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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

HOWARD HOLT, ET AL.,

Plaintiff, No. 1:15cv931

vs.

CITY OF BATTLE CREEK,

Defendant.

Before:

THE HONORABLE JANET NEFF,  
U.S. District Judge  
Grand Rapids, Michigan  
Thursday, August 23, 2018  
Trial Proceedings, Volume II

APPEARANCES:

Avanti Law Group  
MR. ROBERT ANTHONY ALVAREZ  
MR. AGUSTIN HENRIQUEZ, JR.  
600 28th Street SW  
Wyoming, MI 49509  
616-257-6807

On behalf of the Plaintiff;

Kreis Enderle Callander & Hudgins PC  
MR. MARK E. KRETER  
MR. DANIEL WALLACE BOOCHER  
One W. Michigan Avenue  
Battle Creek, MI 49017  
269-966-3000

On behalf of the Defendant.

REPORTED BY: MS. KATHY J. ANDERSON, RPR, FCRR

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August 23, 2018

PROCEEDINGS, 10:38 a.m.

THE LAW CLERK: All rise, please. Court is now in session. You may be seated.

THE COURT: Good morning, everybody.

MR. KRETER: Good morning, Your Honor.

MR. ALVAREZ: Good morning.

THE COURT: Well, we are a little late getting started this morning, but let's get to it.

Mr. Kreter, you have a motion to make, I think.

MR. KRETER: Yes, Your Honor. And just for the record, the city representative today is Linda Morrison. She's the finance director. She was also on our may call witness list. We have decided not to call her as a witness.

THE COURT: Okay.

MR. KRETER: Therefore, I don't think the sequestration order applies, and I have talked to Mr. Alvarez about that.

THE COURT: Okay.

MR. KRETER: He's agreed.

THE COURT: Thank you, Your Honor. We are making a motion to dismiss pursuant to FRCP 52(c). We would ask the Court to enter a judgment in favor of the defendant on issues which we feel the plaintiff has failed to meet their burden of proof on.

1           Almost as a housecleaning matter, the first issue, so  
2 I don't forget it, is willful violation. Plaintiff has claimed  
3 that there was a willful violation of FLSA by the defendants.  
4 There was no evidence presented that the City of Battle Creek  
5 knew or showed reckless disregard of the matter of whether it  
6 conducted or -- whether it violated the statute. There was no  
7 knowing, willful, or bad faith conduct on the City of Battle  
8 Creek. There was no evidence. So I think that count should be  
9 dismissed by the Court.

10           We then get to the exempt status. And as we have  
11 discussed, and the Court is well aware, we have got the  
12 executive and the administrative exemptions. I pointed out  
13 yesterday that the United States Supreme Court in Encino versus  
14 Navarro has now said that when looking at the exemption, a fair  
15 interpretation is required. No longer a strict interpretation.

16           I also believe that the case is in a position now,  
17 given that this is a bench trial, the Court can draw reasonable  
18 conclusions from the testimony presented by the parties, the  
19 cross-examination, and the exhibits, all of which have been  
20 admitted into evidence.

21           I don't want to be redundant so I'm going to probably  
22 meld a few of these arguments together because they do cross  
23 over between the administrative and the executive exemption.  
24 So I'll start with discretion and independent judgment.

25           That is an element of the administration. It's an

1 element in dispute.

2 The testimony has been that there are 75 to 90 people  
3 in the City of Battle Creek Fire Department. Plaintiffs are  
4 the second highest ranking officers. It's implicit that they  
5 were allowed to and had to exercise their independent judgment  
6 and discretion for any organization to operate the way the City  
7 of Battle Creek's fire department operated. They were a well  
8 organized and well oiled machine. And that was because of the  
9 hierarchy that they had in place, and that hierarchy included  
10 management by the battalion chiefs. And I would point out it's  
11 a hierarchy; it's military; I heard it is the military  
12 hierarchy. It is not a dictatorship as would be implied by  
13 some of the plaintiffs's testimony yesterday. Certainly Chief  
14 Houseman was hands on but that doesn't change the exempt  
15 status.

16 The plaintiffs testified yesterday that Chief Hampton  
17 was hands off. The comment, the testimony was that Hampton  
18 said, "Keep me apprised. If anything comes up, let me know."  
19 Clearly when they were working for Chief Hampton, they were  
20 exercising their own discretion and running the day-to-day  
21 operation of the fire department.

22 Chief Schmaltz, he testified or the plaintiffs  
23 testified, that while he was getting acclimated, "Do what  
24 you've been doing." And Chief Schmaltz testified that he gave  
25 them discretion, that he let them run their jobs as battalion

1 chiefs. And, again, their jobs were of significant importance  
2 to the City of Battle Creek and the fire department.

3 I would also point out that unfettered discretion is  
4 not required. Everyone, almost everyone, unless you're a  
5 entrepreneur, has a boss, has somebody to report to. That in  
6 and of itself does not take away the exemption.

7 And let's look to the next element, what were they  
8 involved in? Were they doing things that were significant to  
9 the business or operation of the Battle Creek Fire Department?  
10 We submit they were. There is no dispute they did job  
11 evaluations; there is no dispute they were involved in the  
12 disciplinary process. They could give oral discipline, written  
13 warnings, and if it went beyond that, the testimony is, there  
14 was discussion with the chief.

15 Chief Schmaltz also testified that he sought input  
16 from plaintiffs on the standard operating procedures. This was  
17 the play book. I hate to compare this to a sporting event or a  
18 football game, but the standard operating procedures was the  
19 play book and that was what helped the City of Battle Creek  
20 Fire Department run as efficiently as it did. And Chief  
21 Schmaltz at least on 25 e-mails in the exhibits asked for input  
22 from the battalion chiefs in putting together, amending,  
23 revising the standard operating procedures.

24 Chief Schmaltz also testified that it would be the  
25 responsibility of the battalion chiefs to implement those

1 standard operating procedures.

2 Then we look at the job duty. The suppression chief.  
3 Chief Holt. He oversaw the captains and lieutenants. That's  
4 24 to 27 people that he supervised directly under him. He  
5 maintained standards. He was involved in facility issues,  
6 manpower scheduling, uniform and turnout gear. All of these  
7 were significant functions, managerial functions when running  
8 the Battle Creek Fire Department.

9 Administrative chief, Battalion Chief Erskine was  
10 involved in training, HazMat, road safety, standard operating  
11 procedures, involved in putting together the plan of the day,  
12 the plan of the week, he handled special PR events.

13 Then we have other significant activities. They were  
14 media spoke persons, the station transfers ran through them,  
15 they were on the list of people you could report discrimination  
16 complaints to. Even their uniforms were different because of  
17 the position that they had in the Battle Creek Fire Department.  
18 And Mr. Erskine testified it was a position that he aspired to.  
19 And which in and of itself acknowledges the importance of this  
20 position in the fire department.

21 We go to management duties. Chief Schmaltz testified  
22 that they were part of the senior management team. Mr. Holt  
23 and Mr. Erskine wrote a letter on June 4th, 2014, that talked  
24 about cohesive team of chief officers to operate the fire  
25 department. Referred to our level of management. When it was

1 to their benefit, they were on the management team. When it  
2 isn't to their benefit, like this trial, they decide they are  
3 not responsible for management responsibilities.

4 Then we look at another factor. It's under the  
5 administrative exemption. Was the performance of officer  
6 nonmanual work directly related to managerial or general  
7 business operation. There was no significant manual work  
8 performed by these battalion chiefs. Sure, when you have a  
9 catastrophic event, 192-car accident on I-94 that closes it  
10 down for days, in those exceptional circumstances, they may  
11 have had to perform some manual work. But that was not their  
12 primary function. Just because they were capable of doing it,  
13 just because they took their turnout gear, doesn't mean that  
14 was their primary function. Their primary function was  
15 nonmanual labor and their primary duties was of important  
16 significance to the business and management of the Battle Creek  
17 Fire Department.

18 We go to the executive exemption. And an issue is  
19 well, they can't hire and fire because the Battle Creek  
20 collective bargaining agreement, they have a collective  
21 bargaining agreement with the fire fighters that says they  
22 follow civil service rules. Well, Schmaltz, Chief Schmaltz  
23 said that he gives particular weight to their opinions with  
24 promotions; he also indicated that the one instance where they  
25 did let a probationary fire fighter go, and it wasn't in

1 consultation with either of these battalion chiefs, but another  
2 battalion chief, he gave weight to their recommendation.

3 And then most importantly, I left this to last, but  
4 it's the most important function. Suppressing fires. As  
5 chief, as Mr. Holt said, the primary function of the City of  
6 Battle Creek Fire Department is to mitigate emergencies and  
7 safety of personnel. And that's when they were on a fire  
8 scene. And we have gone through a lot of testimony regarding  
9 how the battalion chiefs, what their responsibilities were at  
10 the fire scene. And it's clear, they managed it, they led it,  
11 they directed it, they took all the SOPs and protocols that  
12 were developed during the non fire working day to operate a  
13 fire scene, to analyze what was going on, to decide what  
14 tactics were going to be used. The most important function of  
15 the fire department the battalion chiefs were in charge of.

16 And ultimately, they were accountable for that fire  
17 scene.

18 So we feel that the evidence is overwhelming that  
19 either under the executive exemption or the administrative  
20 exemption plaintiffs are exempt employees and therefore the  
21 case should be dismissed on that basis alone.

22 In the event the Court disagrees with me, we then get  
23 to the standby time and the issue is was standby so onerous as  
24 to prevent plaintiffs from effectively using their personal  
25 time for personal pursuits.



1           One, they were only required to respond to structure  
2 fires. Chief Schmaltz testified to that. Two, there was no  
3 requirement to monitor radio traffic. Chief Schmaltz left his  
4 radio in the car. He only used his pager. You could put your  
5 pager on alert. When there was an all stations call, the pager  
6 went off. That's what Chief Schmaltz testified he did, and  
7 that's what the plaintiffs could have done. Instead, they  
8 chose to monitor the radio themselves.

9           The records show that there are 124 to 137 structure  
10 fires in a three-year period. About one a week. Payroll  
11 records show that Erskine averaged 3.4 hours of overtime when  
12 on standby; that Mr. Holt averaged 2.2 hours of overtime when  
13 on standby. Again, that's consistent with about one fire a  
14 week. There were no dress restrictions when they are on  
15 standby. The only restrictions were that they could not  
16 consume alcohol and had to be able to respond in a reasonable  
17 time. And there was no need that they respond in four minutes  
18 because they would have engine companies there. And that they  
19 could listen to their radio as they're driving there to help  
20 manage the scene. And let's not lose sight, this standby was  
21 negotiated as part of the collective bargaining agreement.  
22 E-mail from plaintiffs to Chief Schmaltz was they did not want  
23 to switch from the 40-hour standby arrangement to the  
24 24/48-hour arrangement. When I asked Mr. Erskine yesterday  
25 about that, he said that was a negotiating ploy. I think he

1 has to live with his negotiating ploy.

2 Plaintiffs chose to limit their activities while they  
3 were on standby. It was not onerous. Chief Schmaltz said it  
4 was not onerous. There are times when you decide to take an  
5 upper level management position you have some tradeoffs. And  
6 yes, they had to be on standby. That was their tradeoff, but  
7 it wasn't onerous to the extent it impacted their personal  
8 life.

9 I think part of the problem is that plaintiffs,  
10 they're dedicated fire fighters. They have spent their careers  
11 fire fighting; they came up through the ranks; and at least  
12 from a mental standpoint, they never could switch from rank and  
13 file to management. Although, in fact, they were managing the  
14 fire department as battalion chiefs.

15 So we would ask the Court to dismiss plaintiffs's  
16 complaint for the reasons stated. Thank you.

17 THE COURT: Thank you, Mr. Kreter. Any response from  
18 the plaintiffs?

19 MR. ALVAREZ: Yes, Your Honor. First off, Your Honor,  
20 with regard to the good faith argument that the defendants have  
21 raised, I will note that that is an affirmative defense which  
22 they have the burden of proving. And at least as of now, they  
23 have not met that burden.

24 Going directly to the motion for directed verdict at  
25 this point. I think the Court needs to consider the unique

1 circumstances of this case. This is not just about employees  
2 working a few hours a week of overtime. We are talking about  
3 two fire fighters who were working full-time, 24-hour days for  
4 seven days a week every other week. There was a short period  
5 of time when it was every third week but it was still the  
6 majority of the time that we are talking about here is every  
7 other week they were working seven days straight, 168 hours.  
8 That they were at the beck and call of the city.

9 It is also important to note that when they did  
10 respond, when they were on-call, when they did respond, they  
11 were paid for that time. And they were paid at a rate of time  
12 and a half. Essentially they were getting paid overtime. As  
13 they pointed out, as defendant pointed out, they were being  
14 paid 3.4 hours of overtime on average a week. So when they did  
15 respond, they were being paid overtime.

16 Now, this isn't a business where they are making  
17 widgets, where they are selling goods. This is a fire  
18 department where even the defendant in its opening argument has  
19 conceded that on a day-to-day basis the fire department is a  
20 very organized organization. Everything employees do during  
21 the course of the week is designed to suppress or prevent fire.  
22 That's what the fire department does. This isn't some major  
23 corporation, this isn't some store, this isn't a restaurant,  
24 this is a fire department. A public utility that's at the  
25 service of the community.

1                   And so the focus needs to be on what exactly is the  
2 primary duty of a battalion chief, and what was their primary  
3 duty during that period of time that we are talking. It's  
4 important to distinguish the work that they were doing and what  
5 they were required to do during the period of time at issue  
6 here, and how things are now.

7                   And I'll explain.

8                   The period of time at issue here, when they were  
9 working alternating weeks, they were the only two battalion  
10 chiefs on duty. The only two. And they had to alternate for a  
11 short period of time with Chief Houseman every other week, but  
12 they were the only two battalion chiefs on duty that were  
13 required to, as Mr. Holt testified, required to monitor the  
14 radio. Not just listen for the alarm to go off for the all  
15 stations call, but to also monitor the radio. That was his  
16 testimony. Now, what Chief Houseman did during his turn, who  
17 knows. But he was only there for a short period of time.  
18 Chief Schmaltz testified that he left his radio in the car, as  
19 they said. However, Chief Schmaltz also for a period of six  
20 months did not participate in the rotation, and then  
21 interestingly enough, once he did participate, the schedule  
22 changed. And they now have a completely different schedule  
23 where it's only required that they spend one night a week  
24 working a 24-hour rotation. It's no longer the every other  
25 week burden that they had to carry for those three years or so.

1           So what is the primary duty? Primary duty is defined  
2 as the principal, main or most important duty that the employee  
3 performs. Among those factors that the Court should consider  
4 is the relative importance of the exempt duties as compared  
5 with other types of duties and the amount of time performing  
6 that work. In this case, Your Honor, as they testified, during  
7 the standby weeks, as even the job descriptions themselves say,  
8 responding to alarms, and other types of alarms, fire alarms  
9 and other types of alarms was not just an essential job  
10 function, it was the most important job function as testified  
11 to by both plaintiffs.

12           No matter what they were doing, whether they were  
13 writing a report, doing an evaluation, whether they were  
14 sending e-mails, no matter what they were doing at that point  
15 in time, if a call came through, they had to respond. Whether  
16 it was on standby time or during their regular scheduled shift.  
17 They had to drop what they were doing and respond. And it's  
18 important to note, Your Honor, that it's not just a matter of  
19 just showing up and running the show, if that's the case, then  
20 acting Chief Hampton would have been able to respond to calls.  
21 But he couldn't. And why couldn't he? Because acting Chief  
22 Hampton was not a fire fighter. Was not trained as a fire  
23 fighter. And so acting Chief Hampton could not participate in  
24 the rotation, could not respond to calls, could not take  
25 command. Why? Because he was not a fire fighter. Even today,

1 Your Honor, the acting Chief Blocker is also the police chief.  
2 And he also does not respond to any calls because he is not  
3 trained as a fire fighter.

4 That I think is key and instructive as to what was the  
5 primary duty of these individuals.

6 Also, captains and lieutenants, they took command.  
7 When they were on the scene, they were also officers, they also  
8 could take command. And for the most part, if when they  
9 arrived, they took command and only when the battalion chiefs  
10 arrived would they then transfer command to themselves. But  
11 the captains and lieutenants, who are not exempt from overtime,  
12 who receive overtime when they work overtime, are being, are  
13 part of the incident command and they take command.

14 The physical requirements for the battalion chiefs are  
15 the same as the captains, as the lieutenants, and as the fire  
16 fighters. The turnout gear that they have, they have to have  
17 it with them. When they were on standby, when they were on  
18 standby, they had to have that in their vehicle, and both of  
19 them testified that on a few occasions they put on their gear  
20 and Mr. Holt actually fought a couple of fires.

21 Now, sure, it wasn't a huge structure fire, he wasn't  
22 running in with his SCBA but he still fought a fire. He was  
23 there first and he acted as a fire fighter, and he put out the  
24 fire.

25 When they were on standby time, they never knew when a

1 call was coming in. I think I, I stressed that often in the  
2 testimony from all the witnesses so I won't belabor that point.

3 With regard to independent judgment, the defendants  
4 concedes that Chief Houseman was hands on. And as a matter of  
5 fact, as both of the plaintiffs testified, yes, he was. He  
6 wanted everything to be run through him. And though Chief  
7 Hampton was hands off, essentially as defendants point out,  
8 there was already a standard operating procedures, the play  
9 book, by which they each had to follow. That was the play  
10 book. That was how they knew what they had to do with regard  
11 to everything, every procedure related to the fire department.  
12 They were restricted, not just by the standard operating  
13 procedure, but by the collective bargaining agreement of the  
14 local fire fighters union and by the civil service rules, and  
15 by directives that were given by the chief. They had no  
16 discretion. They had no independent judgment. Everything they  
17 did had to conform either to the standard operating procedures  
18 which were in place; Chief Schmaltz may have asked for some  
19 advice when he arrived, but during the period of time that they  
20 were working for Chief Houseman, Chief Hampton, they had to  
21 follow what was already in place.

22 Titles and uniforms are irrelevant in a determination  
23 as to whether a person is executive or administrative or  
24 exempt. So I don't believe that that's something that needs to  
25 be considered.

1           The e-mail that defendant refers to as having been  
2 sent by the battalion chiefs, by the plaintiffs, regarding the  
3 change in the schedule and the change with regard to the car,  
4 yes, they sent the e-mail. But was anything done? Was their  
5 opinion taken into consideration? No. Because ultimately  
6 nothing happened with those e-mails. Nothing happened with  
7 their complaint. Nothing happened with their suggestion that  
8 they work together as a cohesive management team. Nothing  
9 happened. The schedule still changed, the car issue remained  
10 the same. And regarding discipline, they both gave examples,  
11 multiple examples of times when they wanted certain  
12 disciplinary actions to take place against a fire fighter and  
13 the chief said no.

14           So far, we have only had one example from the  
15 defendants, from Chief Schmaltz, and that wasn't even related  
16 to these two plaintiffs. It was another battalion chief. We  
17 don't know what the circumstances were.

18           The defendant concedes that per the collective  
19 bargaining agreement and per the civil service rules, they  
20 couldn't hire and fire anyone. Everything had to happen  
21 through the civil service rules, and the standard operating  
22 procedures for discipline, and they had no authority, no right,  
23 no weight that was given to their recommendations at that  
24 point.

25           If any of the candidates that they liked did meet the



1 civil service rules, they couldn't hire them. Their hands were  
2 tied.

3 Now, the defendant makes a lot about saying that the  
4 plaintiffs, the battalion chiefs, were the right-hand man, the  
5 second in command of the fire department. And we submit to the  
6 Court that if in fact that was true, Your Honor, then why when  
7 Chief Houseman retired did neither the plaintiffs, did neither  
8 of the plaintiffs, why were neither of the plaintiffs made  
9 acting interim fire chiefs? If they were already supposedly  
10 running the day-to-day operations, if they were the right-hand  
11 man, who better to come in and take over in the interim, rather  
12 than bringing in the police chief who couldn't even participate  
13 in the rotation, who couldn't even attend and take command at  
14 an incident than the two battalion chiefs. The same, when  
15 Chief Schmaltz left the fire department, neither one was called  
16 upon to step up and act as interim chief.

17 So right-hand man? I don't think so, Your Honor.

18 It's clear that for the position of fire chief, it's  
19 not necessary to be a fire fighter. It's not necessary to be  
20 able to run into a burning building. It's not necessary to be  
21 able to attend a multi vehicle accident and assist at that  
22 point.

23 But for a battalion chief you have to be a fire  
24 fighter. They are fire fighters. That was their primary duty,  
25 that was their primary function, that was the role, that was

1 the service that was provided by the fire department.

2 Everything else was solely to fight fires and to prevent fires.

3 I think, Your Honor, that when we are talking about  
4 whether the restrictions that were placed on them when they  
5 were on standby time, given all the testimony that was  
6 presented, there should be no doubt that they were limited in  
7 what they could do. Aside from the requirement that they not  
8 drink alcohol, they really couldn't leave a 15-minute window  
9 from anywhere in the city. They had to respond. As Chief  
10 Schmaltz testified, as both of the plaintiffs testified, and as  
11 Chief Houseman will testify, if this case is allowed to  
12 proceed. They had to respond within a certain window. And so  
13 because of that, common sense dictates that if you have to  
14 respond within a certain period of time, then you don't have  
15 the freedom to do whatever you want. You can't attend your  
16 granddaughter's graduation in the middle of Battle Creek  
17 because you don't know what parking is going to be like, you  
18 don't know how crowded it's going to be in the stadium or the  
19 auditorium. You don't know if a call is going to come in as  
20 everyone is being let out, as traffic from a thousand people is  
21 taking up the streets.

22 Certainly, going to dinner, something that both of  
23 their wives said that they enjoyed the weeks that they were not  
24 on-call, certainly that was a problem. Rosalee stated that she  
25 felt she was a prisoner in her own home. Mrs. Erskine said at

1 one point she had to get out in the middle of the street so  
2 that he could respond to a fire. And after that point they  
3 rode separately, and they both gave examples, all four of them  
4 gave examples of when they had to leave in the middle of a  
5 meal. They couldn't travel to Grand Rapids, they couldn't even  
6 travel to Kalamazoo which is close by to Battle Creek. It's  
7 basically right next door.

8 So they couldn't sleep well the weeks that they were  
9 on-call because they had to listen for that call, for those  
10 alerts; they had to monitor the radio; they couldn't even mow  
11 the lawn because, as was explained, even if you put it on  
12 vibrate, you might miss a call. And as plaintiff Erskine so  
13 passionately said, it's about safety. He took his job  
14 seriously. And so if that meant that he had to have all four  
15 electronic devices, which he believed were required, and which  
16 Plaintiff Holt said were required, then that's what he was  
17 going to do because his job was to fight fires and provide  
18 safety to the community.

19 And, Your Honor, I do not believe that given the  
20 unique circumstances of this case, given the testimony that has  
21 been presented to the Court to date, that the Court should  
22 grant their motion. The motion should be denied. This case  
23 should be allowed to move forward and ultimately the Court  
24 should find in the favor of the plaintiffs.

25 THE COURT: Thank you, Mr. Alvarez. Well, under

1 Federal Rule of Civil Procedure 52(c) I do have the discretion  
2 in a nonjury trial to enter judgment on a claim or a defense  
3 that under controlling law can be maintained or defeated only  
4 with a favorable finding on that issue.

5 However, I can also decline to enter judgment at this  
6 time and wait until the close of the evidence, which I think is  
7 the more reasonable approach here.

8 As I said, it is a matter of my discretion either to  
9 grant the motion or deny it or to defer it. And the defendant  
10 wants judgment on the applicability of the FLSA citing the two  
11 exemptions, the executive and administrative. Also whether the  
12 overtime issue dealing with being on-call is compensable.

13 But it's my view that the better course for me to  
14 follow at this point is to reserve ruling on this motion until  
15 the close of all the evidence, the testimony, and the closing  
16 arguments have been before me.

17 So with respect to defense counsel, I am denying the  
18 motion at this time and defer it until such time as everything  
19 is complete.

20 So with that, Mr. Kreter, are you prepared to --

21 MR. KRETER: Yes, Your Honor. We are prepared --

22 THE COURT: -- move forward.

23 MR. KRETER: -- proceed. We have the, we would offer  
24 the video deposition. We have filed the transcript with the  
25 Court, but the video deposition of former Chief Larry Houseman.

1 (Playing videotape, 11:14 a.m.; Videotape concluded,  
2 12:31 p.m.)

3 THE COURT: Okay. It's about 12:30. Shall we adjourn  
4 to your witness at 1:30, Mr. Kreter?

5 MR. KRETER: Yes. I believe he's probably here now or  
6 1:00 o'clock. So 1:30 would be fine.

7 THE COURT: Let's come back at 1:30.

8 THE LAW CLERK: All rise, please. Court is in recess.

9 MR. KRETER: Your Honor, can I ask a question? If  
10 that's our motion in limine witness, I suspect he will be a  
11 half hour, 45 minutes at most. And I assume we will do  
12 closings after that.

13 THE COURT: Assuming that Mr. Alvarez doesn't have any  
14 rebuttal.

15 MR. ALVAREZ: I don't believe I do, Your Honor, at  
16 this time. I'm going to confirm that over lunch. But, yeah, I  
17 mean if yours is only going to be a half hour, my cross would  
18 be maybe 15 minutes at most. So I'm not opposed to closing  
19 arguments.

20 THE COURT: Well, assuming that Mr. Alvarez doesn't  
21 have rebuttal, then we will move into closing statements which  
22 I am going to limit to 15 minutes apiece. I'll give  
23 Mr. Alvarez an additional five to rebut, and at that point once  
24 I have a chance to look at my notes, I'm thinking I might very  
25 well deliver a bench opinion sometime this afternoon.

RUSSELL CLAGGETT - DIRECT EXAMINATION - MR. KRETER

1 MR. KRETER: Okay. Thank you, Your Honor.

2 THE COURT: Okay.

3 MR. ALVAREZ: Thank you.

4 THE COURT: Thank you.

5 THE LAW CLERK: Court is in recess.

6 (Recess taken, 12:32 p.m.; Resume Proceedings,

7 1:33 p.m.)

8 THE LAW CLERK: All rise, please. Court is back in  
9 session. You may be seated.

10 THE COURT: Okay. Counsel, are you ready?

11 MR. KRETER: Yes, Your Honor. I would like to call  
12 Russell Claggett.

13 RUSSELL CLAGGETT, DEFENSE WITNESS, WAS DULY SWORN

14 THE LAW CLERK: If you'll please state your name and  
15 spell your last name for the record.

16 THE WITNESS: Russell Claggett. C-L-A-G-G-E-T-T.

17 DIRECT EXAMINATION

18 BY MR. KRETER:

19 Q Mr. Claggett, what's your current employment?

20 A I'm Assistant Superintendent for Human Resources with the  
21 Calhoun Intermediate School District.

22 Q Were you ever employed by the City of Battle Creek?

23 A Yes.

24 Q When were you employed?

25 A I was employed by the City of Battle Creek from 1983 until

## RUSSELL CLAGGETT - DIRECT EXAMINATION - MR. KRETER

1 1995 and then from 1998 through 2014.

2 Q In what capacity were you employed for the City of Battle  
3 Creek?

4 A When I was initially hired I was an assistant city  
5 attorney, and did prosecution, did labor work for the city, and  
6 then when I came back to the city in 1998 I was hired as the  
7 employee relations director.

8 Q And are you licensed to practice law in the State of  
9 Michigan?

10 A I am.

11 Q And were you licensed to practice law at the time you  
12 worked for the City of Battle Creek?

13 A I was.

14 Q What were your job duties when you returned in 1998?

15 A So I had basically two functions: I was employee relations  
16 director but I also was deputy city attorney for labor  
17 relations. So I serve as the city's chief spokesperson with  
18 our nine bargaining units, handled grievances, arbitrations, I  
19 also handled civil rights matters that the city was involved  
20 in. I was involved with police and fire pension board, was  
21 involved with civil service. Just general employee grievances  
22 and so forth. Then also managed the Human Resources Department  
23 and the Risk Management Department.

24 Q How many employees approximately were employed by the City  
25 of Battle Creek, recognizing it varies from time to time?

## RUSSELL CLAGGETT - DIRECT EXAMINATION - MR. KRETER

1 A Yeah. So we were at a high of over 700 at one point but I  
2 think when I had left it was around 450, 500 employees.

3 Q Okay. And what's the management structure for the City of  
4 Battle Creek when you were there?

5 A So Battle Creek is a city manager form of government so we  
6 have a city commission, but the city manager runs the  
7 day-to-day operations of the city. There's an assistant city  
8 manager, so there's a senior staff the city manager hires  
9 directly, and then there are mid-level managers, and then rank  
10 and file employees.

11 Q Can you list some of the senior staff?

12 A So senior staff would be the city manager, assistant city  
13 manager, my position, the director of employee relations, city  
14 attorney, finance director, police chief, fire chief, the  
15 director of the recreation department. Those are who I  
16 remember at this point.

17 Q Can you list some of the mid-level management?

18 A So mid-level managers would have been like our city clerk,  
19 our city assessor, the city income tax administrator, our  
20 captains and lieutenants in the police department, our  
21 battalion chiefs in the fire department, those types of  
22 positions.

23 Q Were the mid-level managers part of the management team?

24 A Yes.

25 Q And would there be meetings with the mid-level managers and



RUSSELL CLAGGETT - DIRECT EXAMINATION - MR. KRETER

1 the senior staff of Battle Creek?

2 A Yes, there would be.

3 Q Okay. And would the battalion chiefs attend those  
4 meetings?

5 A Yes.

6 Q Okay. Were the battalion chiefs considered part of the  
7 management team for the City of Battle Creek?

8 A Yes, they were.

9 Q We have, I don't think I need to show it to you because you  
10 negotiated it, but Joint Exhibit Number 1 is a 15-year contract  
11 with the battalion chiefs that was executed 2007. Were you  
12 involved in that?

13 A I was.

14 Q And the book in front of you is Defendant's Exhibits, and  
15 Exhibits A, B and C are notes in the back which I believe were  
16 made by you. Can you take a second to review that? Were those  
17 notes made by you?

18 A Yes, they were.

19 Q And they were made during the course of bargaining?

20 A Yes.

21 Q Who negotiated the 15-year contract with the battalion  
22 chiefs on behalf of the city?

23 A So I served as chief spokesperson for the city, but they --  
24 the fire chief was also part of the bargaining team, the  
25 finance director, and I believe it was at the time the

## RUSSELL CLAGGETT - DIRECT EXAMINATION - MR. KRETER

1 assistant city manager.

2 Q Okay. Do you recall who served on the negotiating team for  
3 the battalion chiefs?

4 A The entire bargaining unit. So there were two people in  
5 the bargaining unit and Mark Lindaur and Richard Haworth.

6 Q What was the purpose behind this 15-year agreement, the  
7 battalion chiefs?

8 A So the purpose was to really help them understand that they  
9 were part of the management team. We were transitioning from a  
10 situation where we had at one point four battalion chiefs that  
11 were all 24-hour on/48-hour off employees to a situation where  
12 we had two battalion chiefs, both of them would be 40-hour  
13 employees and worked Monday through Friday. So we were  
14 bringing them into the management fold. The contract that we  
15 negotiated in 2007 brought them into our mid-level manager pay  
16 range, I think it was Grade 11. I think there were 14 or 15  
17 grades in our pay scale at that point. So we tied their wages  
18 to what happened as far as any adjustments with the non  
19 represented group. We tied their health insurance to whatever  
20 adjustments were made with the non represented group. So we  
21 really took away some of the big issues that you normally  
22 engage in when you're in bargaining. And so to provide some  
23 stability for both them and for the city, we negotiated a  
24 15-year agreement.

25 Q Was it important that they be part of the management team

## RUSSELL CLAGGETT - DIRECT EXAMINATION - MR. KRETER

1 at that point?

2 A Absolutely.

3 Q Okay. You said there was a transition. Do you know why  
4 there was a transition from the 24/48/53 to the 40-hour  
5 standby?

6 A So part of it was just looking at how we were managing the  
7 fire department. From our perspective it was almost archaic to  
8 still have a manager who would, who would be there and sleeping  
9 with the fire fighters. We wanted them to realize, the fire  
10 fighters in particular, realize that the battalion chiefs were  
11 not part of their bargaining unit. They were part of the  
12 management team. And so we structured them to look exactly  
13 like all of our other managers.

14 Q And in fact do you know if they had responsibilities like  
15 all of your other managers?

16 A Yes, they did.

17 Q And was standby an issue that was discussed during your  
18 negotiations?

19 A It was.

20 Q And just briefly, what discussions did you have?

21 A So for the bargaining unit, it was, it was a major issue.  
22 I think my notes reflect that. You know, on-call was a big  
23 issue. And for us it was important to try to help them with  
24 the transition to the management team, and also recognize that,  
25 you know, in Battle Creek we are essentially a closed system

## RUSSELL CLAGGETT - DIRECT EXAMINATION - MR. KRETER

1 when it comes to promotion within the fire department. We  
2 can't go and post a battalion chief position and hire from the  
3 outside because of our civil service system. We have to hire  
4 from inside. So we were willing to make some concessions on  
5 this extra pay for standby so that the position would still be  
6 attractive to a 53-hour employee coming to a 40-hour work week.

7 Q Okay. So you referred to extra pay not overtime. So was  
8 extra pay a stipend?

9 A Right. It's a stipend for being in a standby status.

10 Q Okay. Do you know if the battalion chiefs with this  
11 contract made less, more, same amount of money than before this  
12 15-year contract?

13 A So they made more from a base salary standpoint because now  
14 they were, I mean we looked at where their current wage fell,  
15 is around 68,000, which fell within the wage range for our  
16 group 11. And then we tied future wage increases to whatever  
17 the non represented employees got. I know non represented  
18 employees did receive pay increases after 2007, so their  
19 compensation did increase.

20 Q Do you know if there is a functional reason in the  
21 operation of the fire department why this was being negotiated?  
22 In other words, why this arrangement was beneficial to the fire  
23 department and its operation?

24 A So I know in talking with the chief, one of the big reasons  
25 was to make a clear demarcation between the rank and file fire

## RUSSELL CLAGGETT - DIRECT EXAMINATION - MR. KRETER

1 fighter group and the administrative team. And so by having  
2 them be on a 40-hour work week, they were just like the chief;  
3 they were part, I mean they are called battalion chiefs, right,  
4 so it sent a clear message to the rank and file that they were  
5 part of the administrative team. We also gave them specific  
6 duties. I believe one of them was the administrative battalion  
7 chief and the other was the suppression battalion chief. And  
8 they had specific duties related to training and other matters.

9 Q And you successfully negotiated a contract.

10 A Yes.

11 Q Okay. Did you in your capacity do any analysis regarding  
12 whether this was in compliance with FLSA?

13 A I did.

14 Q And what analysis did you do?

15 A So I reviewed I believe it's Section 13A1 of the Fair Labor  
16 Standards Act, had conversations with our bargaining team, with  
17 Chief Houseman, and also the city manager would have been  
18 involved in those discussions. But understood that all  
19 employees are considered eligible for overtime unless they fit  
20 one of the exemptions. So we looked at what exemptions did  
21 they fit. We believe they fit both the executive and  
22 administrative exemptions for overtime and minimum wage. They  
23 met the base wage, I mean the base wage is \$24,000 a year, so  
24 they were making 68. But we also looked at what their duties  
25 and responsibilities were. So they were responsible for

## RUSSELL CLAGGETT - DIRECT EXAMINATION - MR. KRETER

1 running the day-to-day operations of the fire department, they  
2 were responsible for training, they were responsible for  
3 staffing in the morning. So if we had to move fire fighters  
4 around because somebody called in sick, or something else  
5 happened, they were responsible for managing the work force.

6 They also would handle day-to-day complaints, concerns  
7 from employees. They also would play a role in the  
8 disciplinary process. Another important role that they played,  
9 because we were a civil service organization, prior to this  
10 contract we had language that said when there was a vacancy in  
11 the battalion chief position we had to select the top  
12 candidate. So once an individual took the test, if they were  
13 the top they got the job. We changed the negotiated language  
14 with the fire fighters bargaining unit so that we could have  
15 one of the top three candidates, and so the battalion chiefs  
16 played a role, a significant role, in advising us on who among  
17 those top three candidates would be the best fit for the  
18 organization to move forward as the battalion chief.

19 BY MR. KRETER:

20 Q And were these policies followed during the rest of your  
21 tenure at Battle Creek?

22 A Yes.

23 Q Did you take into consideration that they were incident  
24 commanders at a fire scene?

25 A Absolutely.

RUSSELL CLAGGETT - CROSS EXAMINATION - MR. ALVAREZ

1 Q If you had believed there was a violation of FLSA would you  
2 have recommended the City of Battle Creek adopt that agreement?

3 A No, I would not.

4 Q Okay. And are you aware that under the law FLSA rights  
5 cannot be waived?

6 A I am.

7 MR. KRETER: I don't have any further questions, Your  
8 Honor.

9 THE COURT: Thank you very much.

10 CROSS-EXAMINATION

11 BY MR. ALVAREZ:

12 Q Mr. Claggett, were any -- you said there were two members  
13 of the bargaining unit for battalion chiefs that were, that  
14 negotiated the contract at that time. Correct?

15 A Yeah, there were only two people in the bargaining unit, so  
16 both members were at the table.

17 Q So there were only two battalion chiefs at the time?

18 A Yes.

19 Q Okay. Were either one of those the plaintiffs?

20 A No.

21 Q Okay. Were either one of those individuals that negotiated  
22 this contract an attorney?

23 A Not to my knowledge, no.

24 Q And they didn't have an attorney representing them during  
25 those negotiations, correct?

## RUSSELL CLAGGETT - CROSS EXAMINATION - MR. ALVAREZ

1 A They did not have an attorney at the table. But I believe  
2 they consulted with an attorney by the name of Ron Helveston.

3 Q But he wasn't there when it was being negotiated, correct?

4 A He was not at the table, no.

5 Q Okay. Take a look at your notes. Exhibit A. You  
6 mentioned that you didn't consider those hours that were being  
7 negotiated outside of the normal schedule as overtime hours.  
8 You called them extra pay, right, or extra hours?

9 A Right.

10 Q But your notes they clearly say OT.

11 A Right.

12 Q What does OT stand for?

13 A So that's how it was presented to me from the bargaining  
14 union. They were claiming it was an overtime issue.

15 Q Okay. And then if you go to Exhibit B, the second page of  
16 your notes in Exhibit B, it comes up again. It says one hour  
17 of OT, does OT mean overtime?

18 A Yes.

19 Q So one hour of overtime, that's what your notes were for.  
20 So they understood it to be overtime. Whether you understood  
21 it to be something different, you're saying this was a term  
22 that they were using, correct?

23 A They, I don't remember everything from 12 years ago at the  
24 bargaining table. I'm sorry.

25 Q But that's what we have your notes for.



## RUSSELL CLAGGETT - CROSS EXAMINATION - MR. ALVAREZ

1 A Right. So my recollection is that for the city, the issue  
2 was the on-call pay. They in the previous contract had gotten  
3 overtime, and one hour of overtime equaled their current pay.  
4 We were converting that to what we call the on-call pay.

5 Q Thank you. Can you go to the Joint Exhibit book? Yes, can  
6 you go to the Joint Exhibit book? Should be on your right.

7 And if you would go to Exhibit Number 1 which is the collective  
8 bargaining agreement with the OSP that we are discussing. If  
9 you go to page 4 under article 6. To be clear, this collective  
10 bargaining agreement, this Exhibit 1, Joint Exhibit 1 is the  
11 collective bargaining agreement that was reached between the  
12 city and the OSP?

13 A Correct.

14 Q Okay. So looking at article 6 under wages, Section 6.3.  
15 What is the heading of that section?

16 A It says overtime pay.

17 Q It doesn't say extra pay, doesn't say extra hours, it says  
18 overtime pay, correct?

19 A Yes.

20 Q So anyone reading this, who especially are not attorneys,  
21 who had already indicated that they saw those extra hours from  
22 your perspective as being overtime, that's what they would look  
23 at, that's, that's how they would reference this.

24 A I don't know how they would reference it. I know what the  
25 language says.

RUSSELL CLAGGETT - CROSS EXAMINATION - MR. ALVAREZ

1 Q But the -- but it says overtime pay, right?

2 A The heading is overtime pay, yes.

3 Q Who drafted this agreement? Who actually typed it out? It  
4 wasn't the two members that were sitting there from the  
5 bargaining?

6 A No, it would have been a joint effort where I think my  
7 office would have drafted. Some of this language changed from  
8 the previous contract. But not all of it. So --

9 Q So your office would have drafted the agreement, the two  
10 other members would have reviewed it and okayed it, made any  
11 suggested changes?

12 A Correct.

13 Q Can you go to in that same book, can you go to Exhibit 2,  
14 so Joint Exhibit 2? Can you flip to the second page on the  
15 index? What's the heading under article Section 6.2?

16 A It says overtime pay.

17 Q And can you please flip to Section 6.2 and the heading of  
18 that section?

19 A Standby pay.

20 Q Now, as I understand it, any hours under either agreement,  
21 any hours that one of the members works outside of their  
22 40 hours, and I'm not talking about when they are on standby, I  
23 understand they have a stipend for that, but when they actually  
24 did respond when they had to show up and actually do something,  
25 they were compensated at a rate of time and a half, correct?

## RUSSELL CLAGGETT - CROSS EXAMINATION - MR. ALVAREZ

1 A Not any time they showed up, so it was only, my  
2 understanding was only if there was an emergency situation.

3 Q If they put it on their time card, they would?

4 A That I don't know. I know what the language said was that  
5 if they were called back for an emergency situation, then they  
6 received extra compensation and we paid them time and a half of  
7 their regular rate.

8 Q And time and a half of a regular rate is under the FLSA  
9 considered what?

10 A It's the standard for overtime pay.

11 Q Thank you. Now, you mentioned after being asked that one  
12 of the reasons that you switched to this was more functional,  
13 that they, from the 24/48 to the 40-hour work week, was because  
14 it was more functional for the fire department, correct?

15 A Right. That's what the fire chief wanted for his  
16 administration.

17 Q Yeah. Because you said it was too archaic to have a  
18 manager because you considered the battalion chiefs management  
19 at that point to be sleeping at the fire house with the fire  
20 fighters, correct?

21 A Yes, that was one of the issues.

22 Q But you know that right now they have gone back to that  
23 archaic system, right now the battalion chiefs do sleep at the  
24 fire house again.

25 A I didn't know that.

## RUSSELL CLAGGETT - CROSS EXAMINATION - MR. ALVAREZ

1 Q Isn't it true that as Chief Houseman testified earlier that  
2 in fact one of the main reasons was budget wise. Kelloggs had  
3 just left the City of Kalamazoo (sic), and there was a downturn  
4 in the economy. Is that correct?

5 A During what time period are you talking about? When we  
6 negotiated the 2007 agreement?

7 Q Yes.

8 A So I know from a budget standpoint we were looking for  
9 coverage during the week and so that is my understanding why we  
10 went to the 40-hour positions. We already had one I believe  
11 prior to that time, and we made then two. We already had gone  
12 from having four battalion chiefs to two. So I mean I know the  
13 city had some budget issues towards the end of my career. I  
14 mean we did have a point where staff didn't get a pay increase,  
15 there were some furloughs for staff during one year. I don't  
16 remember what year it was. I don't remember if it was during  
17 2007 or not, no.

18 Q That's fine. But at the time there were only two battalion  
19 chiefs when this system was enacted, correct?

20 A Yes.

21 Q So under that system those two battalion chiefs would have  
22 had to work alternating weeks with the chief on that standby  
23 system, correct?

24 A I'm not exactly sure how that worked.

25 Q Okay. Did the city save money by going from the 24/48

## RUSSELL CLAGGETT - CROSS EXAMINATION - MR. ALVAREZ

1 system to this new standby system?

2 A I honestly couldn't tell you if there was a savings. I  
3 just don't know.

4 Q Well, let's think about this math wise. If you have two  
5 people, well, three people that are alternating and working  
6 24-hour days, seven days a week, but you're only paying them  
7 for 40, plus a few hours here and there that they show up to an  
8 emergency at time and a half, versus paying them for the entire  
9 24 hours for seven days a week, there's a big difference in the  
10 amount of money that's being paid out, correct?

11 MR. KRETER: Your Honor, I'm going to object to the  
12 question because it doesn't take into consideration all the  
13 factors such as Mr. Claggett testified the battalion chiefs got  
14 increases.

15 THE COURT: I agree with defense counsel, Mr. Alvarez.  
16 I think that, number one, I think it's a little unfair to the  
17 witness, but number two, I think that it lacks a sufficient  
18 foundation for him to be able to draw any conclusions. I  
19 think, I don't think there's anybody in this courtroom except  
20 maybe the finance person from the city who has the math skills  
21 with that limited amount of information to answer that question  
22 with any degree of reliability. So the objection is sustained.

23 MR. ALVAREZ: Thank you, Your Honor.

24 BY MR. ALVAREZ:

25 Q You said when you -- because you're an attorney, correct?

RUSSELL CLAGGETT - CROSS EXAMINATION - MR. ALVAREZ

1 A Yes.

2 Q And you were an attorney then when this agreement was being  
3 negotiated?

4 A Yes.

5 Q And you said that what you did to determine whether the  
6 positions of battalion chief were exempt from overtime was you  
7 reviewed the statute.

8 A Correct.

9 Q Okay. That was all you did, right, you reviewed the  
10 statute, you compared the statute and the exemptions outlined  
11 in the statute with what you were being told the duties were of  
12 the battalion chiefs?

13 A So what I recall is not only looking at the statute but  
14 there are also guidelines. We had a Fair Labor Standard  
15 handbook series in our Human Resources office. I also  
16 referenced that. So I mean that's what I remember doing.

17 Q Okay. You didn't go to Westlaw or Lexis and look up any  
18 cases, did you?

19 A I don't remember if I did or not. I couldn't --

20 Q You didn't get any opinions from any outside counsel.

21 A I don't believe we did, no.

22 Q And did you do an evaluation every year to see if they  
23 still remained exempt?

24 A I don't recall doing that, no.

25 Q Okay. Because this was a fairly new system, right, going

1 to this week on/week off standby system was new.

2 A Again --

3 Q To the City of Battle Creek.

4 A I don't know about the week on/week off. I don't know how  
5 they operated the standby piece. So I can't --

6 Q But they weren't doing it before because they were on the  
7 24/48-hour system. Correct?

8 A I think one of them was. I'm not sure about the 40-hour  
9 battalion chief, if that person also may have responded to  
10 emergencies, et cetera, so I'm not positive on that.

11 Q So after this agreement was implemented, neither you or  
12 anyone at the city, or at least not you that you know of, did a  
13 reevaluation of what was actually being done during that  
14 standby time and whether it met the exemption standards of the  
15 FLSA, correct?

16 A So I never did a formal review. But I knew what existed  
17 when we made, when we entered into the collective bargaining  
18 agreement, and I was not aware of any changes once we made that  
19 decision.

20 MR. ALVAREZ: Thank you. Thank you, Your Honor.

21 THE COURT: Any redirect?

22 MR. KRETER: No, Your Honor.

23 THE COURT: Thank you, Mr. Claggett. Thank you for  
24 your testimony. You're excused. Mr. Kreter.

25 MR. KRETER: Your Honor, we have no more witnesses so

1 we rest. I would ask that Mr. Claggett be excused as a witness  
2 so that he can remain in the courtroom.

3 THE COURT: Sure. Mr. Alvarez, any objections?

4 MR. ALVAREZ: No objections, Your Honor.

5 THE COURT: Any rebuttal, Mr. Alvarez?

6 MR. ALVAREZ: No, Your Honor.

7 THE COURT: Okay. All right. Let's commence with  
8 closing arguments. And keep in mind, if you would, please,  
9 that I have been taking copious notes. I think that I am  
10 relatively conversant in your arguments, and it is not  
11 necessary for my purposes that you be exhaustive in your  
12 arguments, but only that you, shall we say, hit the high  
13 points. Okay.

14 MR. ALVAREZ: Your Honor, I will be  
15 uncharacteristically brief.

16 THE COURT: If only.

17 MR. ALVAREZ: And in the spirit of brevity, Your  
18 Honor, I will simply request to incorporate my response to the  
19 directed verdict motion into this closing and focus on just a  
20 couple of things.

21 With regard to the testimony that we heard today from  
22 Chief Houseman, I would like the Court to note that he did  
23 indicate that the first reason that he mentioned for the change  
24 was that there were financial constraints. That it was because  
25 the city was in an economic downturn because Kellogg had left,



1 and that this was a way to save money. Because the city was  
2 having financial issues.

3 And even though Chief Houseman did say a couple of  
4 times that he did not, that there was no expectation from him  
5 that the radio be monitored, contrary to what Mr. Holt has  
6 testified to was a directive given to him by Chief Houseman,  
7 Chief Houseman did testify that he did have with him pretty  
8 much at all times even when he was mowing the lawn his radio  
9 because he was monitoring it. And I believe he even mentioned  
10 that he had some sort of monitor or scanner that was on at all  
11 times.

12 So he may have said that it wasn't his expectations,  
13 but the reality was that he was monitoring the radio, and it  
14 lends credibility to Mr. Holt, Mr. Holt's testimony that he was  
15 instructed to also monitor the radio. Including when  
16 Mr. Erskine said in his testimony that he was called a couple  
17 of times by the chief who had been monitoring the radio when he  
18 was on standby.

19 In fact, Chief Houseman said that monitoring the radio  
20 was a part of the job. That was his testimony, and that he  
21 expected them to respond 24/7. Chief Houseman did testify that  
22 he believed but wasn't sure that he had changed the directives  
23 to have a four-man fire engine, but, and Mr. Holt's testimony,  
24 I mean Mr. Erskine's testimony when we reviewed the CBA with  
25 the local fire fighters union, it specifically stated that

1 there was a three-man fire engine, thereby making a responding  
2 battalion chief a member of the two-in/two-out rule.

3 And, Your Honor, one final note that I know I've  
4 reiterated this many times but I want to be very clear for the  
5 record. That if it walks like a duck and it talks like a duck,  
6 it has to be battalion chief. In this case we have had  
7 exhaustive testimony not just from the plaintiffs but from  
8 Chief Schmaltz and Chief Houseman about the fact that when they  
9 were on standby time, during that period of time between 2012  
10 and 2015, they were working. They were required or permitted  
11 to work. They were required to actively monitor or listen to  
12 the radio, to the alarm, and they never knew when a call was  
13 going to come in, whether at 6:00 o'clock in the evening, in  
14 the middle of dinner, or at 3:00 o'clock in the morning.  
15 That's work. They're engaged to wait. They were not waiting  
16 to be engaged. They are engaged to wait at that point. And  
17 though the defendant is arguing that they're exempt because  
18 they're supervisors, executive, or administratively exempt, the  
19 factor remains, Your Honor, that for either one of those tests,  
20 you have to consider what the primary duty was, and as I  
21 mentioned earlier in my response to the motion for directed  
22 verdict, the primary duty of a battalion chief is to respond to  
23 fires. And they did. And they even put out fires. And they  
24 responded to multiple vehicle accidents. They had to have  
25 their gear. They had to have their radios. And, yes, maybe

1 they didn't carry a self-contained breathing apparatus but it  
2 was on the engines. So just like anyone else, they could have  
3 grabbed one and jumped in.

4 Most I think noteworthy is the fact that not anyone  
5 can be a battalion chief. Chief Houseman, Chief Schmaltz, they  
6 both said, you have to be a fire fighter. You have to have the  
7 training. Chief Hampton cannot participate in the rotation  
8 because he was not a fire fighter. He didn't have the  
9 training. So apparently anyone can be a fire chief, but you  
10 need to be a fire fighter to be a battalion chief.

11 And I think that goes to the heart of their defense,  
12 Your Honor. That if the primary duty, if everything else that  
13 is a part of their functions, that is a part of their job  
14 description falls to one side, the minute that siren goes off,  
15 the minute that radio goes off, the minute a call comes in,  
16 then that's the primary function. Because we are not talking  
17 about widget, we are not talking about selling services, we are  
18 talking about saving lives. And as Mr. Holt testified, time is  
19 of the essence. Every minute counts. And that's why they have  
20 to be fire fighters to be battalion chiefs.

21 And that's why, Your Honor, we request this Court find  
22 in favor of the plaintiffs, find that they were working  
23 overtime, that the hours that they spent during the standby  
24 time was work that should have been compensated, that they were  
25 not exempt under either the executive or the administrative and

1 that they be compensated for that time at a rate of time and a  
2 half.

3 And as to liquidated damages, I do not believe that  
4 the defendants have provided sufficient evidence to counter  
5 that almost mandatory requirement of liquidated damages.

6 Mr. Claggett testified that he looked at the statute,  
7 looked at a desk book that he had on FLSA when they were  
8 negotiating the agreement. He did no additional research. He  
9 sought no additional opinions.

10 THE COURT: Well, he said he didn't remember if he  
11 did, Mr. Alvarez. Let's be fair to him.

12 MR. ALVAREZ: Sure. So he said he didn't remember.  
13 You would think something as important as that he would have  
14 remembered.

15 THE COURT: That was a long time ago. Good heavens,  
16 it's more than ten years ago.

17 MR. ALVAREZ: Your Honor, he remembered many other  
18 details, Your Honor. But that's fine. Either way, he said  
19 that he didn't believe that he did any other assessment after  
20 the contract went into implementation. So from 2007 until  
21 2015, well, until he was no longer working for the department,  
22 I can't remember what date that was, he does not believe that  
23 they did any further assessment. So how could he recommend  
24 that the city pay or compensate for those hours if there was no  
25 future, no further assessment done?

1                   And so, Your Honor, on that basis, plaintiff rests.

2                   THE COURT: Thank you very much, Mr. Alvarez.  
3                   Mr. Kreter, closing please.

4                   MR. KRETER: Thank you, Your Honor. Couple quick  
5                   points. One, we believe Mr. Claggett's testimony is sufficient  
6                   to prove good faith. Two, good faith is separate from a  
7                   willful violation. Willful violation extends the period from  
8                   two years to three years. There has been no evidence  
9                   whatsoever of any willful violation, and that Mr. Alvarez did  
10                  not even make comment in his final argument about willful  
11                  violation. So certainly we got down there, that claim should  
12                  absolutely be dismissed.

13                  I'm going to go right back to where I think this case  
14                  is. It's these are exempt employees. I said at the beginning  
15                  of trial yesterday: Manage, lead and direct were the key  
16                  words. I've got two key words: Primary duty. If you look at  
17                  the elements of executive, the first element, whether  
18                  plaintiffs's primary duty is management in the Battle Creek  
19                  Fire Department. If we go to administrative, the first element  
20                  in dispute, whether plaintiffs's primary duty was the  
21                  performance of office or nonmanual work directly related to  
22                  management or general business operations of the Battle Creek  
23                  Fire Department. If we go to the final element that's in  
24                  dispute is whether plaintiffs's primary duty included the  
25                  exercise of discretion, independent judgment, and respect to

1 matters of significance.

2 All I heard for a day and a half from plaintiff are  
3 exceptions to the rule. The exception they had to respond to  
4 a, to an automobile accident on I-94 which we have covered. It  
5 was a 192-car pileup. The exception that they had to respond  
6 to I think a barrel fire and then a cement mixer fire. That's  
7 all we heard. Those exceptions do not become their primary  
8 duty. And the fact that they are able to fight a fire and  
9 carry some gear with them in the event of a catastrophic  
10 situation that does not make that their primary duty.

11 I think the testimony of Chief Houseman was compelling  
12 that they managed, lead, and direct. And he relied on them.  
13 Chief Schmaltz said the same thing.

14 I think it's also important to note that what I feel  
15 are the three key witnesses for us, Chief Schmaltz, we didn't  
16 call him, Chief Houseman, and Mr. Claggett, all no longer work  
17 for the city. They don't have any, as the expression, skin in  
18 the game anymore. They have, they are telling it to the best  
19 of their ability. They're testifying to the best of their  
20 recollection as to what actually happened.

21 And all three witnesses support that these were part,  
22 these battalion chiefs were part of the management team. They  
23 had discretion, they had important roles and functions, and  
24 they ran the day-to-day operations of the Battle Creek Fire  
25 Department which consisted of 75 to 90 people.

1                   And finally, most importantly, the most important  
2 activity that they do, they drop everything if there's a fire,  
3 all stations fire, they go to the scene, and they control the  
4 scene. They apply everything they know. Every protocol that  
5 the Battle Creek Fire Department has developed, their  
6 experience, their intuitiveness, whatever it takes, they're in  
7 charge of the scene. They manage, lead, and direct. And I  
8 think that is decisive in finding that both Mr. Holt and  
9 Mr. Erskine are exempt.

10                   I'm not going to address standby. I addressed it  
11 earlier. I know Your Honor is well aware of our position with  
12 standby and whether it's onerous. I would only say that both  
13 chiefs supported our position that is not onerous when they  
14 provided testimony.

15                   And, therefore, we would ask that the Court dismiss  
16 plaintiffs's case in toto.

17                   THE COURT: Thank you very much, Mr. Kreter. Any  
18 rebuttal?

19                   MR. ALVAREZ: Very brief, Your Honor. Defendant  
20 states that those times when they had to respond to an  
21 emergency situation was the exception to the rule. The  
22 problem, Your Honor, is that the rule was also that a fire  
23 fighter had to respond to those emergency calls. Chief  
24 Hampton, acting Chief Hampton couldn't respond, the current  
25 acting chief can't respond because they are not fire fighters.

1           As far as them being considered part of the management  
2 team, if that's true, and if they really were the right-hand  
3 man of the fire chief, why wasn't it that no battalion chief in  
4 this entire time has been stepped up to act as a fire chief in  
5 the interim? Even now they pull in the Chief of Police to  
6 manage the fire department.

7           As far as their primary duty, Your Honor, if we are  
8 going to go based on exactly everything that they are doing  
9 during the day, then, Your Honor, fire fighters, as Chief  
10 Houseman testified to, for the most part are cleaning, mopping,  
11 and doing other chores at the fire house. Does that make them  
12 house keepers? No. They're fire fighters. Exactly like the  
13 battalion chiefs.

14           Thank you, Your Honor.

15           THE COURT: Thank you. Thank you all. I am going to  
16 take about a half an hour and I am going to then come back and  
17 I'm going to give you my ruling in this case. First I have to  
18 collect my notes. So I'll be back here about quarter of  
19 3:00 if anybody wants to hear what I have to say. We are  
20 adjourned until then.

21           THE LAW CLERK: All rise, please. Court is in recess.

22           (Recess taken, 2:21 p.m.; Resume Proceedings,  
23 2:59 p.m.)

24           THE LAW CLERK: All rise, please. Court is now in  
25 session. You may be seated.



1 THE COURT: What follows is my bench opinion in case  
2 number 1:15cr931, Howard Holt and Martin Erskine versus the  
3 City of Battle Creek.

4 This matter was tried to the Court on August 22nd and  
5 23, 2018 on plaintiffs's claims against the defendant, City of  
6 Battle Creek, for unpaid wages, compensable under the Fair  
7 Labor Standards Act, FLSA, 20 U.S.C. 201 et seq. The Court has  
8 carefully reviewed the facts to which the parties stipulated at  
9 the final pretrial conference on August 13, 2018, the proposed  
10 findings of fact and conclusions of law the parties submitted  
11 before trial, and the testimony and exhibits admitted at trial.

12 This opinion contains the Court's findings of fact and  
13 conclusions of law in accordance with Federal Rule of Civil  
14 Procedure 52(a).

15 The Court determines that the City of Battle Creek is  
16 entitled to a judgment in its favor as follows:

17 Findings of fact: Plaintiffs Howard Holt and Martin  
18 Erskine served as battalion chiefs for the defendant, City of  
19 Battle Creek's Fire Department. Holt was employed as one of  
20 the Battle Creek Fire Department -- I'll refer to that as BCFD  
21 going forward, battalion chiefs from November 20, 2007, until  
22 his voluntary retirement on February 13, 2015.

23 Erskine has been continuously employed as one of the  
24 Battle Creek Fire Department's battalion chiefs since June 8,  
25 2012.

1                   From April 2013 to July 2014, plaintiffs were the only  
2 two battalion chiefs in the fire department. Battle Creek  
3 developed a detailed job description for the position of  
4 battalion chief for the relevant time period at issue.

5                   Battle Creek also issued a departmental directive  
6 concerning the position of battalion chief including the  
7 positions of administrative battalion chief, the position held  
8 by Erskine, and suppression battalion chief, the position held  
9 by Holt. Within the Battle Creek Fire Department, battalion  
10 chiefs were second in chain of command behind the chief, but  
11 ahead of captains, lieutenants, and fire fighters respectively.  
12 The City of Battle Creek has approximately 75 to 90 members of  
13 the fire department.

14                   Chief Larry Houseman was fire chief for the BCFD from  
15 1997 through April 26, 2013. Chief Jackie Hampton was fire  
16 chief of the BCFD from April 26, 2013, through January 31,  
17 2014. Chief Arthur David Schmaltz was fire chief for BCFD from  
18 approximately February 1, 2014, through the time period during  
19 which the standby system was in place.

20                   For all relevant time periods, plaintiffs's work week  
21 was 40 hours. Plaintiffs allege that as part of their duties  
22 and responsibilities, they were required to be on standby duty  
23 or standby status for certain periods of time during their  
24 employment.

25                   Under the standby system, which was in place until

1 May 1, 2015, standby began at 5:00 p.m. and continued until  
2 8:00 a.m. the following morning. Standby generally rotated  
3 every seven days. Through Chief Houseman's tenure as fire  
4 chief, he rotated standby with the two battalion chiefs,  
5 including plaintiffs.

6 Plaintiffs were on standby approximately once every  
7 three weeks until May 1, 2013.

8 Chief Hampton was unable to be on standby, therefore,  
9 from May 1, 2013, through July 1, 2014, plaintiffs were on  
10 standby approximately every other week. However, once Chief  
11 Schmaltz assumed the position of fire chief, and moved closer  
12 to Battle Creek, he began taking a turn on standby returning  
13 plaintiffs to approximately once every three weeks of standby  
14 time from July 1, 2014, through May 2, 2015.

15 While employed as battalion chiefs, plaintiffs were  
16 members of a bargaining unit represented by the Organization of  
17 Supervisory Personnel, OSP, of the Battle Creek Fire  
18 Department. In fact, Holt was the president of the  
19 organization, Erskine was the vice president. A different  
20 bargaining unit represented the other employees of the BCFD.  
21 The Organization of Supervisory Personnel in Battle Creek  
22 negotiated the terms and conditions of plaintiffs's employment,  
23 as memorialized by the parties collective bargaining agreement,  
24 CBA, dated July 1, 2007, entitled "Contract Between the City of  
25 Battle Creek and the Organization of Supervisory Personnel of

1 the Battle Creek Fire Department."

2 With regard to standby status and overtime, the  
3 parties' CBA provides the following:

4 Section 6.2, Standby Pay. In the event that the city  
5 requires bargaining unit members to act in a standby status,  
6 such members will be entitled to one hour of pay at one and a  
7 half times their regular rate of pay for each day spent in  
8 standby status. If the standby status occurs on a weekend or  
9 holiday, the employee shall be entitled to two hours of pay at  
10 a rate of time and one half times their regular hourly rate of  
11 pay.

12 Section 6.3, Overtime Pay. Employees, who are called  
13 back to duty for an emergency, as defined by the fire chief,  
14 shall receive pay for all actual hours worked at one and a half  
15 times their regular hourly rate of pay. Bargaining unit  
16 members are considered overtime exempt except for the stipend  
17 for on-call status and the stipend for emergency call-in. All  
18 other work assignments conducted after what is considered  
19 normal working hours is administrative work and shall not be  
20 subject to overtime payment.

21 The parties agree that "for all relevant time periods,  
22 plaintiffs each received all required standby pay contractually  
23 mandated under the CBA."

24 Similarly, the parties agree that "for all relevant  
25 time periods, plaintiffs each received all required overtime

1 pay contractually mandated under the CBA."

2 The CBA remained in full force and effect until  
3 April 2, 2015, when a superseding agreement was reached between  
4 Battle Creek and the OSP. "The 2015 CBA". After entering into  
5 the 2015 CBA, effective May 2, 2015, no battalion chiefs,  
6 including Erskine, were required to be on standby time for a  
7 week at a time because battalion chiefs worked shift-based  
8 schedules.

9 On September 12, 2015, plaintiffs initiated this case,  
10 alleging that during their standby status, they worked hours in  
11 excess of the hourly levels specified in the FLSA, and are  
12 entitled to overtime compensation at a rate of not less than  
13 one and one and a half times their regular rate of pay for the  
14 hours of overtime they have worked.

15 Relying on 29 U.S.C. 216(b), plaintiffs seek their  
16 unpaid wages plus an additional equal amount in liquidated  
17 statutory damages along with costs and reasonable attorney  
18 fees.

19 The parties were unsuccessful in their attempt to  
20 mediate a resolution of this case in May of 2016. On  
21 February 14, 2017, this Court denied defendant's motion to  
22 dismiss in favor of arbitration. On February 6, 2018,  
23 following discovery, this Court denied defendant's motion for  
24 summary judgment. On March 2, 2018, the parties participated  
25 in a settlement conference which was also not successful in

1 resolving this case. Last, on July 9, 2018, the parties  
2 participated in voluntary facilitative mediation which was not  
3 successful in resolving the case.

4 Conclusions of law. And to the extent that any of the  
5 following conclusions of law constitute findings of fact, they  
6 are hereby adopted as such.

7 The FLSA prohibits, for qualifying employees  
8 employment "for a work week longer than 40 hours unless such  
9 employee receives compensation for his employment in excess of  
10 the hours above specified at a rate not less than one and one  
11 half times the regular rate at which he is employed." 29  
12 U.S.C. 207(a)(1).

13 The parties do not dispute that at all relevant times  
14 that Battle Creek was an employer and the plaintiffs were  
15 employees of the Battle Creek within the meaning of the Act.  
16 There are three potential issues for this Court's resolution:

17 First, the applicability of the two FLSA exemptions,  
18 second, in the event that neither of the exemptions applies,  
19 liability, and finally, damages.

20 The FLSA exemptions. The FLSA expressly does not  
21 apply to "any employee employed in a bona fide executive,  
22 administrative, or professional capacity." 29 U.S.C.  
23 213(a)(1).

24 An exemption is an affirmative defense and an employer  
25 seeking to assert one "must establish through 'clear and

1 affirmative evidence' that the employee meets every requirement  
2 of the exemption." Hughes versus Gulf Interstate Field  
3 Services, Inc., 878 F.3d 183 at 188, Sixth Circuit 2017,  
4 citations omitted.

5 In April 2018, the Supreme Court rejected the  
6 principle that exemptions to the FLSA should be "narrowly"  
7 construed. Encino Motorcars, LLC versus Navarro, 138 Supreme  
8 Court, 1134 at 1142, 2018.

9 The Supreme Court reasoned that "because the FLSA  
10 gives no textual indication that its exemptions should be  
11 construed narrowly, there is no reason to give them anything  
12 other than a fair rather than a narrow interpretation." Id.

13 Defendant argues that plaintiffs's FLSA claim must  
14 fail because plaintiffs are exempt from the Act's coverage  
15 under either the "executive" or "administrative" exemptions of  
16 the act. To the act. The Court agrees.

17 The executive exemption. The Secretary of the  
18 Department of Labor promulgates rules to govern whether an  
19 employee qualifies for a particular exemption. The parties  
20 agree that under the governing regulation, 29 CFR 541.100, an  
21 employee falls within the executive exemption where the  
22 following four requirements are met: (1) the employee receives  
23 a salary of not less than \$445 each week, (2), the employee's  
24 primary duty, I'm sorry, (2), the employee's "primary duty is  
25 management of the enterprise" of the employer. (3), the

1 employee "customarily or regularly directs the work of two or  
2 more employees", and (4), the employee "has the authority to  
3 hire or fire other employees or whose suggestions and  
4 recommendations as to hiring, firing, advancement, promotion,  
5 or any other change of status of other employees are given  
6 particular weight."

7 Only the second and fourth elements are at issue in  
8 this case. Whether plaintiffs's primary duty is management of  
9 the enterprise, and whether plaintiffs have authority to hire,  
10 or fire other employees, or whose suggestions and  
11 recommendations as to hiring, firing, advancement, promotion,  
12 or any other change of status of other employees are given  
13 particular weight.

14 Relevant to plaintiffs's "primary duty", defendants  
15 submitted that plaintiffs's duties and responsibilities as  
16 battalion chiefs are executive in nature as evidenced by the  
17 job description developed by Battle Creek. See the Defendant's  
18 Exhibit G, the relevant Standard Operating Procedures developed  
19 by the fire department, and the expectations and directives of  
20 acting fire chiefs. Specifically, plaintiffs were required to  
21 directly supervise lower-ranking officers and personnel,  
22 evaluate personnel, administer and enforce department policy,  
23 and coordinate the day-to-day operations of the department.  
24 Despite some selective quotes highlighted by plaintiffs's  
25 counsel in an attempt to emphasize similarity, the job



1 descriptions of the battalion chiefs in comparison to the job  
2 descriptions of the fire captains and lieutenants were in fact  
3 quite different. See Joint Exhibits 5 and 6 and Plaintiff's  
4 Exhibit 5 and 6. A point further explicated by Russell  
5 Claggett, who was formerly employed by Battle Creek as its  
6 director of employee relations.

7 The testimony of Chief Houseman and plaintiff Holt was  
8 clear that the work of the fire department is to suppress fires  
9 and the primary duty of the battalion chiefs was to "take  
10 charge" and operate as "the incident commanders at the scene of  
11 a fire."

12 Chief Houseman testified that fire chiefs and  
13 battalion chiefs were not counted within the "two-in/two-out"  
14 rule. The fire chief and battalion chiefs dress differently  
15 from the fire fighters, per Standard Operating Procedure. See  
16 Defendant's Exhibit T. The battalion chiefs were separate and  
17 apart from the bargaining unit that bargained on behalf of the  
18 fire fighters and other personnel, and per the director of  
19 employee relations, Claggett, were more highly compensated from  
20 a "base salary standpoint".

21 Chief Schmaltz and Chief Houseman both testified that  
22 plaintiff Holt was "in charge" of all suppression personnel and  
23 plaintiff Erskine was "in charge" or "oversaw" the training  
24 division. Approximately 27 lieutenants and captains directly  
25 reported to plaintiff Holt who monitored their adherence to

1 standards. Moreover, Chief Houseman testified that if any fire  
2 fighter "had a problem" he or she would take it to plaintiff  
3 Holt.

4 Both Chief Schmaltz and Chief Houseman described the  
5 management of the department as a "team effort" by fire chiefs  
6 and the battalion chiefs.

7 Chief Schmaltz referred to plaintiffs as "his senior  
8 staff".

9 Defendant's Exhibit II contains e-mails from Chief  
10 Schmaltz asking for input from the battalion chiefs, Re, fire  
11 department standard operating procedures, and Chief Houseman  
12 similarly testified to discussing operating procedures with  
13 plaintiffs.

14 Chief Schmaltz testified that he did not use the  
15 phrase "standby system" but instead called it the "duty chief  
16 system". Indeed, plaintiffs characterize themselves in a  
17 June 4, 2014, letter to Chief Schmaltz as members of the fire  
18 department "management". Defendant's Exhibit R.

19 Chief Houseman and plaintiff Holt both testified that  
20 part of the battalion chief job was to set forth for the  
21 department "what they hoped would transpire during the day".

22 Plaintiff Holt agreed that the battalion chiefs  
23 oversaw the department to make sure it was running smoothly on  
24 a day-to-day basis. Plaintiff Holt characterized himself as  
25 the "go between" between the city and/or the fire chief.

1 Although he testified that fire fighters, in practice, often  
2 went around him because of the city's open door policy.

3 Plaintiff Holt testified that Chief Hampton, who was  
4 responsible for not only the fire department but also the  
5 police department, was a "hands off" chief. Plaintiff Holt  
6 testified that Chief Hampton relied on plaintiffs to run the  
7 day-to-day operations of the fire department. "If anything big  
8 pops up, let me know."

9 Last, Director of Employee Relations Claggett also  
10 explained how battalion chiefs were made part of the  
11 "management team" for the City of Battle Creek.

12 The Court concludes that defendant established through  
13 clear and affirmative evidence that the plaintiffs's primary  
14 duty as battalion chiefs is "management of the fire  
15 department".

16 Regarding the second requirement, authority re,  
17 hiring, firing, advancement and promotion, and change in  
18 status, plaintiff Holt testified that battalion chiefs do not  
19 have the ability to hire, fire or suspend fire fighters.  
20 However, Chief Houseman testified that plaintiff Holt was the  
21 person who was responsible for oral and written disciplinary  
22 proceedings of the fire fighters, and that Holt issued the  
23 "majority" of the discipline in the department. Chief Houseman  
24 testified that he gave "a lot of weight" to plaintiff Holt's  
25 recommendation, that he did "not operate in a vacuum".

1 Chief Houseman also specifically testified that  
2 plaintiff Erskine, the administrative battalion chief, was  
3 responsible for managing vacation and "Kelly days" in the  
4 department.

5 Similarly, Chief Schmaltz testified that while the  
6 battalion chiefs could not hire, fire, or suspend fire  
7 fighters, he would use the battalion chiefs's recommendations.  
8 He testified that he specifically requested plaintiffs's input  
9 concerning personnel decisions. Indeed, plaintiff Holt  
10 conducted employee evaluations. An October 23, 2014, e-mail  
11 from Chief Schmaltz to plaintiff Holt within Defendant's  
12 Exhibit HH delineates 13 evaluations for which Holt was then  
13 responsible. Plaintiffs were provided with the various  
14 eligibility lists established by the Civil Service Commission  
15 for entry level fire fighters, and per Claggett, plaintiffs  
16 played a "significant role" in advising the city on who among  
17 the top candidates would be the best for the organization.

18 The Court concludes that the defendant established  
19 through clear and affirmative evidence that plaintiffs also  
20 meet the last requirement of the executive exemption: That  
21 their suggestions and recommendations as to hiring, firing,  
22 advancement, promotion or any other change of status of other  
23 employees were given "particular weight".

24 Therefore, giving the executive exemption a fair  
25 interpretation, the Court concludes that plaintiffs fall within

1 the executive exemption from the FLSA's overtime compensation  
2 obligation.

3 The administrative exemption. The second FLSA  
4 exemption at issue is for individuals "employed in a bona fide  
5 administrative capacity". 29 U.S.C. 213(a)(1).

6 The parties agree that an employee working in a bona  
7 fide administrative capacity is someone, (1), compensated on a  
8 salary or fee basis at a rate of not less than \$455 per week;  
9 (2), whose primary duty is the performance of office or  
10 nonmanual work directly related to the management or general  
11 business operations of the employer, or the employer's  
12 customers, and (3), whose primary duty includes the exercise of  
13 discretion and independent judgment with respect to matters of  
14 significance. 29 CFR 541.200(a).

15 Only the second and third requirements are in dispute:  
16 Whether "plaintiffs's primary duty is the performance of office  
17 or nonmanual work directly related to the management or general  
18 business operation of the employer or the employer's  
19 customers," and whether their "primary duty includes the  
20 exercise of discretion and independent judgment with respect to  
21 matters of significance."

22 Plaintiff Holt testified that he was "always a fire  
23 fighter", and that his job included responding to calls related  
24 to fire or medical emergencies which required manual work.  
25 However, drawing from the BCFD Incident Command Procedure,

1 Defendant's Exhibit P, defendant demonstrated that plaintiffs's  
2 primary duty was in fact work other than physically fighting  
3 fires, i.e., nonmanual work. Specifically, plaintiff Holt  
4 testified that battalion chiefs generally remain in their cars  
5 during an incident, that the battalion chief's car is "command  
6 central" at the fire scene. Plaintiff Holt testified that  
7 battalion chiefs would not put on their fire gear unless they  
8 were getting out of their car. Plaintiff Holt agreed that his  
9 duty was to evaluate the situation, receive input from the fire  
10 crew, provide tactical objectives, and review and revise the  
11 incident accident plan as needed, i.e., nonmanual work.

12 Indeed, plaintiff Holt conceded that when a fire crew  
13 was on the scene, he "probably never" physically suppressed a  
14 fire as a battalion chief.

15 During his deposition Chief Houseman, whom the Court  
16 found to be very credible, was specifically, also specifically  
17 described the battalion chief's job as to "manage, lead, and  
18 direct". He specifically rejected the proposition that the  
19 battalion chief's primary work was either "manual" or  
20 "physical".

21 Chief Houseman emphasized that while trained as fire  
22 fighters, battalion chief's job description did not include  
23 fighting fires.

24 Therefore, the Court concludes that the defendant  
25 established through clear and affirmative evidence that

1 plaintiffs's primary duty was the performance of nonmanual work  
2 directly related to the management of the fire department.

3 Turning to the next element, whether plaintiffs's  
4 primary duty included the exercise of discretion and  
5 independent judgment with respect to "matters of significance".  
6 Plaintiff Holt testified that the battalion chiefs did not  
7 exercise discretion. For example, plaintiff Holt testified  
8 that he "ran everything through Chief Houseman" who was a  
9 "hands on chief". Plaintiff Holt testified that even under  
10 Chief Schmaltz, Holt had "very little authority".

11 Plaintiff Holt testified that he had "no power to buy  
12 anything" and pointed to an e-mail he sent to Chief Schmaltz  
13 with price quotes. Plaintiff's Exhibit 1. Plaintiff Holt  
14 testified that he did not have the authority to transfer fire  
15 fighters and pointed to an e-mail he sent to Chief Schmaltz to  
16 find out "if he wanted me to ask for more volunteers".  
17 Plaintiff's Exhibit 1. Plaintiff Holt testified that he could  
18 not tell a fire fighter he could not take a vacation day.

19 However, defendant demonstrated that plaintiffs  
20 exercised independent judgment and discretion in accomplishing  
21 their duties even if the ultimate decision maker was the fire  
22 chief.

23 Significantly, Chief Schmaltz testified that  
24 plaintiffs were his "right hand men", that he allowed them to  
25 exercise "independent judgment" and gave them "latitude to make

1 decisions". Chief Houseman similarly praised plaintiffs for  
2 their work ethic and opined that he gave them latitude to  
3 perform their jobs. Plaintiff Holt agreed that his duty was to  
4 independently evaluate an incident with input from the fire  
5 crew, provide tactical objectives, and review and revise the  
6 incident action plan as needed within his discretion.

7 Plaintiff Holt agreed with the Court's questioning  
8 that he was "in charge" of the scene and that he, the person  
9 who bore the ultimate responsibility, would take the blame for  
10 anything that went wrong.

11 Last, the evidence and the Court's analysis of the  
12 evidence in support of plaintiffs's management responsibilities  
13 described earlier also applies here. The Court concludes that  
14 defendant also established the last requirement through clear  
15 and affirmative evidence that plaintiffs's primary duty  
16 included the exercise of discretion and independent judgment  
17 with respect to matters of significance.

18 Therefore, giving the administrative exemption a fair  
19 interpretation, the Court concludes that plaintiffs work in a  
20 bona fide administrative capacity, and, therefore, also fall  
21 within the administrative exemption from the FLSA's overtime  
22 compensation obligation.

23 In sum, plaintiffs having achieved the position of  
24 second in command at the Battle Creek Fire Department, were not  
25 "merely fire fighters" and do not come within the purview of



1 the Act. Rather, they fall clearly and directly within the  
2 executive and administrative exemptions to the Act.

3 As to liability. Although the Court has concluded  
4 that the plaintiffs are not within the class of employees  
5 subject to FLSA coverage, the Court will briefly address the  
6 liability issue in this case.

7 The FLSA does not state whether time spent on-call is  
8 working time, but the United States Supreme Court has held that  
9 "under some circumstances waiting time is compensable." *Adair*  
10 *versus the Charter County of Wayne*, 452 F.3d, 482, at 486, 87,  
11 *Sixth Circuit* 2006.

12 According to the Supreme Court, the result in a  
13 particular case turns on whether an employee's time "is spent  
14 predominantly for the employer's benefit or for the employee's  
15 benefits." A question "dependent upon all the circumstances of  
16 the case."

17 *Martin versus the Ohio Turnpike Commission*, 968 F.2d  
18 606 at 609, *Sixth Circuit* 1992.

19 "Facts may show that the employee was engaged to wait,  
20 or they may show that he waited to be engaged." *Skidmore*  
21 *versus Swift and Company*, 323 U.S. 134 at 137, 1944. Each case  
22 must stand on its own facts. *Id.*

23 The Sixth Circuit has instructed that "on-call time  
24 spent at home may be compensable if the restrictions imposed  
25 are so onerous as to prevent employees from effectively using

1 the time for personal pursuits." That's Martin case 968 F.2d  
2 at 611. "The employees must show that on-call policy imposes  
3 additional burdens that seriously interfere with their ability  
4 to use the time for personal pursuits." Id.

5 Plaintiffs testified that standby status required  
6 battalion chiefs to monitor fire department radio traffic,  
7 answer telephone calls, respond to all structure fires, and  
8 address any staffing issues that arose. Rosalee Holt and  
9 Carrie Erskine, plaintiffs's spouses, testified that while on  
10 standby status plaintiffs could not be out of telephone or  
11 radio range, drink alcoholic beverages, baby-sit, supervise or  
12 care for minor children who were unable to be left alone, or  
13 travel in one vehicle with family and friends so that they were  
14 free to leave at a moment's notice to respond to any emergency.

15 Rosalee Holt testified that they were "prisoners" in  
16 their own home and plaintiff Holt was precluded from attending  
17 out of town school functions. However, Chief Houseman  
18 testified that they would cover for each other when conflicts  
19 arose. Defendant also submitted the following contrary  
20 evidence: Neither plaintiff was required to spend the entire  
21 night monitoring for calls and were permitted to sleep. Chief  
22 Schmaltz testified that he did not take the radio into the  
23 house to monitor radio traffic. He left the radio in his car.  
24 Plaintiff Holt testified that Chief Houseman expected that Holt  
25 would listen to the radio until bedtime, however, Chief

1 Houseman testified at his deposition that keeping the radio  
2 with you was optional. According to Chief Houseman, "duty  
3 chiefs" that is, the fire chief and the Battle Creek battalion  
4 chief, only had to monitor alerts, not monitor the radio.  
5 Chief Houseman kept only the pager with him. Plaintiff Holt  
6 testified that he listened to the radio because it would be the  
7 easiest way for the fire fighters to get to me.

8 Carrie Erskine, whose testimony the Court found quite  
9 credible, testified that the noise of the radio traffic was  
10 "the biggest disturbance" but she also testified that plaintiff  
11 Erskine "liked to monitor the radio".

12 Over a three-year period, there were approximately 124  
13 to 137 structure fires that occurred when plaintiffs may have  
14 been on-call. In other words, while the occurrence of  
15 structure fires is unpredictable, a point plaintiffs emphasized  
16 regularly, the frequency with which they occurred in the  
17 three-year period was nonetheless not even one per week.

18 Chief Houseman estimated the number of calls to multi  
19 vehicle accidents as one per year. Rosalee Holt conceded that  
20 over the years that Holt was a battalion chief their dinners  
21 out at restaurants were interrupted "less than five times" by  
22 calls that Holt had to take. Rosalee Holt testified that while  
23 Holt did not mow the grass, paint the house, or work on his  
24 cars, he could pretty much, he could do "pretty much everything  
25 else" around the house while on standby.

1 Chief Schmaltz testified that the pager made an  
2 audible sound that did not need to be monitored while on  
3 standby. Chief Schmaltz was able to mow his lawn and do most  
4 household activities while on standby. The only restrictions  
5 to which Chief Schmaltz strictly adhered were the no alcohol  
6 and the geographical limit restrictions. Chief Schmaltz  
7 testified that he wanted plaintiffs to be "relaxed" when they  
8 were at home on standby.

9 Chief Houseman, again, whose testimony the Court found  
10 to be very credible, similarly testified that while duty chiefs  
11 never drank alcohol "we may go outside and mow our lawn or even  
12 golf." Houseman did not want to micromanage the lives of the  
13 battalion chiefs while they were on standby. He expressly  
14 rejected the proposition that being on-call was "onerous". He  
15 testified that the battalion chiefs did not complain to him  
16 about the on-call duty.

17 The Court concludes that even if plaintiffs were  
18 within the classes of employees subject to FLSA coverage, their  
19 duties during standby time were not so onerous as to prevent  
20 them from effectively using the time for personal pursuits.

21 Given my conclusions as to the FLSA coverage and  
22 liability, the Court will not address the issue of damages.

23 And for all of the reasons stated herein, judgment  
24 will be entered in favor of defendant and against the  
25 plaintiffs.

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If there's nothing further, Mr. Alvarez?

MR. ALVAREZ: No, Your Honor. That's it.

THE COURT: Mr. Kreter.

MR. KRETER: No, Your Honor. Thank you.

THE COURT: Thank you. We are adjourned.

THE LAW CLERK: All rise, please. Court is adjourned.

(Proceedings concluded, 3:40 p.m.)

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REPORTER'S CERTIFICATE

I, Kathy J. Anderson, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Kathy J. Anderson

Kathy J. Anderson, RPR, FCRR  
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