Court's mention of the Aaron decision "since the Circuit Court discussed it" in the order and "apparently erroneously relied on the City's interpretation for its ruling." (Pet'rs Br. 31.)

decision by several years, the fact remains that the City erroneously believed, until 2011, that Aaron prevented any changes in its method of calculation. (App. 47, Memo. in Supp. of City's Mot. to Dismiss, Jan. 28, 2013, 3 n. 2; App. 796, Order, ¶ 66.)

Accordingly, any question as to the City's reliance or interpretation regarding the earlier (or the later) Aaron decision is completely unrelated to the actual matters that were decided by the Circuit Court's order, namely the legal question as to the City's ability to unilaterally modify its method of calculating overtime compensation for its firefighters. The Circuit Court largely disregarded the Aaron decisions as irrelevant to this matter, and did not err in doing so.

**4. THE CIRCUIT COURT DID NOT ERR WITH REGARD TO THE APPLICABILITY OF COLLINS V. CITY OF BRIDGEPORT TO THE CITY'S ABILITY TO UNILATERALLY MODIFY ITS OVERTIME RATE-OF-PAY CALCULATION.**

The predominant question posed by the firefighters in their appeal has already been answered in the affirmative by this Court. Generally speaking, an employer is permitted under West Virginia law to unilaterally change the terms and conditions of employment with reasonable notice. See Syl. Pt. 4, Hogue v. Cecil I. Walker Machinery Co., 189 W. Va. 348, 431 S.E.2d 687 (1993). Although Hogue was a private-sector employer, this basic tenant of West Virginia employment law has specifically been applied to the calculation of overtime compensation for public-sector employees by Collins v. City of Bridgeport.

In Collins, this Court addressed a similar claim made under similar factual circumstances to those presented by this matter. The City of Bridgeport had followed a longstanding employment practice of including holiday compensation in the calculation of overtime compensation for its police officers. Collins, 206 W.Va. at 475, 525 S.E.2d at 666. After nearly 20 years, the City of Bridgeport altered its policy such that police officers were not paid at an overtime rate until the actual hours worked exceeded the hours of compensation not worked

during the applicable workweek. Id. The police officers objected to the new calculation and specifically argued that the city's longstanding method of calculating overtime compensation and the police officers' reliance on this practice had created a contract between the city and its police officers that could not be unilaterally modified by the city. Collins, 206 W.Va. at 475, 525 S.E.2d at 666.

This Court soundly rejected this argument in holding that the City of Bridgeport was permitted to unilaterally modify its long-held employment practice of calculating overtime so long as it notified its employees of the change:

We have also said, however, that, an employer may modify or revoke prior personnel manuals or policies that have created express or implied contract rights as to job security and establish in a subsequent personnel manual or policy that the employment is one at-will.... In the context of the present case, this means that the City of Bridgeport is permitted to revoke or alter its long-held policy concerning overtime pay provided it notifies its employees of the change.

Collins, 206 W.Va. at 476, 525 S.E. 2d at 667. The Collins decision is controlling precedent with regard to the City of Charleston's correction to its method of calculation of overtime compensation and, simply put, could not be more applicable to this matter. It is for good reason, then, that the Petitioners seek to portray Collins as a "misapplication and misunderstanding of settled federal and state employment law" and, further, ask that this Court overturn its decision in that case. (Pet'rs' Br. 35). Yet, the Petitioners make little effort to explain what "settled federal and state employment law" has been misapplied or misunderstood, either by this Court or by the Circuit Court of Kanawha County, except to allege that the holding in Collins "misapplied settled West Virginia case law by holding that a firefighter who is a civil service employee is an employee at will." (Pet'rs' Br. 35.) Of course, that is not the holding of Collins, and the City respectfully submits that Collins and its predecessors represent the settled law of this state. For

this reason, Collins applies with full force and effect to this matter, and the Circuit Court did not err regarding the applicability of Collins to this matter.

**a. The Petitioners' contractual claim fails as a matter of law because the City properly notified the Petitioners prior to correcting the method of calculation.**

The Petitioners have alleged that each of them “accepted an employment contract with the City which established a designated number of regular hours in the work week with a stated annual salary, and established the number of regular work hours for the entire year.” (App. 267, Pet’rs’ Memo. in Supp. of Mot. For Summ. J., 6; Pet’rs’ Br. 18.) Here, too, the Petitioners have argued that the firefighters and the City “have individual contracts governed by the FLSA, and cannot be unilaterally modified. (Pet’rs’ Br. 31-32.) This claim is entirely consistent with the claim made by the police officers in Collins that the City of Bridgeport’s past practice of calculating overtime pay – along with the police officers’ reliance on the past practice – had created a contract between the city and its police officers that could not be unilaterally modified. Collins, 206 W.Va. at 476, 525 S.E. 2d at 667. And, much like the contractual claims of the police officers in Collins, the Petitioners’ untenable contractual claims here should fail as a matter of law. As this Court stated in Collins, “an employer may modify or revoke prior personnel manuals or policies that have created express or implied contract rights...” Id.; citing Syl. Pt. 4, Hogue, 189 W. Va. at 348, 431 S.E.2d at 687. In the context of Collins, that meant that the City of Bridgeport was permitted to revoke or alter its long-held policy concerning overtime pay provided it notified its employees of the change. Collins, 206 W.Va. at 476, 525 S.E. 2d at 667. Here, too, in accordance with Collins, the City is permitted to unilaterally modify its employment policies and practices, including its method of calculating overtime compensation, so long as it notifies the Petitioners of the change and the change is otherwise enacted in accordance with state and federal law.

In this matter, the City lawfully passed Resolution No. 037-11 on November 7, 2011 following the requisite notice to the firefighters and the public at large. (App. 59-60, Aff. J. Thomas Lane, ¶¶ 16, 19.) The City's Finance Committee published its meeting agenda on Wednesday, November 2, 2011, in accordance with applicable law. (Id at ¶ 16.) The resolution, titled "Authorizing the Finance Director to amend the FY 2011-2012 General Fund budget," was reviewed, discussed, debated and eventually passed by affirmative vote of a majority of the council members in attendance at the public meeting held on November 7, 2011. (Id at ¶ 19.) In short, the City clearly provided notice to the firefighters prior to correcting the method of calculation in accordance with settled law.

**b. The Petitioners' alleged property interest claim also fails as a matter of law because no statute or local laws granted the firefighters any property interest in the City's historical method of calculation.**

The police officers in Collins also asserted that the City of Bridgeport's previous method of calculation of overtime compensation had given rise to property rights that could not be unilaterally altered. Collins, 206 W.Va. at 477, 525 S.E.2d at 668. In response, this Court specifically held that it was unaware of any statutes or local laws which granted a property interest in any certain method of calculation of overtime compensation. Collins, 206 W.Va. at 477, 525 S.E.2d at 668 ("[A] property interest does not normally arise from policies promulgated solely at the discretion of government officials."); see also Hartman v. Board of Educ., 194 W.Va. 539, 460 S.E.2d 785 (1995). The Court cited Hutchison v. City of Huntington, 198 W. Va. 139, 154, 479 S.E.2d 649, 664, for the premise that "although the Constitution protects property interests, it does not create them. To decide whether plaintiff had a property interest at stake, we look to see whether some independent source, such as federal, state, or local law, has created an enforceable expectation." Id. Moreover, property interests do not arise from policies

promulgated solely at the discretion of government officials. See Syl. Pt. 4, State ex rel. Deputy Sheriff's Ass'n v. County Com'n, 180 W. Va. 420, 376 S.E.2d 626 (1988) (“Because civil service coverage is an option subject to the discretion of the local county commission and, ultimately, the citizens of the county, the deputy sheriffs have only an expectation of entitlement, which is not sufficient to give rise to a property interest”).

Here, too, the Petitioners have alleged that they have a liberty and property interest in their employment contracts generally, and in their overtime rate-of-pay specifically. (App. 281, Pet’rs’ Memo. in Supp. of Mot. for Summ. J., 20; Pet’rs’. Br. 35.) However, the City’s discretionary policies regarding the method of calculation of overtime compensation did not give rise to any such property interests. As in Collins, these claims fail as a matter of law, and the City was permitted to modify its previous method of calculation of overtime compensation.

There is no question that the City’s method of calculation of overtime compensation is, at least in part, a discretionary policy.<sup>7</sup> The rates of pay and means of compensation set forth in the municipal budgetary process are promulgated by the City of Charleston in its own discretion and in accordance with W.Va. Code § 8-5-12. (App. 58, Aff. J. Thomas Lane, ¶¶ 9, 10.) Simply put, the City has always had the discretion and must, as a matter of necessity, retain the discretion to modify its policies for calculating the compensation for its employees. So long as such calculations are made in accordance with applicable wage and hour laws and are implemented following reasonable and appropriate notice to the employees involved, the City may freely modify its discretionary employment practices. Accordingly, the legal precedent in Collins dictates that the City can unilaterally modify its method of calculating overtime compensation and the relief sought in the petition should be denied.

---

<sup>7</sup> The method of calculation of overtime compensation is also subject to federal and state wage and hour laws, including the FLSA. See Adkins v. City of Huntington, 191 W.Va. 317, 27 F.3d 110 (1994).

**5. THE CIRCUIT COURT DID NOT ERR IN DISMISSING THE COMMISSIONERS OF THE FIREMEN'S CIVIL SERVICE COMMISSION ON JULY 9, 2013.**

The Petitioners sought, through Count Two of their Complaint and Petition for Writ of Mandamus, an order from the Circuit Court ordering the Commissioners to (i) assume jurisdiction; (ii) hold a full evidentiary hearing; and (iii) enter an order restoring the prior method of calculation of overtime compensation. (App. 6, Pet'rs' Compl., ¶ 10.). However, the standard for issuance of a writ of mandamus is threefold and requires: (i) a clear legal right in the petitioner to the relief sought; (ii) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (iii) the absence of another adequate remedy. Syl. Pt. 1, State ex rel. Billy Ray C. v. Skaff, 190 W. Va. 504, 438 S.E.2d 847 (1993). The Petitioners' plea for mandamus relief falls well short of satisfying these three requisite criteria, largely due to the fact that the Firemen's Civil Service Commission's jurisdiction is limited to matters involving the removal, discharge, suspension, or reduction in rank or pay of particular firefighters. (App. 62, City's. to Mot. Dismiss, 2, ¶ 3.)

The Petitioners' argument in this regard is twofold, as follows: (i) the Commissioners should have required the City to demonstrate a financial hardship; and (ii) the City's remedy in response to such a hardship is to lay off firefighters, not reduce their pay. (Pet'rs' Br. 38.) Here again, the Petitioners have alleged that a reduction in pay has occurred, notwithstanding that fact that each and every firefighters' salary has remained unchanged. That fact alone serves to rob the Commissioners of jurisdiction in this matter. It is axiomatic that civil service commissions are created by statute and therefore have only the rights, duties and responsibilities conferred upon them by statute; they have no inherent jurisdiction. Pugh v. Policeman Civil Service Commission, 214 W.Va. 498, 590 S.E.2d 691 (2003). In Darlington v. Mangum, 192 W.Va. 112, 450 S.E.2d 809 (1994), this Court determined that a civil service commission has no jurisdiction

to address matters relating to reductions in pay when such matters are unrelated to disciplinary matters. And, the reduction in the overtime rate-of-pay pay at issue in this matter resulted from the lawful action of the City's council, completely unrelated to any disciplinary matters. (App. 60, Aff. J. Thomas Lane, ¶¶ 17-20.) No firefighters were removed, discharged, suspended or reduced in rank or pay for disciplinary reasons, and none of the firefighters had any disciplinary actions threatened against them by the City. For these reasons, and in reliance upon Darlington v. Mangum and other West Virginia jurisprudence, the Commissioners properly concluded that they did have jurisdiction to hear the non-disciplinary grievances of the firefighters. (App. 63, ¶ 8, City's Mot. to Join in Commissioners' Mot. to Dismiss.)

Absent jurisdiction by the Firemen's Civil Service Commission, there is neither a clear legal right to the mandamus relief sought by the Petitioners nor a legal duty on the part of Commissioners to do the thing which the Petitioners seek to compel. The criteria for mandamus relief not having been satisfied, the Circuit Court properly granted the Commissioners' motion to dismiss on July 9, 2013, and that decision should be affirmed by this Court.

#### CONCLUSION

WHEREFORE, on the basis of the foregoing authorities and arguments made thereupon, the City of Charleston respectfully requests: (i) that the relief sought by the firefighters in the Brief of Petitioner be denied; (ii) that the decisions of the Circuit Court of Kanawha County on July 9, 2013 and October 7, 2013 be affirmed; and (iii) that this Court award such other and further relief as it may deem proper.

CITY OF CHARLESTON,

By Counsel,

A handwritten signature in black ink, appearing to read "T. V. Flaherty", written over a horizontal line. The signature is fluid and cursive.

Thomas V. Flaherty (W.Va. State Bar No. 1213)

Caleb P. Knight (W.Va. State Bar No. 11334)

Flaherty Sensabaugh Bonasso PLLC

200 Capitol Street (P. O. Box 3843)

Charleston, West Virginia 25338-3843

Telephone: (304) 345-0200

[TFlaherty@fsblaw.com](mailto:TFlaherty@fsblaw.com)

[CKnight@fsblaw.com](mailto:CKnight@fsblaw.com)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-1261

MYRON BOGGESS, et al.  
Plaintiffs Below, Petitioners

v.

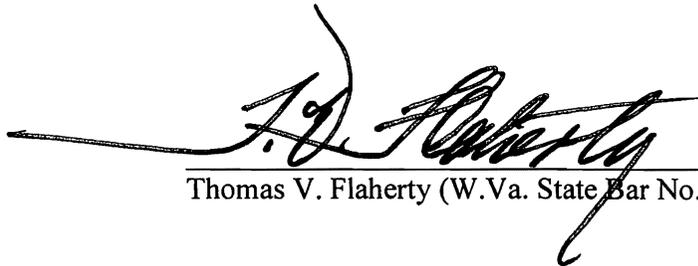
CITY OF CHARLESTON, A WEST VIRGINIA MUNICIPAL  
CORPORATION; MATTHEW P. JACKSON, ERIC E KINDER,  
AND VICTOR E. SIGMON, IN THEIR CAPACITY AS  
COMMISSIONERS OF THE FIREMEN'S CIVIL SERVICE  
COMMISSION OF THE CITY OF CHARLESTON  
Defendants Below, Respondents

CERTIFICATE OF SERVICE

I, Thomas V. Flaherty, counsel for the City of Charleston, do hereby certify that I have served the foregoing *City Of Charleston's Response to the Brief of Petitioners* upon counsel of record this 14<sup>th</sup> day of April, 2014, addressed as follows:

Thomas P. Maroney, Esq. (W.Va. State Bar No. 2326)  
Patrick K. Maroney, Esq. (W.Va. State Bar No. 8956)  
Maroney, Williams, Weaver & Pancake, PLLC  
608 Virginia Street, East  
Charleston, West Virginia 25301

Arden J. Curry, II  
Pauley Curry, PLLC  
P.O. Box 2786  
Charleston, WV 25330-2786



Thomas V. Flaherty (W.Va. State Bar No. 1213)