

**SETTLEMENT STATEMENT AND DEMAND**  
*Michael Bode, et al. v. City of Covington, Kentucky*

Presented to:

Hon. Denny Bowman, Mayor  
Mr. Larry Klein, City Manager  
Hon. Frank Warnock, City Solicitor  
City of Covington, Kentucky  
638 Madison Avenue  
Covington, Kentucky 41011

Prepared By:

Hon. Charles R. Wheatley II  
Hon. Steven J. Megerle  
1003 Russell Street and 618 Washington Street  
Covington, Kentucky 41011

## FACTUAL AND LEGAL BACKGROUND

Plaintiffs are a collective group of retired Covington firefighters. They retired between 1995 and 2009. Fifty-eight (58) retired Covington firefighters are represented by undersigned counsel. The following collective group is making a claim for damages for which this demand applies:

<u>Name</u>	<u>Date of Retirement</u>	<u>Retiring Rank</u>
Roger Askin	07/31/2008	Lieutenant
Jerry Avery	02/01/2001	Firefighter
Anthony Axle	07/31/2004	Engineer
Michael Best	07/31/2001	Captain
Michael Bode	07/31/2008	Engineer
John Bornhorn	07/31/2005	Assistant Chief
Thomas Brinkman	07/31/2003	Lieutenant
Richard Brown	07/31/2002	Lieutenant
Ronald Brown	07/31/2000	Engineer
Wesley Chasteen	08/01/2007	Firefighter/Medic
John Cross	07/31/2009	Lieutenant
James Diskin	07/31/2000	EMT/Specialist
David Ducker (deceased)	07/31/2000	Captain
Thomas Feebeck	05/31/2008	Lieutenant
William Ford	10/31/1998	Engineer
Glenn Fossett	07/31/2009	Lieutenant
Christopher Fryman	07/31/2009	Engineer

Harry Geimeier	11/30/1999	Captain
Bobby Joe Glenn	07/31/2000	Lieutenant
Jeffery Groneck	02/28/2009	Assistant Chief
Thomas Hellman	10/31/2000	Lieutenant
Joseph Heringhaus	07/31/2005	Chief
Kevin Jasper	04/30/2006	EMT/Specialist
Jack Kells	07/31/2005	Engineer
Anthony Kidwell	07/31/2004	Lieutenant
William Kirby	10/31/1999	Lieutenant
Frank Knapp	07/31/2006	Engineer
Perry McClure	07/31/2009	Firefighter
Gregory McDermott	08/28/1998	EMT/Specialist
Barry Meyer	07/31/2009	Lieutenant
David Meyer	07/31/2006	EMT/Specialist
Richard Meyer	07/31/2005	Captain
Stanley Nassano	05/31/2005	Captain
Neil Nielander	07/31/2004	Lieutenant
Michael Pyke	10/31/1999	Engineer
James Reed	04/30/1997	EMT/Specialist
David Reeves	07/31/2003	Captain
Michael Reilly	07/31/2005	Engineer
Robert Reinhart	10/31/2002	Captain
John Scott Rigney	12/03/2003	Captain
Mark Ruschman	12/31/2007	Engineer
Steve Schatzman	07/31/2007	Engineer

Elizabeth Schwartz	07/31/1998	EMT/Specialist
Richard Siegrist	07/31/2005	Captain
Michael Skeen	12/31/2005	Engineer
Joe Spears	11/30/2000	EMT/Specialist
James Stevens	07/31/2002	Engineer
Richard Sullivan	08/31/1995	Captain
Thomas Sullivan	07/31/2005	Engineer
Michael Swain	07/31/2005	Assistant Chief
Michael Swegles	07/31/2009	Engineer
David Tuemler	11/01/1995	Lieutenant
Scott Urlage	07/31/2005	Engineer
William Wagner	7/31/2009	Engineer
Michelle Westermeyer	7/31/2005	Captain
Charles Wheatley, II	08/31/2008	Chief
James Whitaker, Jr.	12/31/2005	Lieutenant
Michael Wilde	07/31/2006	Captain
Donald Wilder	7/31/2005	Lieutenant

The City of Covington (hereinafter “City”) has long recognized the labor organization known as Covington Professional Firefighters International Association of Fire Fighters Local 38 (hereinafter “Union”). The City and the Union entered into a series of collective bargaining agreement contracts (hereinafter “CBA”) governing the relationship between the City and Union members. Kentucky law, specifically, **Ky. Rev. Stat. § 345.030(2)**, requires the City to engage in collective bargaining since it

recognizes the Union. Any violations of the agreement between the City and the Union or its members must be brought in Circuit Court irrespective of the amount in controversy.<sup>1</sup>

The parties were governed by CBAs between 1995 and 2009 with the exception of one interim period. During that interim, Article V of the CBA protected the prevailing rights collective bargaining unit member firefighters. Plaintiffs have a claim of breach of contract. It centers on the city's failure to properly calculate all remuneration of covered firefighters' hourly rate under Article XI of the CBA. The City's failure to properly calculate a legal rate of pay also breaches the CBA under Article VI of the CBA that requires the City and the Union to follow all federal and state laws. Article VI requires the City to follow all federal and state laws. It did not. The language of a business contract should be construed in the light of what intelligent business men would reasonably expect.<sup>2</sup> The most direct route to finding a breach of contract and the strongest ground is the contract itself. *The City's failure to properly calculate CBA unit members' pay rate has led to approximately \$410,000.00 in damages which was incurred by the Plaintiffs when the City did not properly compensate covered Covington firefighters as required by state law.*

### **Correct Calculation of Remuneration**

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<sup>1</sup> Ky. Rev. Stat. 345.100(3).

<sup>2</sup> *Thompson-Starett Co. v. Mason's Adm'rs*, 201 S.W.2d 876, 881 (Ky. 1947).

The City failed to include the state educational incentive pay in the calculation of wages resulting in miscalculation of the hourly rate of pay, which in turn led to miscalculation of CBA unit members' regularly scheduled overtime. Firefighters wages and rate of pay is governed by **Ky. Rev. Stat. §§ 337.010 and 337.094**. While an employer may choose to give more than minimum, an employer cannot contract to give less.<sup>3</sup> Under **Kentucky Rev. Stat. § 95A.250** firefighters are entitled to educational incentive pay as administered by Kentucky Fire Commission. All members of the CBA during the period at issue participated in the state training program and were eligible for the educational incentive pay. Educational incentive pay was distributed monthly to CBA members.<sup>4</sup> Between the period 1995 and 2009 the city did not include state educational incentive pay as part of a firefighters wages as defined under **Ky. Rev. Stat. § 337.010(1)(c)1**.<sup>5</sup>

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<sup>3</sup> **Walling v. Harnischfeger Corp.**, 325 U.S. 427, 431-432, 65 S.Ct. 1246, 1248-49, 89 L.Ed. 1711 (1945). See also *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354 (Ky. 2005) and *Featsent v. City of Youngstown*, 70 F.3d 900 (6<sup>th</sup> Cir. 1995)(union representatives cannot bargain away employee rights under the FLSA).

<sup>4</sup> The annual amounts total \$2750 from July 1, 1982 through June 30, 1999, \$3,000.00 from July 1, 1999 through June 30, 2002, and \$3,100.00 from July 1, 2002 to the present.

<sup>5</sup> "Wages" includes any compensation due to an employee by reason of his employment, including salaries, commissions, vested vacation pay, overtime pay, severance or dismissal pay, earned bonuses, and any other similar advantages agreed upon by the employer and the employee or provided to employees as an established policy. The wages shall be payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to the allowances made in this chapter.

The CBA dictates firefighter work weeks to be 48 hours, based on the average hours worked in a twenty-one day cycle. Covington firefighters work regularly scheduled eight hours of overtime per week. The City paid firefighters overtime for any hours in excess of 40 hours a week during the period in question, however, the City failed to include state educational incentive pay in the total remuneration for purposes of properly determining the overtime rate for the regularly scheduled eight hours. The City's failure to 1) include the state educational incentive pay into the wage calculation required under **Ky. Rev. Stat. § 337.010(1)(c)1**; and 2) miscalculation of Covington firefighters hourly rate of pay led to a failure to pay the proper rate of pay for scheduled overtime under **Ky. Rev. Stat. § 337.285(1)** constitutes a breach of the CBA.

The City may have relied upon Department of Labor regulations promulgated to assist in the calculation of overtime wages, yet such reliance cannot be relied upon as a defense.<sup>6</sup> The Court of Appeals determined those Dept. of Labor regulations violated the state wage and hour laws and the regulations were stricken.<sup>7</sup> Therefore, the city's miscalculation is a second means to find a breach of contract. No court would endorse

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<sup>6</sup> *Comm., Labor Cabinet v. Hasken*, 264 S.W.3d 215, 223 (Ky. App. 2008). See also *City of Frankfort v. Davenport*, 2006 WL 2380792 (Ky.App. 2006)(interpreting state regulations similar to the issue sub judice involving wages of paramedics.)

<sup>7</sup> *Id.*

an interpretation of a CBA as compensating firefighters for overtime at a rate lower than provided in Ky. Rev. Stat. 337.<sup>8</sup>

The third avenue to find a breach of contract is based on case law. The FLSA and Ky. Rev. Stat. Chapter 337 establish the minimum requirements of every employment contract. Re-stated, an employer may choose to give more than the minimum, and employer cannot contract to give less. Union representatives cannot bargain away minimum employee rights under the FLSA.<sup>9</sup> Fixing the minimum measure of the employer's liability to pay for services rendered by an employee, must be read into and form a part of every employment contract to which the act applies.<sup>10</sup> Hereto, the city breached the CBA by failing to follow the common law regarding FLSA.

## **LIABILITY OF CITY OF COVINGTON**

In the litigation phase the City's liability is easily shown. To prove a breach of contract, the complainant must establish three things: 1) existence of a contract; 2) the breach of that contract; and 3) damages flowing from the breach of contract.<sup>11</sup>

Minimum discovery will be necessary. Plaintiffs will file a motion for summary judgment. Plaintiffs will succeed. It would not benefit the City to delay the inevitable; compensating firefighters for monies due and owing as a matter of law.

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<sup>8</sup> *Noel v. Season-Sash, Inc.*, 722 S.W.2d 901, 902 (Ky. 1986) Rev'd on other grounds.

<sup>9</sup> *Fletcher v. Grinnell Brothers*, 64 F.Supp. 778 (E.D.Mich. 1946)

<sup>10</sup> *Manseau v. United States*, 52 F.Supp. 395 (D.C. 1943).

<sup>11</sup> *Barnett v. Mercy Health Partners-Lourdes, Inc.* 233 S.W.3d 723, 727 (Ky. App. 2007).



The City cannot rely on the fact the firefighters did not complain about the method of calculating overtime pay because it had used the same formula since prior to 1995. Nor can the City rely on the fact Union representatives failed to realize they were agreeing to an illegal calculation of their rate of pay. The Court of Appeals clearly rejects that argument by emphasizing that **“the FLSA and Kentucky’s wage and hour law would have no teeth and no purpose if their minimum requirements could be waived by acquiescence.”**<sup>12</sup>

*Metro Louisville, et al. v. Abma, et al.*<sup>13</sup>

Plaintiffs allege the City miscalculated their hourly rate, and as a result, their overtime rate of pay for eight (8) regularly scheduled overtime hours each week. Their position is supported and finds strength in the Kentucky Court of Appeals’ decision in *Metro Louisville, et al. v. Abma, et al.* Louisville firefighters prevailed.

First, the Court of Appeals upheld the Jefferson Circuit Court’s holding that both the City of Louisville and its successor, Louisville Metro, violated state law by miscalculating the base wages by failing to include state incentive pay as required by **Ky. Stat. § 337.010(1)(c)1**, leading to 1) the miscalculation of the firefighter wages and rate of pay that 2) resulted in failing to properly calculate the proper overtime amount

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<sup>12</sup> *Metro Louisville, et al. v. Abma, et al.* 2009 WL 2837355 (Ky. App. 2009).

<sup>13</sup> *Id.*

equaling 1 ½ times the rate of pay required under Ky. Rev. Stat. § 337.285. These also constitute Plaintiffs' claims.

The Court of Appeals found Louisville's calculations violated state law. It also found a breach of the collective bargaining agreement between Louisville and its firefighters because of the provision in the CBA requiring the parties to follow any and all applicable federal and state laws. The Louisville CBA provision is nearly identical in language as Article VI of the CBA between the City of Covington and its firefighters. The Court ultimately found the firefighters had breach of contract claims extending back 15 years under **Ky. Rev. Stat. § 413.110**.

### **Prejudgment Interest Calculation**

The monies are past due and owed to the Plaintiffs forthwith. The retired Covington firefighters are entitled to pre-judgment interest. Prejudgment interest must be awarded where the amount sought is liquidated.<sup>14</sup> The Court must entertain issues of fairness when determining the date from when prejudgment interest would accrue.<sup>15</sup> The Court should take into consideration the fault of the party who is required to pay the interest. Where a party owes a debt, then the party owing the debt has deprived its

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<sup>14</sup> *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440, 450 (Ky. 2005) The Court may award prejudgment interest where unliquidated damages are sought. *Nucor Corp. v. General Electric*, 812 S.W.2d 112 (Ky. 1996).

<sup>15</sup> *Alexander Hamilton Life Insurance Company of America v. Lewis*, 550 S.W.2d 558 (Ky. 1977)

creditor of money deserved. Since the party was at fault, the date on which the money was owed should be used to calculate the amount of prejudgment interest.<sup>16</sup> The rate of prejudgment interest is eight (8) percent per annum.<sup>17</sup>

The damages are due and owing under the terms of the CBA between the City and Plaintiff firefighters. Therefore, the damages are liquidated and any determination of the amount due to fire fighters must include prejudgment interest.

This position is bolstered by the Louisville case. The trial court specifically found firefighters were entitled to pre-judgment interest, and the damages were liquidated.

The trial court judgment in relevant part stated as follows:

Accordingly, IT IS HEREBY ORDERED AND ADJUDGED that Defendant City shall pay to each Plaintiff additional overtime pay (“AOP”) which shall be calculated by dividing the State Educational Incentive Pay, Longevity Pay, Salary Supplement and July Bonus received by each Plaintiff in each year subsequent to September 8, 2005, by Two Thousand (2000) annually, or Forty (40) hours per week, then multiplying the resulting rate by 1.5 (representing time and a half) to arrive at an additional overtime pay rate. The additional overtime rate shall be multiplied by all hours over forty (40) in a work week (whether “scheduled” or “unscheduled”) worked by each Plaintiff, to arrive at the OP to which that Plaintiff is entitled for that week. The weekly AOP shall not include any overtime pay received by that Plaintiff in that week relating to State Educational Incentive Pay or July bonus.

***Plaintiffs are entitled to prejudgment interest on each weekly amount of AOP calculated under the preceding paragraph at the statutory rate of eight percent (8%), compounded annually, through the date of entry of this Judgment, and at***

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<sup>16</sup> **Id. at 559, 560.**

<sup>17</sup> **Ky Rev. Stat. 360.010(1).**

**the statutory rate of twelve (12%), compounded annually, subsequent to the entry of this Judgment until paid.**<sup>18</sup>

When prejudgment interest is calculated the base amount is more than doubled.

The issues herein will be disposed with summary judgment. Post-judgment interest is 12%.<sup>19</sup> The amount due will increase if either 1) the city fails to settle the firefighters' claims; 2) a judgment is entered; or 3) if the City enters the bond market to obtain funds to pay monies due to its retired firefighters.<sup>20</sup>

### **Attorney's Fees**

The CBA is clear that the City is required to pay attorney's fees where the members of the union successfully challenge a breach of the agreement. Furthermore, the attorney's in *Abma* were entitled to their attorney's fees taxed as costs.<sup>21</sup>

### **DEMAND**

The base amount due and owing to retired Covington firefighters is \$411,678.61. Damages for a breach of contract are limited to an amount to compensate for the breach. This figure is not negotiable. It is the floor of the City's liability. It should be noted the City attempted to settle with a few retired firefighters for an amount less than the actual

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<sup>18</sup> *Abma*, supra at \*6.

<sup>19</sup> **Ky. Rev. Stat. 360.040.**

<sup>20</sup> Metro Louisville was forced to enter the bond market to pay its settlement. **See Firefighter settlement could cost city \$45 million, *Louisville Courier Journal*, October 14, 2009.**

<sup>21</sup> *Amba*, supra at \*8.

amount owed. Presently, any such tactic would not only be futile, it only further agitate the Plaintiffs. If the city again scoffs at its obligation, the Plaintiffs will immediately seek redress. This will trigger an automatic award of pre-judgment and post-judgment interest.

The firefighters are entitled to pre-judgment interest from the date of the breach. For every year the City failed to properly calculate the firefighters' wages, a breach of contract occurred. Pre-judgment interest relates back to each year the contract was breached for each individual plaintiff. Both the trial court and Court of Appeals determined the damages were liquidated. If this matter moves to a litigation phase, the City must recognize that liquidated damages will be awarded as a matter of law. Time is of the utmost essence on the City's part.

The Plaintiffs, through counsel, hired the accounting firm of Munninghoff, Lange & Company to certify the amount of pre-judgment interest due to the firefighters. Their report is attached hereto. **They certify the accurate amount of damages due to the Plaintiff's for pre-judgment interest is \$538,987.06.** They will testify at trial to explain their methods and certify the accurate amount to the Court. Their certification letter is attached hereto for review. **This brings the total amount the city owes the Plaintiffs to \$950,665.67 without attorney's fees and costs.** If this matter is litigated, this number will increase.

Finally, if the city fails to settle this matter promptly, the Plaintiff's will continue to incur legal fees. Under the CBA, the city is obligated to pay the attorney's fees of CBA members. This protection extends to these Plaintiffs who now seek redress for the past breach of contract. Again, with the Louisville firefighters' case as a guide, both the trial court and Court of Appeals ruled Metro Louisville was liable for attorney's fees.

If this matter is not settled, attorney's fees will continue to build. While success of this claim is virtually assured, if unsuccessful, any adverse ruling will be appealed. A successful appeal will mean the City is liable for statutory post-judgment interest at 12%. **One year's interest on the total judgment amount (\$950,665.67) is \$114,079.88.** Being held liable for attorney's fees will dig the City in a deeper financial hole.

*Does the city want to again spend hundreds of thousands of dollars to litigate something that could be settled for the amount due and owing?* Metro Louisville's serious financial troubles were further exacerbated when it was forced to dip into its rainy day fund and to issue bonds to pay its \$60 million legal obligation nearly eight years after being in same place the City of Covington now finds itself with this group of retired Covington firefighters.

Plaintiffs seek only what Kentucky courts have deemed they are due. They do not wish to embark on a lengthy and costly battle in court. They understand the city's

financial situation. The Plaintiffs also are very appreciative and respectful of being given the opportunity by the City to serve its citizens as firefighters.

*In a gesture of good faith, the Plaintiffs therefore demand the city pay one million one hundred eighty-eight thousand four hundred thirty-one dollars (\$1,188,431.00) to settle this claim. Pre-litigation settlement will prevent negative publicity and save the taxpayers of the City thousands of dollars in litigation costs if settled quickly. This demand will be open and negotiable until January 31, 2010. A settlement will not take much contemplation or debate. It is due as a matter of law. A speedy resolution is paramount to the City's and Plaintiffs' interest.*

Respectfully submitted,

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HON. CHARLES WHEATLEY, II, Ky. Bar Reg. No. 93310  
HON. STEVEN JOSEPH MEGERLE, Ky. Bar Reg. No. 90675  
1003 Russell Street and 618 Washington Street  
Covington, Kentucky 41011  
(859) 912-4847 and (859) 982-2025  
Facsimile: (859) 581-1047  
Counsel for the Plaintiffs