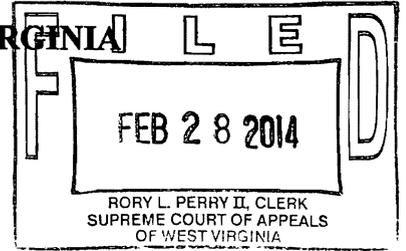


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



**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**

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**BRIEF OF PETITIONER**

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## **I. ASSIGNMENT OF ERROR**

Petitioners/Firefighters (hereinafter “Firefighters”) for the City of Charleston filed a two count Complaint against the City of Charleston (hereinafter “City”), with Count One alleging the City had unilaterally breached the employment contract the City had with the Firefighters by changing the method for calculation of their hourly rate of pay in violation of employment laws, with Count II seeking a Writ of Mandamus against Matthew P. Jackson, Eric E. Kinder, and Victor E. Sigmon, in their capacity as Commissioners of the Firemen’s Civil Service Commission (hereinafter “Commission”) for the City of Charleston. The Firefighters filed grievances under the City’s Firemen’s Civil Service Act with the Commission who found they had no jurisdiction. The Circuit Court of Kanawha County affirmed a finding of the Commission that it had no jurisdiction and dismissed Petitioner’s appeal as to the Commission, and granted the City’s Motion for Summary Judgment as to the City. Firefighters appeal both rulings.

### **1. ASSIGNMENT OF ERROR AS TO CITY OF CHARLESTON**

The Circuit Court erred in granting the City’s Motion for Summary Judgment and denying Petitioners’ Motion for Summary Judgment, as follows:

1. Erred by failing to find that §§ 206 and 207 of the Fair Labor Standards Act (hereinafter “FLSA”), 29 U.S.C. 201, *et seq.*, and the U.S. Department of Labor Regulations apply to Firefighters for the City when the City unilaterally altered the employment contract of the City’s Firefighters by reducing the hourly rate of pay by \$1.68 to \$2.70 per hour. Federal law pre-empts state law and municipal ordinances on this issue.

2. Erred in failing to find that the Firefighters had employment contracts with the City.

3. Erred in finding that the calculations used by the City to arrive at the divisors used to calculate the hourly rate of pay historically excluded vacation hours, and was a practice which was supported by the City's interpretation of federal case law in Aaron v. City of Wichita, 797 F.Supp. 898 (D.Kan. 1992). The calculations used from January 1990 to November 2011 were not created by the City's interpretation of Aaron v. City of Wichita.

4. Erred in finding that the City learned in 2011 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 Aaron v. City of Wichita, 54 F.3d 652 (10th Cir. 1995).

5. Erred in finding that this corrected method of calculation, which included vacation hours in the divisor consistent with federal law, resulted in a reduction in the hourly rate used to calculate overtime compensation and is the unilateral modification of which the Firefighters complain in this civil action.

6. Erred in finding that these salaries have historically been modified as a matter of fiscal responsibility and public policy, based on the City's financial condition and other factors.

7. Erred in finding that the City's application of the method of calculation in the Aaron case unnecessarily cost the City \$1.4 million in hourly and overtime wages that were not required under applicable FLSA standards over the past ten fiscal years.

8. Erred in finding that this corrected method of calculation did not serve to reduce the salaries paid to any Firefighters based on the wage progression schedules in the City's annual budget.

The Circuit Court further erred in its Conclusions of Law as follows:

1. Failure to apply the FLSA for calculation of hourly rate of pay which preempts state law as to all of the following:

a. By finding as a matter of law that the City can unilaterally change the hourly rate of pay for Firefighters.

b. By finding as a matter of law that a municipal employer can unilaterally change the method of calculating overtime compensation for its Firefighters under Collins v. City of Bridgeport, 206 W. Va. 467, 525 S.E.2d 658 (1999).

c. By finding as a matter of law that under Collins v. City of Bridgeport, 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 Firefighters of the change.

d. By finding as a matter of law that the rates of pay and means of compensation set forth in the municipal budgetary process are promulgated by the City in its own discretion and in accordance with West Virginia Code § 8-5-12.

e. By finding as a matter of law that 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.

f. By finding as a matter of law that the legal precedent in Collins dictates that the City's discretionary policies regarding the method of calculation of overtime compensation did not give rise to any contractual rights or property interests and the City can unilaterally modify its method of calculating overtime compensation.

g. By finding as a matter of law 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.

2. By finding as a matter of law that the City's discretionary policies regarding the method of calculation of overtime compensation did not give rise to any property interests.

3. By finding that as a matter of law none of the Firefighters' alleged individual employment contracts have been offered as evidence, and the terms and conditions of these alleged contracts are ambiguous at best.

4. By finding that as a matter of law that the terms "contract" or "agreement" do not appear anywhere 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.

5. By finding that the City lawfully passed Resolution No. 037-11 on November 7, 2011, following the requisite notice to the Firefighters and the public at large.

6. By finding as a matter of law that Firefighters do not have a liberty or property interest in their employment contracts.

7. Erred in finding that the decision of Aaron v. City of Wichita, 54 F.3d 652 (10th Cir. 1995), applies to the facts of this case.

**2. ASSIGNMENT OF ERROR AS TO FIREMEN'S CIVIL SERVICE COMMISSION OF THE CITY OF CHARLESTON**

This is the appeal of Myron Boggess and William Gill, individually, and in their capacity as representatives of the Charleston Firefighters, and 162 Firefighters who timely filed a grievance with the Commission of the City of Charleston, to reinstate their correct hourly rate of pay which had been unilaterally reduced by the City by \$1.68 to \$2.70 per hour. The Commission, at the conclusion of a hearing on January 26, 2012, found by a 2-1 decision that it did not have jurisdiction. Firefighters filed their complaint in the Circuit Court of Kanawha County requesting a Writ of Mandamus. The Circuit Court, on July 9, 2013, granted the

Commission's Motion to Dismiss and affirmed the decision of the Commission as to no jurisdiction. It is from the Order of the Circuit Court of Kanawha County dated July 9, 2013, that affirmed the Commission's finding of no jurisdiction that is appealed.

## **II. SUMMARY OF ARGUMENT**

Petitioners/Firefighters are all shift workers of the Fire Suppression Division of the City who were paid an annual salary with a mutually agreed method for determining their fixed hourly rate of pay to comply with the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* The City unilaterally changed the calculation method for determination of hourly rate of pay which reduced the hourly rate per hour between \$1.68 to \$2.70, which directly affects the pay the Firefighters receive for overtime work. The City is an employer subject to FLSA since more than 80% of its employees are non-exempt.<sup>1</sup>

Firefighters filed grievances with the Commission under West Virginia Code §§ 8-15-10, 8-15-11, 8-15-12, 8-15-25 and Part VII 7.01 of Civil Service Commission. The Commission ruled that they had no jurisdiction. The Firefighters then filed a two count Complaint alleging that the City had violated employment laws by unilaterally reducing the hourly rate of pay and a Writ of Mandamus that the Commission did have jurisdiction and to proceed with the grievance hearing.

The Circuit Court granted the Commission's Motion for Dismissal for lack of jurisdiction and granted the City's Motion for Summary Judgment, both of which the Firefighters timely appealed.

The Circuit Court in granting the City's Motion for Summary Judgment held in the findings of fact that the Firefighters were hired "on terms and conditions of employment that are

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<sup>1</sup> (App. 600-633) Charleston Departmental Staffing - Year 2012-2013 City has 785 total employees, 703 are non-exempt or 89.55%; and (App. 574-600) Charleston Departmental Staffing – Year 2011-2012 had 800 employees, 720 non-exempt or 90% under 29 USC § 203(e)(2)(c) and 29 USC § 213(a)(1).

largely governed by federal, state and local law”... yet never addressed nor discussed the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, which preempts state and local law for overtime for firefighters, nor did the Circuit Court discuss nor apply the rule of Adkins v. City of Huntington, 191 W.Va. 317 (1994), and Haney v. County Comm’n of Preston County, 212 W.Va. 824 (2002), which hold that the Fair Labor Standards Act controls the overtime provisions for Firefighters in West Virginia.

The Circuit Court erroneously applied the rulings of Aaron v. City of Wichita, 797 F.Supp. 898 and 54 F.3d 652 (D.Kan.1992), and Collins v. City of Bridgeport, 206 W.Va. 467 (1999), that the City could unilaterally change the method of calculating the hourly rate of pay. Both rulings have been consolidated in this appeal.

### **III. STATEMENT OF THE CASE**

Firefighters are shift workers of the Fire Suppression Division of the City of Charleston’s Fire Department, and members of Local 317 of International Association of Firefighters (hereinafter “IAFF”). All but two of the Fire Suppression Division’s Firefighters are members of Local 317. While there is no formal collective bargaining agreement in place between Local 317 IAFF and the City, Local 317 has represented the Local members over 40 years in negotiating with the City as to terms and conditions of employment. (App. 103-115; App. 303, Retired Fire Chief Carl Beaver Affidavit ¶¶ 3-5; App. 319, Retired Captain Douglas Legg Affidavit ¶¶ 3-5; and App. 323, Retired Assistant Chief Eugene Beaver Affidavit ¶¶ 3-5.)<sup>2</sup> When each of the Firefighters 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. This

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<sup>2</sup> Carl Beaver served 38 years as a Charleston Firefighter, Lieutenant, Captain, Assistant Chief, and Chief from 1991-1997. Douglas Legg served 19 years as a Charleston Firefighter and Lieutenant Captain; Eugene Perry served 26 years as a Charleston Firefighter, Lieutenant Captain and Assistant Chief.

established the mode of payment for determining the regular rate of hourly pay by dividing the annual salary by the contractually established number of regular work hours for the year. Overtime was then paid for all hours worked over the agreed to work hours for the week. (App. 302, 313, and 323, Affidavits of Beaver, Legg and Perry ¶¶ 3-5.)

The history of the employment contract between the City and members of the Fire Suppression Department is set forth in the following paragraphs and supported by affidavits and The Code of the City of Charleston which sets forth the terms of their employment. (App. 302, 319, and 323, Affidavits of Beaver, Legg and Perry ¶¶ 3-5.)

As early as 1985, the City and Local 317 began negotiations to reduce the Firefighters' work week from 56 hours to 51.7 hours using a Kelly shift<sup>3</sup> to accomplish this goal. (App. 302-304, Beaver Affidavit ¶¶ 1-7; and App. 289-301, Resolution of City Council dated January 21, 1986.) Following those discussions, a Blue Ribbon Committee on Uniform Services was established by City Council in the late 1980's and determined there was a large hourly salary difference in shift work for the Police, EMS, Metro 911, and Firefighters. The outcome of the study was the development of 12 hour shifts for Police, EMS, and Metro 911 personnel which included 208 hours of built in overtime annually. Police, EMS and Metro 911 employees began working three 12 hour shifts one week, and four 12 hour shifts the following week, and went from working a 40 hour week to an average of a 44 hour work week every two weeks, with four hours overtime each week, and earned approximately \$2,500.00 to \$3,000.00 dollars as scheduled overtime per year. (App. 303, Beaver Affidavit ¶ 5.)

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<sup>3</sup> Some firefighting agencies have a rotating system that provides their members additional scheduled time off to meet a negotiated agreement regarding work hours; these are frequently called "Kelly Days". Kelly Days or Rotating Days Off is a term which originated in Chicago in 1936 when Mayor Edward Kelly gave firefighters a day off for every 7 days on duty. A common Kelly arrangement is a three-platoon system A, B and C that works a "24 on/48 off" rotation with a Kelly Day every seventh shift which the City of Charleston uses.

The method for calculating police officers' hourly rate for the City who work three 12 hour shifts and four 12 hour shifts within a two-week pay cycle began being paid 40 hours straight time calculated on 1976 annual hours at straight time and 8 hours overtime with a minimum of 208 overtime hours annually remains unchanged today. (App. 303, Beaver Affidavit ¶ 5; and App. 141, Municipal Wage Progression Schedule for Charleston Police Dept. 2012-2013.)

While shift Firefighters at this time were working 56 hours per week for the same wages other uniform personnel who were working 40 hours to earn, the Firefighters were working 16 hours more per week at regular wages before they received overtime after 56 hours at an hourly rate which was considerably lower than police or EMS personnel with the same rank and seniority. The solution for the Firefighters was to lower the required number of weekly work hours down from 56 with a goal set at 48 hours per week. (App. 303-326, Affidavits of Beaver, Legg, and Perry ¶ 5.)

The City and Firefighters had discussions in late 1990 and agreed to reduce the 56 hour week to a 51.7 hour week beginning in January 1991. (App. 303-326, Affidavits of Beaver, Legg, and Perry ¶ 5.) Approximately 3 years later, the next step was mutually agreed by reducing to a 50.4 hour work week. (App. 303, Affidavit of Beaver ¶5.) On January 21, 1997, City Council adopted Resolution 613-97 "Authorizing the Fire Chief to reduce the number of hours in the workweek of the Fire Suppression Division of the Charleston Fire Department from 50.4 hours to 49 hours." (App. 303, Affidavit of Beaver ¶ 5, and App. 332-333, Resolution of Charleston City Council dated Jan. 21, 1997.)

The method for the establishment of the calculation of the regular rate of hourly pay as mutually agreed to from January 1991 to November 2011 is set forth in the Affidavits of Former

Fire Chief Carl Beaver, Eugene Earl Perry, Jr., and Douglas Martin Legg (App. 302-326) as corroborated by City Wage Progression Schedules from 1990 to 2012. (App. 148-176.)

From January 1991 to 1995, a Firefighter received a Kelly Day off after every twelve (12) shifts worked, or seven days off per year. From 1995 to January 1996, a Firefighter received a Kelly Day off after every nine (9) shifts worked, or 10 days per year, and since January 1997 has received a Kelly Day off after every seven (7) shifts worked, 13 days per year. The regular hourly rate from January 1991 to November 7, 2011, was determined as follows:

January 1991 to June 31, 1995

less than 15 years' service	2920	more than 15 years' service	2920
Vacation hours	- <u>336</u>		- <u>384</u>
	2584		2536
Kelly hours	- <u>172</u>		- <u>172</u>
	2412		2364

The regular hourly rate of pay for firefighters was determined and specifically set out in the wage progression schedule by dividing the firefighters' annual salary by 2412 hours or 2364 hours and received overtime pay at one and one-half times the hourly rate after working 51.7 hours per week. (App. 148-153.)

July 1, 1995 to June 31, 1996

less than 15 years' service	2920	more than 15 years' service	2920
Vacation hours	- <u>336</u>		- <u>384</u>
	2584		2536
Kelly hours	- <u>240</u>		- <u>240</u>
	2344		2296

The regular hourly rate of pay for firefighters was determined and specifically set out in the wage progression schedule by dividing the firefighters' annual salary by 2344 hours or 2296 hours and received overtime pay at one and one-half times the hourly rate after working 50.4 hours per week. (App. 154-155.)

February 1997 to November 11, 2011

less than 15 years' service	2920	more than 15 years' service	2920
Vacation hours	- <u>336</u>		- <u>384</u>
	2584		2536
Kelly hours	- <u>312</u>		- <u>312</u>
	2272		2224

The regular hourly rate of pay for firefighters was determined and specifically set out in the wage progression schedule by dividing the firefighters' annual salary by 2272 hours or 2224 hours and received overtime pay at one and one-half times the hourly rate after working 49 hours per week. (App. 156-176.)

The City unilaterally on November 7, 2011, changed the method of calculation of the regular hourly rate from 2272 hours for less than 15 years and 2224 for more than 15 years' service to 2548 hours (App. 331, Charleston Wage Progression Schedule for Firefighters effective Nov. 20, 2011.)<sup>4</sup> The change results in a reduction of the regular rate of hourly pay between \$1.68 to \$2.70 per hour which is used to calculate overtime pay, violates the Fair Labor Standards Act and is purely discriminatory.

The Circuit Court erred in finding that the overtime policy established in 1991 was erroneously based on the decision of Aaron v. City of Wichita, 797 F.Supp. 898, 54 F.3d 652 (10 CA 1995). The Aaron case was decided by the U.S. District Court for the District of Kansas on June 17, 1992, and clarified on March 9, 1993, and April 26, 1993, a full two years after the establishment of Kelly Days in December 1990 by the City, becoming effective January 1991. Obviously, the Kansas case was not the basis for the method arrived at for overtime calculations for the Charleston Fire Suppression members as asserted by the City. The Kelly Day Agreement discussions began as early as 1985 with the City, with an agreement reached in November 1990, and began in January 1991 after discussions with City officials and members of Local 317, with

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<sup>4</sup> Prior to June 30, 2011, Charleston City Council passed by resolution the budget for the year July 1, 2011, to June 30, 2012, for the Fire Suppression Department salaries in Exhibit 2 of Plaintiffs' Complaint. (App. 11.) The method for determining the hourly rate for the 2011-2012 year for each firefighter, lieutenant, captain, and assistant chief was determined by dividing the annual salary of each by 2272 hours for members with less than 15 years' service, 2224 hours with members with more than 15 years' service. This method of determining the regular hourly rate and has been used and agreed to continuously by the City of Charleston and the Fire Suppression members beginning in January 1991.

Each member of the Fire Suppression Department when they hired into the department accepted, contracted, and agreed to the method of pay, overtime pay, and other benefits as set forth in the Wage Progression Schedules on Pages 10-11 of this Brief. The members acquired a property interest as a result of this employment agreement.

their oral agreements and mutually agreed to written documents and actual practice to reduce the yearly regular hours worked by Kelly Days and vacation days. (App. 302-326, Affidavits of Beaver, Legg, and Perry; and App. 363-393, Chas. Fire Dept. Log Books Jan. 2, 1991 through Dec. 29, 1992.)<sup>5</sup> Also see letter dated March 16, 1993, of Thomas Hayes, City Attorney, to Kent Hall, Mayor. (App. 394-395.) This memo makes it clear that the agreement of January 1991 was not based on the Aaron case, and that the Firefighters would not make any claims for overtime based on that decision. The City failed to accurately inform the Circuit Court of why it reduced the hourly overtime rate by acknowledging and setting forth in great detail how it has unilaterally breached the employment contract it had with the Firefighters by relying on a report from a Virginia-based consulting firm to arrive at a “new methodology to calculate hourly, overtime and holiday/overtime wages for its firefighters.” (App. 396-403, Affidavit J. Thomas Lane dated July 19, 2012, ¶ 27.)

The Circuit Court erred in finding that the holding in Collins v. City of Bridgeport, 206 W.Va. 467 (1999), permitted the City to recalculate overtime. The facts and law of Collins are totally distinguishable from this case. In Collins, the city modified a discretionary policy of using vacation pay, holiday compensation time, and sick pay in calculation of hours worked in a week. Bridgeport changed the discretionary policy of not paying overtime if the employee used sick time, vacation time or holiday compensation until the employee’s actual hours worked exceeded the extra hours of vacation, sick or holiday pay taken during the pay period, this was not a recalculation of the method of the regular hourly rate of overtime. Collins at 475. Here, the City of Charleston, by mutual agreements with resolutions and ordinances passed by council on November 19, 1990, in 1994, and on January 21, 1997, established by contract the number of

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<sup>5</sup> App. pages 363-393 are copies of log books for Engines 451, 452, 456, 457, 458, Truck 461, and Rescue 481. These exhibits specifically show that firefighters began Kelly Days in January 1991.

regular hours in the work week for the Fire Suppression Division. (App. 148-176 Wage Progression Schedules 148-146.)

The City, on several occasions since 1990, has had the overtime issue under FLSA and West Virginia law reviewed by attorneys. In March 2001, the City was informed by Forrest H. Roles of the Law Firm of Heenan, Althen and Roles that it was in violation of the FLSA and had been underpaying Firefighters' overtime of approximately \$220,000.00 per year.<sup>6</sup> (App. 404-405.) The City was also informed by Heenan, Althen and Roles in March 2001 that West Virginia Code §§ 8-15-10 and 8-15-25(a) applied. (App. 406-409.) Notwithstanding this advice, the City continued to pay overtime based on the mutual agreement originally established in 1991. The City is now, ten years later, after receiving competent legal advice in 2001, wrongfully asserting that they were acting under a mistake made in 1993. This unilateral breach of the employment contract by increasing the number of hours worked at regular rate of pay is purely a question of state employment contract law and the Fair Labor Standards Act, 29 USC 201, et seq.

Count I also alleges the City violated Chapters 8-15-10, 8-15-11, 8-15-12 and 8-15-25 of the Code of West Virginia, and Part VII 7.01<sup>7</sup> of the Rules and Regulations of the Firemen's Civil Service Commission of the City, by reducing the overtime rate of pay of the Firefighters by unilaterally changing the employment agreement.

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

Petitioners/Firefighters respectfully request that the Court determine that this case be placed on the oral argument docket pursuant to Rule 19. This case involves assignment of error of settled federal and state laws and regulations as to firefighter overtime hourly calculations

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<sup>6</sup> Mr. Roles is a well-respected labor lawyer in Charleston with over forty (40) years' experience. (App. 404-409.)

<sup>7</sup> Rule 7.01 – No member of the Fire Department shall be removed, discharged, suspended, reduced in rank or reduced in pay, except for just cause. [Emphasis added.]

which were not followed by the lower court resulting in clearly erroneous and an unsustainable abuse and exercise of discretion as to fact finding under settled law, and its erroneous conclusions of law.

As to the appeal as to the jurisdictional issue regarding the Firefighters Civil Service Commission, this is a question involving first impression and also involves the validity of federal, state and municipal ordinances, and lower court rulings regarding each of them.

## **V. ARGUMENT**

### **1. STANDARD OF REVIEW**

#### **(A) AS TO ENTRY OF SUMMARY JUDGMENT AS TO CITY OF CHARLESTON**

A circuit court's entry of summary judgment is reviewed *de novo*. Syllabus Point 1, Jochum v. Waste Management of WV, 224 W.Va. 44 (2009), affirming Painter v. Peavy, 192 W.Va. 189 (1994). When reviewing a lower court's decision regarding summary judgment, the reviewing court applies the same standard as required by the Circuit Court. Estate of Robinson v. Randolph County, 209 W.Va. 505 at 509 (2001), citing Cottrill v. Ranson, 200 W.Va. 691 (1997).

Syllabus 1. "In reviewing the judgment of a lower court this Court does not accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law." Bolton v. Bechtold, 178 W.Va. 556 (1987), and Syllabus Point 1, Burks v. McNeel, 164 W.Va. 654, 264 S.E.2d 651 (1980).

In reviewing challenges to the findings and conclusions of the Circuit Court, a two-prong deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual

findings is reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review. See syl. pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108 (1997).

Generally, findings of fact are reviewed for clear error and conclusions of law are reviewed *de novo*. However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*. The sufficiency of the information presented at trial to support a finding that a constitutional predicate has been satisfied presents a question of law. See Syl. pt. 1, *State ex rel. Cooper v. Caperton*, 196 W.Va. 208 at 213 (1996).

**(B) AS TO DISMISSAL OF CIVIL SERVICE COMMISSION**

Standard of appellate review of the Circuit Court's Order granting relief through an extraordinary writ is *de novo*. Syl. pt. 1, *Pugh v. Policemen's Civ. Serv. Comm'n*, 214 W. Va. 498 (2003).

Syl. pt. 2, *Alden v. Harpers Ferry Police Civ. Serv. Comm'n*, 209 W.Va. 83 (2001), states:

"The judgment of a circuit court affirming a final order of a police civil service commission, upon appeal therefrom as provided by statute, will not be reversed by this Court unless the final order of the commission was against the clear preponderance of the evidence or was based upon a mistake of law." [Emphasis added.]

In the case *sub judice*, the Commission's and Circuit Court's rulings were made upon a mistake of law.

**(C) AS TO BOTH CITY AND COMMISSION**

"A motion by both plaintiff and defendant for summary judgment under Rule 56, R.C.P. does not constitute a determination that there is no issue of fact to be tried and if a genuine issue of material fact is involved both motions should be denied.' Syl. pt. 3, *Haga v. King Coal Chevrolet Company*, 151 W. Va. 125, 150

S.E.2d 599 (1966)." In syl. pt. 4, Warner v. Haught, Inc., 174 W. Va. 722, 329 S.E.2d 88 (1985)

**2. THE CIRCUIT COURT ERRED IN FINDING THERE WAS NO EMPLOYMENT CONTRACT**

The City's Response, Motion to Dismiss, and Motion for Summary Judgment are based on the Affidavit of Thomas Lane dated January 28, 2013, attempting to take the position that the employer-employee relationship by the City with its Firefighters is not a legally binding contract, and that the method for determining overtime compensation for the preceding 18 years had been based upon a misapplication of federal law resulting in the unintentional inflation of the overtime rate paid to the Firefighters. (App. 410-413, Affidavit J. Thomas Lane, January 28, 2013, ¶¶ 12 and 13.)

Mr. Lane 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. 401-413, Affidavit J. Thomas Lane, January 28, 2013, ¶¶ 1, 2 and 3.)

Interestingly, Mr. Lane had signed an Affidavit on July 19, 2012, which 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 (App. 396-403, Affidavit J. Thomas Lane, July 19, 2012, ¶¶ 13, 16 and 17), and now he files an Affidavit which states otherwise.

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

"13. In or around 1991, which would have been the last year of Mayor Charles Gardner's term and an election year for the Mayor and City Council, at the recommendation of the Mayor and administrative personnel, 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.

16. In or around 1994, which would have been in the last year of Mayor Kent Hall's term, the City Council and an election year for the Mayor and City Council, at the recommendation of the Mayor and administrative personnel, 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, which would have been in the last year of Mayor Kemp Melton's administration and an election year for the Mayor and City Council, the City Council again, at the recommendation of the Mayor and administrative personnel, 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." [Emphasis added.]

The City asserted, and the Circuit Court erred in finding, there was no employment contract with each Firefighter. (App. 782-797, Circuit Court Order ¶¶ 39-53, citing App. 410-413, Affidavit J. Thomas Lane, January 28, 2013, ¶¶. 11-12.)<sup>8</sup> This attempt by the City and holding by the Circuit Court defies all legal logic since an employer-employee relationship can only exist by a contract, oral or written, or combination of the two. Lipscomb v. Tucker County Commission, 206 W.Va. 627 (1999). Also see Davis v. Fire Creek Fund, 144 W.Va. 537 at 545 (1959) , holding the relationship of master and servant or employer and employee is a contractual relationship, and first Lipscomb v. Tucker County Commission, 197 W.Va. 84 at 90 (1996), holding claims for oral or implied contracts are subject to the five year statute of limitations. Also see 12B M.J. Master Servant § 3. The City Council Resolutions of 1991, 1994 and 1997

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<sup>8</sup> Additional terms of the Firefighters' employment contracts are pensions, holiday pay, vacation pay, sick leave found in Charleston City Code § 54-101.

establish hourly the pay rates of the employment contract. In Lipscomb,<sup>9</sup> the West Virginia Supreme Court of Appeals found that a unilateral employment contract existed 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 a full command of the Queen's English, as well as 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.”<sup>10</sup> 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 of Morgantown, 174 WV 122; and Adkins v. City of Huntington, 191 W.Va. 317 (1994), and Pullano v. City of Bluefield, 176 W.Va. 198 (1986). In Adkins, the Supreme Court of Appeals held that where 80% of the municipal firefighters are subject to the overtime provisions of the Fair Labor Standards Act. 29 USC 201, et seq., the federal law applies.<sup>11</sup> Also see Haney v. County Comm’n, Id. [Emphasis added.] In Dept. of Labor Field Operations Handbook, Chapter 12, 32f82; 32g01; 32g03, referencing that under FLSA, employment contracts may be either written or oral employment

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<sup>9</sup> Lipscomb was an employee of Tucker County Commission.

<sup>10</sup> 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.

<sup>11</sup> See Footnote 1 of this Brief.

contracts, and the employer's duties as to written memorandum covering more than one employee. 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, 334 U.S. at 464 (1948). [Emphasis added.]

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).

In Local 313 v. City of Morgantown, 174 W.Va. 122 (1984), the Supreme Court of Appeals adopted the mutual agreed upon rate of regular pay stating:

"In order to comply with the [Fair Labor Standards Act], an employment contract 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 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.]

For twenty years, the Firefighters and the City had a mutually agreed upon rate of hourly pay which was in written form of the City Resolution passed each year.

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.

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 at issue constituted a substantial impairment of the employees’ contract.

Contracts enable individuals to order 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.

The City's action in changing the method for determining the hourly rate of pay was purely unilateral and breaches the employment contract, and is in violation of FLSA as will be shown in the following section.

3. **CIRCUIT COURT ERRED BY NOT FINDING THAT UNDER FAIR LABOR STANDARDS ACT 29 U.S.C. § 201, ET SEQ., AN EMPLOYER CANNOT UNILATERALLY CHANGE THE METHOD OF DETERMINING THE MODE OF THE REGULAR RATE OF HOURLY PAY**

Congress in 1986 amended the Fair Labor Standards Act by extending its coverage to state and city employees, and specifically added city police and firefighters. 29 U.S.C. § 207(k). Jurisdiction under §§ 206 and 207 is allowed in federal or state court. 29 U.S.C. §§215-217. The West Virginia Supreme Court of Appeals in Adkins v. City of Huntington, 191 W.Va. 317 (1994), and Haney v. County Comm'n of Preston County, 212 W.Va. 824 (2002), held the FLSA applied to and controlled over state law firefighter overtime. Also see West Virginia Code § 21-5C-1(e); § 21-5C-3(c); and § 8-15-10.<sup>12</sup> The FLSA being the controlling act, it preempts any state or municipal law or regulation.

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<sup>12</sup> West Virginia Code § 21-5c-3(c):

(c) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section two [§ 21-5C-2] and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

In Anderson v. Sara Lee Corporation, 508 F.3d 181 (4CCA 2007), Judge King, speaking for a unanimous court as to preemption under FLSA, stated:

“We are guided by longstanding principles of preemption in our assessment of whether the FLSA invalidates the Class Members' remaining claims. The *Supremacy Clause of the Constitution* renders federal law ‘the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’ *U.S. Const. art. VI, cl. 2*. ‘As a result, federal statutes and regulations properly enacted and promulgated can nullify conflicting state or local actions.’ *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 595 (4th Cir. 2005)...” Anderson at 191.

“As we have recognized, ‘the FLSA provides an unusually elaborate enforcement scheme.’ *Kendall v. City of Chesapeake*, 174 F.3d 437, 443 (4th Cir. 1999) (internal quotation marks omitted). With respect to the minimum wage and overtime compensation requirements, the FLSA's enforcement scheme includes the provision of criminal penalties for willful violations; the empowerment of the Secretary of Labor to supervise payment of unpaid wages due and to bring actions for unpaid wages, liquidated damages, and injunctive relief; and the authorization for workers to file private actions, in state or federal court, to recover unpaid wages, liquidated damages, and costs and attorney's fees. See 29 U.S.C. §§ 215-217....” [Emphasis added.] Anderson at 193.

Whether the FLSA provides exclusive remedies for the enforcement of its own provisions is a question that need not occupy us for long, because we already answered it in *Kendall*....”

In accordance with our ruling in *Kendall*, we must hold today that Congress prescribed exclusive remedies in the FLSA for violations of its mandates. And we note that we are not alone in so concluding. See *Roman v. Maietta Constr., Inc.*, 147 F.3d 71, 76 (1st Cir. 1998) (citing *Tombrello v. USX Corp.*, 763 F. Supp. 541, 544-45 (N.D. Ala. 1991)); *Westfall v. Kendle Int'l, CPU LLC, No. 1:05-cv-00118*, 2007 U.S. Dist. LEXIS 11304, 2007 WL 486606, at \*16 (N.D. W. Va. Feb. 15, 2007); *Lerwill v. Inflight Motion Pictures, Inc.*, 343 F. Supp. 1027, 1028-29 (N.D. Cal. 1972).” Anderson at 194.

The FLSA provides in part as follows:

Section 207:

“(a)...(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed....”

“(e) ‘Regular rate’ defined—As used in this section the ‘regular rate’ at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee...”

“(k) Employment by public agency engaged in fire protection or law enforcement activities— No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.”

Department of Labor Regulation 29 C.F.R. 553.230(c) provides as follows:

“(c) The ratio of 212 hours to 28 days for employees engaged in fire protection activities is 7.57 hours per day (rounded) and the ratio of 171 hours to 28 days for employees engaged in law enforcement activities is 6.11 hours per day (rounded). Accordingly, overtime compensation (in premium pay or compensatory time) is required for all hours worked in excess of the following maximum hours standards (rounded to the nearest whole hour):

## Overtime Compensation Rules

### § 553.230 Maximum hours standards for work period of 7 to 28 days—section 7(k).

Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

Chapter 8-15-10 of the Code of West Virginia provides, in part:

“...The members of any such paid fire department shall, by a majority vote, determine the schedule of hours to be worked in any twenty-four-hour period: Provided, That the members of any paid fire department shall not remain on duty for more than twenty-four consecutive hours except in case of an emergency requiring the service of more than one half of the department. The chief executive officer of the department is hereby empowered, authorized and directed to make the necessary assignments as provided in this section.” [Emphasis added.]

Charleston Firefighters work rotating shifts of 24 on and off 48, and are on a 14 day/week pay cycle, making them eligible for overtime after 106 under FLSA. The employment contract Firefighters have with the City makes them eligible for overtime after working 49 hours per week. Under FLSA, the hours worked per week are maximum with the parties free to create a lesser work week. 29 USC § 218.<sup>13</sup>

While there is no collective bargaining agreement, there are individual employment contracts with each Firefighter and the City. The City and Firefighters are both subject to the employment contracts provisions of the Fair Labor Standards Act 29 USC 201, et seq., West Virginia Code §§ 8-15-10 and 8-15-25(a), and the rules of the City of Charleston Firemen's Civil Service Rules and Regulations as to reductions in pay, as well as the Council resolutions establishing the Wage Progression Schedules for twenty years which established the regular hourly wage for the firefighters and maximum hours in a work week.

The FLSA provides that any state law or municipal ordinance may establish a minimum wage higher than the minimum wage established or a maximum workweek lower than the maximum workweek established under the Act. 29 USC § 218. The FLSA merely sets the minimum regular hourly rate and maximum work week. The parties are free to contract for higher hourly rates and may agree to pay compensation according to any time or work measurement they desire.

The U.S. Supreme Court in Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419 at 425 (1945), has clearly held that the employer and employee are free to enter into a wage agreement which may exceed the requirements of FLSA by holding

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<sup>13</sup> 29 USC § 218 "(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter..."

“...As long as the minimum hourly rates established by Section 6 are respected, the employer and employee are free to establish this regular rate at any point and in any manner they see fit. They may agree to pay compensation according to any time or work measurement they desire....” [Emphasis added.]

“...Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary ‘regular rate’ in the wage contracts.” Id. at 424-425.

In Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1948), the Supreme Court acknowledged that individual contracts are just as binding as collective bargaining agreements, stating:

“Further, we reject the argument that under the statute, an agreement reached or administered through collective bargaining is more persuasive in defining regular rate than individual contracts. Although our public policy recognizes the effectiveness of collective bargaining and encourages its use, nothing to our knowledge in any act authorizes us to give decisive weight to contract declarations as to the regular rate because they are the result of collective bargaining. A vigorous argument is presented for petitioners by the International Longshoremens Association that a collectively obtained and administered agreement should be effective in determining the regular rate of pay but we think the words of and practices under the contract are the determinative factors in finding the regular rate for each individual.” [Citations omitted.] Id. at 463-464. [Emphasis added.]

29 U.S.C. Section 207(e)(7), (f) and (g)<sup>14</sup> of the FLSA, 29 CFR §778. 407, Chapters 32ao(e), 32f00, 32f01, and 32f02 of the Field Operations Handbook of the U.S. Department of Labor Wage and Hour Division, follow the holdings of these cases by recognizing that the employment contract may be either written or oral, and that the terms of the agreement will be

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<sup>14</sup> Section 207(f) refers to contracts of employment necessitating regular work hours, including Firefighters’.

determined by the oral or written provisions and the actual practices of the parties.<sup>15</sup> [Emphasis added.]

In this case, in addition to the written resolutions passed annually since 1991 by the City which define the employment contract, the actual practices for 20 years was that the regular rate of hourly pay was determined by dividing the annual salary by the fixed duty hours minus vacation and Kelly Day hours.

29 CFR § 778.407 The nature of the section 7(f) contract.<sup>16</sup>

“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, since a contract of this character is rather complicated and proof both of its existence and of its compliance with the various requirements of the section may be difficult if it is not in written form. 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:

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<sup>15</sup> (App. 445.) The City admitted in its response brief that “terms and conditions of employment are largely governed by federal and state law...” (App. 450.) “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).” (Def.s’ Resp. Pl.s’ Mot. for Summary Judgment, Pages 5 and 10, FN2.)

<sup>16</sup> 29 CFR § 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”...

“(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.]

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 CFR 778.500). Blanton v. City of Murfreesboro, 856 F.2d 731 at 734 (6 CA 1988). [Emphasis added.]

It is clear that under federal law and West Virginia law there must be a contract specifying the regular rate of hourly pay which cannot be unilaterally modified, and that there is a set of maximum number of regular hours that a Firefighter can be required to work within a 14 day period 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, and, in fact, supports Beaver, Perry and Legg’s Affidavits as to the method adopted by Council resolutions to calculate the regular hourly rate beginning in January 1991 to November 2011.<sup>17</sup> 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 as set forth in their Affidavits, with the final reduction on January 21, 1997, by City Council Resolution 613-97 with a 49-hour per work week and reductions of vacation and Kelly Days. (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 what is the actual “words and practices” under the contract are the determinative facts in finding the regular rate for each individual. Bay Ridge

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<sup>17</sup> Wage Progression Schedules from 1990 to 2012. (App. 148-176.)

Operating Co. v. Aaron, 334 U.S. 446 (1948). Additionally, David Molgaard,<sup>18</sup> 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 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.)

Clearly the City's unilateral changing the method of calculation of the hourly rate of pay violates the FLSA and U.S. Department of Labor regulations.

**4. CIRCUIT COURT ERRED IN FINDING THAT THE CITY RELIED ON AARON v. CITY OF WICHITA**

The City's Motion for Summary Judgment was also based on Mr. Lane's second Affidavit which states that in 2011 the City learned through its City Manager (David Molgaard) 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. As previously referenced, the City is referring to the case of Aaron v. City of Wichita, 797 F.Supp 898, from the District Court of Kansas decided on June 17, 1992, and clarified on March 9, 1993, and April 26, 1993. 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

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<sup>18</sup> 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.) The duties of council members, especially those serving on the Finance Committee, and the City Manager require a complete review of the budget documents and its inclusive language.

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.)

For further clarification, 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 of Charleston’s agreement with its Firefighters was established by Council Resolution in November 1990 to become effective and remain 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.)

As previously stated, in March 2001, 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), Mr. Lane then 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. CIRCUIT COURT ERRED IN HOLDING THAT CITY COULD UNILATERALLY MODIFY ITS EMPLOYMENT POLICIES UNDER COLLINS v. CITY OF BRIDGEPORT**

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),<sup>19</sup> allow a municipality to unilaterally change the methods of calculation of the hourly rate of pay is simply 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.

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 the holding of 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. However, 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 cannot be

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<sup>19</sup> The 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.

unilaterally modified. Additionally, 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. 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).

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.]

The employment contract here is governed by FLSA § 207, 29 CFR § 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 as previously stated. Id.

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

As previously stated, under 29 CFR § 778.407, that the section 7(f) employment contract:

“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, since a contract of this character is rather complicated and proof both of its existence and of its compliance with the various requirements of the section may be difficult if it is not in written form. 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.]

“A contract cannot be a one-sided affair.... 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.”  
32g01(b) of the U.S. Department of Labor Field Operations Handbook. [Emphasis added.]

## **VI. CONCLUSION AS TO CITY OF CHARLESTON**

The City and Firefighters have had in place an employment contract at least since January 1991 to November 2011, which sets forth the mode and method for determining the regular hourly rate of pay. The unilaterally changing the terms of the agreement lowering the hourly rate is a question of employment law for Firefighters under the FLSA, which this Court firmly held in Adkins v. City of Huntington, Id., and Haney v. County Comm’n, Id., applies to West Virginia firefighters. In addition to Adkins and Haney, West Virginia has a long line of cases involving municipalities and firefighter employment wage and overtime agreements, and has looked at decisions from the federal system for guidance in its decisions regarding these contractual agreements relating to hours worked and overtime. See Local 313, International Association of Firefighters v. The City of Morgantown, 174 W.Va. 122 (1984); and Pullano v. City of Bluefield, 176 W.Va. 198 (1986). In Local 313 v. Morgantown, the court stated in Syllabus 1 that our wage and hour law is model to some extent on the federal minimum wage law contained in the Fair Labor Standards Act, 29 USC § 201, et seq. The Supreme Court of Appeals in Pullano at 207 stated that under the Fair Labor Standards Act an employer may establish a work week that exceeds the forty hour work week provided the employees are compensated at a rate of one and one-half times their regular rate. The Court went on to say that this concept was enclosed in Local 313 v. Morgantown. Pullano at 207, and as stated in Darlington.

City of Charleston Resolution 613-97 in January 1999 established a 49 hour work week for Firefighters working shift work, and Section 54-101 of the Charleston City Code establishes

a work day as 12 hours and shift as a twenty-four hour period or two days for the Fire Suppression Division, which must meet the requirements and restrictions of the FLSA for overtime for Firefighters.

The Circuit Court applied the ruling from Issue 3 of Collins v. City of Bridgeport, 206 W.Va. at 475. 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. Firefighters have shown a legitimate entitlement under FLSA and existing state case law. 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. Firefighters ask this Court to overturn Issue 3 of the Collins case. 17 M.J. *Stare Decisis* § 9 FN9. Long v. City of Weirton, 158 W.Va. 741 (1975); Janasiewicz v. Board of Educ., 171 W. Va. 423 (1982).

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 that the City cannot unilaterally alter the employment contract by changing the method of calculation of the regular rate of hourly pay which reduces the hourly rate, and direct the Circuit Court to require 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, and award costs and attorney's fees.

**1. 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. 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.

See also Major v. DeFrench, 169 W.Va. 241, 286 S.E.2d 688 (1982); Kisner v. Public Serv. Comm'n, 163 W.Va. 565, 569-70, 258 S.E.2d 586, 588-89 (1979); State ex rel. McLendon v. Morton, 162 W.Va. 431, 249 S.E.2d 919 (1978); North v. West Virginia Bd. of Regents, 160 W.Va. 248, 233 S.E.2d 411 (1977).”

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. 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). Also see Stull v. Firemen’s Pension and Relief of the City of Charleston, 202 W. Va. 440 (1998), finding that a firefighter had a property interest in the pension fund and was entitled to due process protection. *Id.* at 445.

In determining the process appropriate to protect a property interest, the court first must find there is a legitimate claim of entitlement as there is *sub judice*, the contractual property right of hourly pay, and then determine the extent of due process to be afforded if the party suffered tangible economic loss which here the Firefighters have suffered; second, risk of erroneous deprivation; and third, the state’s interest of the additional burden that would be added by imposing some due process procedures. Waite, *Id.* at 163, Barron, *Id.* at 484.

The refusal of the Commission to assume jurisdiction denied the Firefighters the 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.

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. The reduction in members of the paid fire department of the municipality shall be effected by suspending the last person or persons, including probationers, who have been appointed to the paid fire department. The removal shall be accomplished by suspending the number desired in the inverse order of their appointment: Provided, That in the event the said paid fire department is increased in numbers to the strength existing prior to the reduction of members, the members suspended under the terms of this subsection shall be reinstated in the inverse order of their suspension before any new appointments to said paid fire department are made.” [Emphasis added.]

The Petitioners/Firefighters have suffered a reduction in pay, and 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 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, Chapter 57, Acts of the Legislature, 1937, 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, that the Commission has a broad mandate to investigate and develop a factual record on the issues involved. See Pugh at 504. Here, the Commission should have investigated 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 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, and 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.

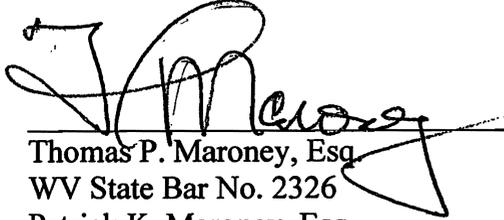
The Commission's reliance on Darlington v. Mangum, 192 W.Va. 112 (1994), that it has no jurisdiction is unfounded, for here the members of the Fire Suppression Unit are being reduced in pay, while in Darlington, the deputy sheriffs' salaries were not being reduced, but those who wanted healthcare were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

## **VII. CONCLUSION AS TO PROPERTY RIGHTS AND WRIT OF MANDAMUS**

The judgment of the Circuit Court affirming the final order of a Civil Service Commission was based on a mistake of law and should be reversed. Firefighters respectfully request this Court order a Writ of Mandamus compelling the City of Charleston Firemen's Civil

Service Commission to assume jurisdiction under West Virginia Code § 8-15-25 to find that the Firefighters have contractual property rights under the Fifth and Fourteenth Amendments of the United States Constitution, and 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 with the Firefighters, and order that the City cannot unilaterally alter the employment contract by changing the method of calculation of the regular rate of hourly pay which reduces the hourly rate, and direct the Circuit Court to require 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, and award costs and attorney's fees.

Respectfully submitted,



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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 **BRIEF OF PETITIONER** upon counsel for the respondents via hand-delivery on this the 28<sup>th</sup> day of February 2014, addressed as follows:

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