

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 07-CV-00753-MSK-BNB

ALEXANDER L. TRUJILLO,  
DAVID HENRICHSEN,  
GILBERT LUCERO,  
ALAN ROMAN,  
COLBY DOOLITTLE,  
OTTO KNOLLHOFF, and  
MATT MARTIN,  
on behalf of themselves and  
all others similarly situated,

Plaintiffs,

v.

THE CITY OF COLORADO SPRINGS,

Defendant.

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**~~PROPOSED~~ SCHEDULING ORDER**

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**1. DATE OF CONFERENCE  
AND APPEARANCES OF COUNSEL AND *PRO SE* PARTIES**

**Date of Conference:** July 20, 2007, 9:30 a.m.

**Appearing for the Plaintiffs:**

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**Appearing for the Defendant:**

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**2. STATEMENT OF JURISDICTION**

Jurisdiction over the FLSA claims is based upon 28 U.S.C. § 1337(a) and 29 U.S.C. § 207 and 216 (b). Jurisdiction to provide declaratory relief and any relief as necessary to effectuate such declaration is authorized by 28 U.S.C. § 2201 and 2202. Jurisdiction over the remaining claims is based upon 28 U.S.C. § 1367(a).

**3. STATEMENT OF CLAIMS AND DEFENSES**

*a. Plaintiffs:* Plaintiffs are all employed as sworn police officers of the Defendant, City of Colorado Springs (“City”). Plaintiffs Knollhoff and Martin are sergeants of the Police Department. The other named Plaintiffs are patrol officers of the Police Department. The Plaintiffs have brought this action on behalf of themselves and all others similarly situated, under the FLSA and Fed. R. Civ. P. 23.

The City is obligated to pay the Plaintiffs for all hours worked, including overtime pay for all hours worked in excess of eighty (80) hours per two (2) week period. The City has not paid the Plaintiffs for all hours actually worked. Rather, the City requires police officers to perform work tasks and assignments “off-the-clock”, without pay. In addition, the

City has misclassified police sergeants as exempt employees, thereby denying police sergeants compensation for all of their work activities, including overtime compensation.

Further, the City has systematically failed to properly account for and award compensatory time as required by the FLSA. The actions of the City described above were willful within the meaning of 29 U.S.C. § 255(a).

Plaintiffs have asserted claims under the FLSA, and under state law for compensatory and statutory damages, interest, costs and attorneys' fees. Plaintiffs also seek a declaratory judgment as to the unlawful practices of the Defendant.

*b. Defendant:*

Defendant, the City of Colorado Springs ("the City"), denies that it has violated the Fair Labor Standards Act (FLSA) or any other law. The City has paid the named plaintiffs and putative class members all compensation for which they are entitled.

Moreover, there was not any single decision, policy, or plan that violated the FLSA in connection with the payment of overtime or the handling of compensatory time, thereby making a collective action inappropriate.

Plaintiffs and putative class members are not entitled to any overtime for the donning and doffing of their uniforms and other gear.

Plaintiffs were not forced to work off the clock during their employment with the City.

The non-exempt plaintiffs and putative class members, as law enforcement employees, were subject to Section 7(k) of the FLSA which permits a 28-day work period for computation of overtime.

Plaintiffs and putative class members held a variety of different positions and assignments, reported to different supervisors, and performed vastly different duties from each other, thereby making a collective action inappropriate in this matter.

Moreover, because sergeants have supervisory duties over some of the named plaintiffs and other putative class members, the sergeants who are named plaintiffs are inappropriate representatives for putative class members and pose inherent conflicts of interest that should prevent certification of any collective or class claims.

In addition, the City denies that it is liable to the named plaintiffs and putative class members for any of the asserted state claims such as breach of contract, promissory estoppel, implied contract, and unjust enrichment.

Plaintiffs did not have any contract with the City for the payment of overtime. Indeed, the alleged contract, in any event, is void inasmuch as it does not comply with the municipal contracting requirements set forth in the City's Charter and Municipal Code.

Nor are there any facts that warrant imposition of any quasi-contract or alternative theories under state law. The City never made any promises or other statements that would lead a reasonable person to believe that they had a contractual right to overtime. The City has disclaimers of contractual intent in its municipal code as well as its personnel policies.

Moreover, because of the highly individualized nature of the state claims relative to each plaintiff and putative class member, a class action under Fed. R. Civ. P. 23 is inappropriate.

Additionally, a Rule 23 class action for overtime pay is preempted inasmuch as Congress intended the FLSA to be the sole vehicle for pursuit of overtime claims.

In addition to generally denying the allegations set forth in the Plaintiffs' Amended Complaint, the City states the following affirmative defenses: (1) Plaintiffs have failed to state any claims upon which relief may be granted; (2) At all times, the City's actions were lawful, justified and made in good faith; (3) Plaintiffs' claims are barred in whole or in part by the applicable statute of limitations; (4) Plaintiffs' claims for recovery of overtime compensation and liquidated damages, if any, are limited to the time period of two years, or in the alternative three years, from the date the Plaintiffs' Complaint was filed; (5) Plaintiffs are not entitled to liquidated damages under 29 U.S.C. § 260, since, at all times relevant and material herein, the City acted in good faith and had reasonable grounds for believing that it did not violate the provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*; (6) Plaintiffs' Fair Labor Standards Act claims are barred in whole or in part by the Portal-to-Portal Act because all actions taken in connection with each Plaintiff's compensation were done in "good faith" and in conformity with and in reliance upon written administrative regulations, orders, rulings, approvals, interpretations, administrative practices, and/or enforcement policies of the U.S. Department of Labor; (7) To the extent that a putative class member is an exempt employee under the Fair Labor Standards Act white-collar exemptions (administrator, executive, and/or professional), such person is not entitled to overtime compensation; (8) Sergeants are exempt employees under the Fair Labor Standards Act white collar exemptions (administrative, executive, and/or professional) and therefore are not entitled to overtime compensation and were properly classified by the City as exempt employees; (9) Without admitting that any violations of the Fair Labor Standards Act have occurred, the *de minimis* rule applies to any such violations; (10) Plaintiffs have failed to state a claim upon which relief may be granted because,

among other reasons, Plaintiffs were compensated for all appropriate wages for all hours worked; (11) Those Plaintiffs who were entitled to overtime compensation as required by the Fair Labor Standards Act, were either paid or provided compensatory time in accordance with the FLSA and its overtime rate; (12) Those Plaintiffs who are not exempt from the FLSA, did not accrue compensatory time in excess of the amount permitted by the FLSA; (13) Plaintiffs are not entitled to overtime wages for work time that was used for personal reasons that have no connection with the City's business; (14) Plaintiffs' claims are barred in whole or in part to the extent that the work they performed falls within exemptions, exclusions, exceptions, or credits provided for in Section 7 of the FLSA, 29 U.S.C. §207; (15) Plaintiffs are partially exempt from the overtime requirement of the Fair Labor Standards Act as the City adopted a 7(k) work schedule of twenty-eight days for employees involved in law enforcement activities pursuant to 29 U.S.C. §207(k); (16) The Plaintiffs are estopped from bringing a cause of action under the Fair Labor Standards Act or from receiving time and one-half for all hours worked because, among other things, to the extent they worked overtime, they voluntarily, and without the City's knowledge, under-reported their hours of work, accepted the denominated rate of pay, and/or failed to comply with the prevailing terms, conditions, policies, and procedures governing their employment, including the policies and procedures governing overtime; (17) The application of the Fair Labor Standards Act to the City of Colorado Springs, a municipality, is an impermissible and unconstitutional interference with the functions of the City as a local government body in contravention of the Tenth Amendment of the United States Constitution; (18) The Plaintiffs unreasonably delayed commencement of this action so that their recovery, if any, should be barred or reduced under the doctrine of laches; (19) Plaintiffs' claims are barred

by the principles of res judicata, collateral estoppel and waiver; (20) Plaintiffs' claims are barred by the doctrine of accord, satisfaction and release; (21) No contract, implied or expressed, existed between the City and Plaintiffs; (22) Plaintiffs' contractual claims are barred by the Statute of Frauds, and absence of consideration, and/or lack of mutual obligation; (23) Should this Court find that a contract was entered into between the City and Plaintiffs, the Plaintiffs breached the contract; (24) Although the City denies the existence of any valid contract, Plaintiffs failed to satisfy the condition precedent that they obtain supervisor approval before performing any alleged overtime hours claimed in this civil action; (25) The alleged contract is not valid or enforceable inasmuch as it either conflicts with or otherwise does not satisfy the City's Charter, Code, and other municipal laws; (26) The City asserts that Plaintiffs have failed to exhaust applicable administrative and/or contractual remedies including, without limitation, the requirement to file a formal complaint relating to an act, omission, or situation involving the interpretation and misapplication of written or verbal policy, procedure, or established practice; (27) Any alleged contract is ultra vires and void; (28) Should this Court find that a contract was entered into between the City and Plaintiffs, the alternative remedy of promissory estoppel is not applicable; (29) The City did not make a promise to Plaintiffs regarding their employment which it should have reasonably expected to induce action by Plaintiffs. Plaintiffs did not reasonably rely upon statements/representations allegedly made by the City. Nor is there an existence of circumstances such that justice can be avoided only by enforcement of the alleged promise; (30) The Plaintiffs are barred from seeking equitable relief because they have an adequate remedy at law; (31) The City has not been unjustly enriched at the expense of Plaintiffs. Nor does good conscience demand that additional payment be made to Plaintiffs; (32)

The Plaintiffs' equitable relief is barred in whole or part under the doctrine of unclean hands. Plaintiffs' submission of overtime reports did not set forth the overtime for which compensation is now sought. Plaintiffs' claims are barred due to Plaintiffs' other acts and omissions, including but not limited to their knowledge, acquiescence, consent, approval, ratification, participation, and/or failure to notify the City of the acts complained of in this action; (33) The Plaintiffs failed to mitigate their losses, if any, and as a result their claims must be reduced or discharged in their entirety; (34) Plaintiffs' claimed damages against the City are speculative and therefore may not be recovered; (35) The Plaintiffs' claims are not representative of a class of similarly related employees so that this action cannot be properly brought as a collective action under the Fair Labor Standards Act; (36) This action cannot be maintained as a collective or class action because the allegations, facts, and defenses relating to Plaintiffs will not support a collective or class action; (37) This action cannot be maintained as a collective or class action because, during the Plaintiffs' employment at the City, they were not similarly situated to each other and to any other employees, and there is no commonality between Plaintiffs' circumstances, individually and collectively, and those of any other employees of the City; (38) This action cannot be maintained as a collective or class action because Plaintiffs and/or their counsel are not adequate representatives for the proposed collective and class action; (39) This action cannot be maintained as a collective or class action because Plaintiffs have failed to identify any uniform policy that facially creates an overarching unlawful pay practice in violation of the overtime pay requirements of the FLSA; (40) Should the Court certify this matter as a collective or class action, it will violate the City's constitutional right to due process; (41) Should the Court certify this matter as a collective or class action, the City reasserts each of these

affirmative defenses with respect to each class member or person filing a consent to this action; (42) To the extent any of the state causes of action lies in tort or could lie in tort, regardless of whether that may be the type of action or the form of relief chosen by the Plaintiffs, such claim is barred by the Colorado Governmental Immunity Act; (43) To the extent any of the state causes of action lies in tort or could lie in tort, regardless of whether that may be the type of action or the form of relief chosen by the Plaintiffs, they failed to serve a notice of claim on the City in order to comply with the Colorado Governmental Immunity Act; and (44) Plaintiffs' claims for attorneys' fees on any class action claim are limited by Colo. Rev. Stat. § 24-10-114.5.

#### **4. UNDISPUTED FACTS**

The following facts are undisputed:

1. Plaintiffs are residents of the State of Colorado, and are currently employed as sworn police officers of Defendant, City of Colorado Springs ("City").
2. The City is a home rule city under the laws of the State of Colorado and is the official governmental authority responsible for the organization, provision, management and operation of law enforcement within its jurisdiction.
3. The Colorado Springs Police Department (the "Police Department" or "CSPD") is an official department of the City authorized and established to provide the City's law enforcement.

#### **5. COMPUTATION OF DAMAGES**

Plaintiffs have filed this action on behalf of themselves and other similarly situated and claim economic losses including lost wages and benefits and/or compensatory damages.

Plaintiff patrol officers claim damages based upon unpaid work in excess of four (4) hours each week. Plaintiff sergeants claim damages based upon unpaid work in excess of four (4) hours each week, together with compensation for monthly and quarterly unpaid work activities. All Plaintiffs claim for reasonable attorneys' fees, costs, interest, and statutory recoveries. Claims under the FLSA are asserted for a period of three (3) years. Claims under state law are asserted for a period of six (6) years.

**6. REPORT OF PRECONFERENCE DISCOVERY AND  
MEETING UNDER FED. R. CIV. P. 26(f)**

a. Date of Rule 26(f) meeting. Friday, June 29, 2007.

b. Names of each participant and party he/she represented.

Scott W. Johnson and Paul W. Hurcomb for the Plaintiffs. Steven W. Moore, Stacy L. Gatto and Tracy Lessig for the Defendant.

c. Proposed changes, if any, in timing or requirement of disclosures under Fed. R. Civ. P. 26(a)(1). None.

d. Statement as to when Rule 26(a)(1) disclosures were made or will be made.  
Disclosures will be made: July 13, 2007.

e. Statement concerning any agreements to conduct informal discovery, including joint interviews with potential witnesses, exchanges of documents, and joint meetings with clients to discuss settlement. If there is agreement to conduct joint interviews with potential witnesses, list the names of such witnesses and a date and time for the interview which has been agreed to by the witness, all counsel, and all *pro se* parties.

The parties have discussed, but have not at this time agreed to, limited informal discovery. Discussions are continuing on this issue. The parties have participated in meetings and discussions concerning potential settlement. A private mediator, Kathryn Miller, Esq., has been selected by the parties for a 2-day mediation to be scheduled to take place in September 2007.

f. Statement as to whether the parties anticipate that their claims or defenses will involve extensive electronically stored information, or that a substantial amount of disclosure or discovery will involve information or records maintained in electronic form. In those cases, the parties must indicate what steps they have taken or will take to (i) preserve electronically stored information; (ii) facilitate discovery of electronically stored information; (iii) limit associated discovery costs and delay; and (iv) avoid discovery disputes relating to electronic discovery. Describe any agreements the parties have reached for asserting claims of privilege or of protection as trial-preparation materials after production of computer-generated records.

The parties have discussed the electronically stored information that may be relevant to claims or defenses. The Defendant has stated that it has taken steps to preserve such information. Plaintiffs have proposed informal meetings with a City IT official to determine the scope and extent of the electronically stored information which may be the subject of formal discovery. Defendant is considering Plaintiffs' request. Upon inquiry, named Plaintiffs have little or no non-privileged electronically stored information pertaining to the claims or defenses.

The parties have agreed that either may assert attorney-client or work product doctrine privileges as to any materials inadvertently disclosed in the course of production of

electronic materials. Such claims shall be asserted within a reasonable time of learning of the inadvertent disclosure.

## 7. CONSENT

All parties have not consented to the exercise of jurisdiction of a magistrate judge.

## 8. CASE PLAN AND SCHEDULE

a. Deadline for Joinder of Parties and Amendment of Pleadings: **September 3, 2007** ~~October 20, 2007~~; provided, however, in the event the Court conditionally certifies a class of opt-in plaintiffs under the Fair Labor Standards Act, that joinder of additional opt-in plaintiffs shall extend through any notice and joinder period ordered by the Court.

b. Discovery Cut-off: March 31, 2008.

c. Dispositive Motion Deadline: **April 30, 2008** ~~May 31, 2008~~

d. Expert Witness Disclosure:

(1) State anticipated fields of expert testimony, if any.

Plaintiffs may offer expert testimony on police procedures and department management, human resource practices and procedures, and economic calculations. Defendant may offer expert testimony regarding police, human resources, damages, and technology issues.

(2) State any limitations proposed on the use or number of expert witnesses.

The parties **are limited to propose a limit of** five (5) experts for each side.

(3) The parties shall designate all experts and provide opposing counsel and any pro se party with all information specified in Fed. R. Civ. P. 26(a)(2) on or before January 8, 2008.

(4) The parties shall designate all rebuttal experts and provide opposing counsel and any pro se party with all information specified in Fed. R. Civ. P. 26(a)(2) on or before February 7, 2008.

(5) Notwithstanding the provisions of Fed. R. Civ. P. 26(a)(2)(B), no exception to the requirements of the rule will be allowed by stipulation of the parties unless the stipulation is approved by the court.

e. Deposition Schedule:

| Name of Deponent                           | Date of Deposition          | Time of Deposition | Expected Length of Deposition |
|--|-----------------------------|--------------------|-------------------------------|
| 30(b)(6) Representatives of the Defendants | September 2007              | TBD                | 7 hours (maximum)(each)       |
| Named Plaintiffs                           | September 2007              | TBD                | 7 hours (maximum)(each)       |
| Other Police Officers to be identified     | September 2007 – March 2008 | TBD                | 7 hours (maximum)(each)       |

f. Interrogatory Schedule: **All written discovery must be served so that responses are due on or before the discovery cut-off** ~~Interrogatories shall be served not less than thirty-three (33) days prior to the discovery cut-off ordered by the Court.~~

g. Schedule for Request for Production of Documents: **All written discovery must be served so that responses are due on or before the discovery cut-off** ~~Requests for Production of Documents shall be served not less than thirty-three (33) days prior to the discovery cut-off ordered by the Court.~~

h. Discovery Limitations:

(1) Any limits which any party wishes to propose on the number of depositions. ~~Plaintiffs propose~~ twenty (20) per side, not including experts. The Defendant believes that it may need leave from Court to take additional depositions should this matter be conditionally certified as a collective action under the FLSA or certified as a class action under Rule 23, depending on what claims are certified and the number of opt-in plaintiffs and putative class members at issue.

(2) Any limits which any party wishes to propose on the length of depositions. Seven (7) hours, unless a longer period is agreed to by the parties or ordered by the Court.

(3) Modifications which any party proposes on the presumptive numbers of depositions or interrogatories contained in the federal rules. ~~The parties propose~~ twenty (20) depositions per side, not including experts, and fifty (50) interrogatories per side.

(4) Limitations which any party proposes on number of requests for production of documents and/or requests for admissions. None.

(5) Other Planning or Discovery Orders:

(a) Plaintiffs shall file their motions for collective action certification under the FLSA, and for class action certification under Fed. R. Civ. P. 23, by October 20, 2007.

## 9. SETTLEMENT

The parties have agreed to participate in an early mediation of the case, and have tentatively agreed upon a private mediator, Kathryn Miller, Esq. The parties expect to schedule the mediation during September, 2007.

## 10. OTHER SCHEDULING ISSUES

a. A statement of those discovery or scheduling issues, if any, on which counsel, after a good-faith effort, were unable to reach an agreement.

### **(i) Bifurcation Issues**

The parties have a dispute at this time whether the case should be bifurcated. Plaintiffs have proposed that this matter be bifurcated, specifically that claimant eligibility and damages be determined following any determination of liability. Defendants believe that the issue of bifurcation is premature at this time inasmuch as the Court has not certified any class at this time.

### **(ii) Deposition Issues**

Plaintiffs propose 20 depositions per side, not including experts. The Defendant believes that it may need leave from Court to take additional depositions should this matter be conditionally certified as a collective action under the FLSA or certified as a class action under Rule 23, depending on what claims are certified and the number of opt-in plaintiffs and putative class members at issue.

b. Anticipated length of trial and whether trial is to the court or jury. A jury trial has been demanded by Plaintiffs and is anticipated to last fifteen (15) days.

c. A request to conduct appropriate pretrial proceedings in the Court's facility at 212 N. Wahsatch Street, Colorado Springs, CO. None at this time but the Plaintiffs may make such requests for pretrial conferences or other proceedings.

**11. DATES FOR FURTHER CONFERENCES**

a. A settlement conference will be held **at the request of the parties**

It is hereby ordered that all settlement conferences that take place before the magistrate judge shall be confidential.

( ) *Pro se* parties and attorneys only need be present.

( ) *Pro se* parties, attorneys, and client representatives with authority to settle must be present. (NOTE: This requirement is not fulfilled by the presence of counsel. If an insurance company is involved, an adjustor authorized to enter into settlement must also be present.)

( ) Each party shall submit a Confidential Settlement Statement to the magistrate judge on or before \_\_\_\_\_ outlining the facts and issues, as well as the strengths and weaknesses of their case.

b. Status conferences will be held in this case at the following dates and times:

\_\_\_\_\_  
\_\_\_\_\_

c. A final pretrial conference will be **set by the district judge**

## 12. OTHER MATTERS

In addition to filing an appropriate notice with the clerk's office, counsel must file a copy of any notice of withdrawal, notice of substitution of counsel, or notice of change of counsel's address or telephone number with the clerk of the magistrate judge assigned to this case.

Counsel will be expected to be familiar and to comply with the Pretrial and Trial Procedures established by the judicial officer presiding over the trial of this case.

In addition to filing an appropriate notice with the clerk's office, a *pro se* party must file a copy of a notice of change of his or her address or telephone number with the clerk of the magistrate judge assigned to this case.

With respect to discovery disputes, parties must comply with D.C.COLO.LCivR 7.1A.

The parties filing motions for extension of time or continuances must comply with D.C.COLO.LCivR 6.1D. by submitting proof that a copy of the motion has been served upon the moving attorney's client, all attorneys of record, and all *pro se* parties.

## 13. AMENDMENTS TO SCHEDULING ORDER

The scheduling order may be altered or amended only upon a showing of good cause.

Dated July 20, 2007.

BY THE COURT:

s/ Boyd N. Boland  
United States Magistrate Judge

APPROVED:

s/ Paul W. Hurcomb

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