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LEGAL OPINION 2023-01

To: Mayor Jamie Miller and City Council

From: Daniel T. Jones, City Attorney

Date: June 27, 2023

Re: Exemption Status of Chief of Police Ernest Padilla for Purposes of Eligibility for Overtime Pay

I. Issue

Is Ernest Padilla (“Padilla”), as Conrad Police Department’s (“CPD”) Chief of Police, entitled to overtime pay?

II. Brief Answer

Yes. For the weeks during which there are five or more employees in the CPD, Padilla is entitled to overtime pay under the Fair Labor Standards Act (“FLSA”) because he is primarily engaged in law enforcement activities. In 2004 the Secretary of the United States Department of Labor promulgated the “first responders” regulations to clarify that police officers, regardless of title, are not exempt from overtime pay under the executive, administrative, or professional exemptions if the police officers are primarily engaged in law enforcement activities. While Padilla certainly engages in exempt managerial duties, his primary duty is to engage in non-exempt law enforcement activities that are similar to, if not the same as, those of his subordinate police officers. This conclusion is further supported by the fact that when Padilla is on duty or responding to calls for service, he is more often than not the only CPD police officer on duty.

III. Factual Background

A. Creation and Control of the Conrad Police Department

The City of Conrad (“City”) is a political subdivision of the state, known as a “local government unit”. The City adopted a self-government charter as authorized by the 1972 Montana Constitution.¹ The Constitution grants to such entities the exercise of: “any power not prohibited

¹ City of Conrad Charter, Preamble.

by this constitution, law, or charter.”² Thus, the City has the authority to exercise any power, including powers concomitantly shared with the State, unless the City is explicitly denied power by the Constitution or the legislature.³

Pursuant to the City’s self-governing charter, and Mont. Code Ann. § 7-32-4101, the City has established a police department. The Mayor has charge of and supervision over the police department.⁴ It is the Mayor’s duty to “make rules, not inconsistent with the provisions of [Montana Code Annotated Part 41, Chapter 32, Title 7], the other laws of the state, or the ordinances of the city or town council, for the government, direction, management, and discipline of the police force.”⁵ The City Council also has authority to make ordinances for the “government of the police department and for regulating the powers and duties of its officers and members.”⁶

B. Appointment of Police Officers to the Conrad Police Department by the City

All police officers⁷, including the chief of police, are appointed and removed by the Mayor, with majority consent of the Conrad City Council (“Council”).⁸ The Council, in turn, “has exclusive power to determine and limit the number of police officers and members to comprise the police force... , [and] to reduce the number of the police force at any time... .”⁹ Increasing or decreasing the number of police officers on the CPD police force is at the sole discretion of the Council and is not subject to review, even by the district court.¹⁰ Prior to appointment, all applicants to the CPD must first be examined by the police commission and issued a certificate of qualification.¹¹ The police commission was established for the purpose of hiring, disciplining, and firing police officers.¹² Upon receipt of said certificate, the applicant must then be offered an appointment by the Mayor and the appointment must be confirmed by a vote of the Council in order to commence employment with the CPD.¹³

Conrad’s Chief of Police (“Chief”) has very limited authority when it comes to hiring police officers. The Chief only has the authority to solicit applications for employment.¹⁴ All applications received by the Chief must be delivered to the Mayor.¹⁵

² Mont. Const. Art. XI, § 6 (1972).

³ D & F Sanitation, 219 Mont. at 445 (quoting II Mont. Const. Conv. 796-97 (1972)).

⁴ Mont. Code Ann. §7-32-4103.

⁵ Mont. Code Ann. §7-32-4103.

⁶ Mont. Code Ann. §7-32-4104.

⁷ Throughout Montana Code Annotated, “police officers” are synonymously referred to as “peace officers” and “law enforcement officers”. For simplicity, all POST certified officers, as well as those seeking certification, are referred to herein as “police officers”.

⁸ Mont. Code Ann. §§ 7-32-4103 & 4108; see also City of Conrad Charter § 3.06.

⁹ Mont. Code Ann. §7-32-4106(1).

¹⁰ Mont. Code Ann. §7-32-4106(3).

¹¹ Mont. Code Ann. §7-32-4108(2).

¹² Mont. Code Ann. §§ 7-32-4154 to 4164.

¹³ City of Conrad Charter § 3.06(3).

¹⁴ City of Conrad Policy Manual at 8.

¹⁵ City of Conrad Policy Manual at 8; see also Police Commission Handbook at 5-6, (4th Ed. 2010).

If an application is received by the Mayor that indicates the skills of the applicant closely match those outlined in the job description, then the Mayor, and only the Mayor, may refer the applicant to be interviewed by the police commission.¹⁶ The interview for all police officer positions must be conducted by the Police Commission.¹⁷ If the position applied for is that of the Chief, the applicant must also be interviewed the Council.¹⁸ The Mayor cannot be compelled to refer an applicant to the Police Commission and an applicant cannot be offered a position by the City unless the Police Commission has interviewed and certified as qualified an applicant.¹⁹ In other words, if the Mayor does not refer an applicant to the Police Commission for interview, then the applicant would never have the opportunity to be hired as a police officer.

Applicants are then subject to a background check and assigned a score based upon the contents of their applications (counting for 20% of the score) and interview (counting for 80% of the score).²⁰ The selection committee(s), and the Mayor, then make their respective recommendations to the Council for a vote on which applicant to appoint.²¹ The applicant that receives a majority vote of the Council is then appointed to the CPD as a police officer.²²

C. Training and Qualifications for CPD Police Officers

All police officers appointed to the CPD “must meet the minimum qualifying standards for employment promulgated by the Montana public safety officer standards and training council.”²³ The Montana Public Safety Officer Standards and Training Council (“POST”) establishes the basic qualifications and training standards for individuals seeking certification as police officers.²⁴ All police officers must be certified by POST as having met POST’s qualifications and training standards in order to continue to engage in law enforcement activities on behalf of the City (i.e. police officers must be POST certified).

A non-POST certified police officer has one year to satisfy POST’s training requirements for the basic certificate after being appointed by the Council.²⁵ Non-POST certified police officers are required to undergo on-the-job training and attend the Montana Law Enforcement Academy’s twelve-week Law Enforcement Officer Basics course.²⁶ Topics generally covered include: Law & Criminal Procedure, Human Behavior & Social Interaction, Crisis Intervention Training, Patrol Readiness, Police Vehicle Operations, Mental Illness & Mental Health, First Aid, Traffic Enforcement, DUI Enforcement, Crash Investigation, Investigations (Sexual Assault, Domestic Violence, Dangerous Drugs & Computer Crime, Human Trafficking & Child Crimes, Missing Juveniles & Indigenous Persons, Firearms Instruction, Defensive Tactics, Appropriate Use of

¹⁶ City of Conrad Policy Manual at 8; see also Police Commission Handbook at 5-6, (4th Ed. 2010).

¹⁷ City of Conrad Policy Manual at 9; see also Mont. Code Ann. §7-32-4152,

¹⁸ City of Conrad Policy Manual at 9.

¹⁹ Mont. Code Ann. §7-32-4108; see also Police Commission Handbook at 5-6, (4th Ed. 2010).

²⁰ City of Conrad Policy Manual at 9.

²¹ City of Conrad Policy Manual at 10 and City of Conrad Charter § 3.06(3).

²² City of Conrad Charter § 3.06(3).

²³ Mont. Code Ann. §§ 7-32-303(2) and 7-32-4112.

²⁴ Mont. Code Ann. §§ 7-32-201(5), 44-4-401(2)(e), 44-4-403(1)(a)-(c).

²⁵ Admin R. Mont. 23.13.206(2)(e).

²⁶ Admin. R. Mont. 23.13.205.

Force Continuum, Physical Fitness & Nutrition, Critical Incident Stress Management, and CPR/AED & Stop the Bleeding.²⁷

D. Supervision of the CPD

As the chief executive officer of the City, the Mayor has the general authority to exercise control and supervision of the administration of all departments.²⁸ As such, the Mayor specifically “has charge of and supervision over the police department.”²⁹ Part and parcel of the Mayor’s supervisory authority, the Mayor has authority to make rules “for the government, direction, management, and discipline of the police force.”³⁰ The statutes generally leave the administrative management of the City’s affairs to the Mayor absent some affirmative action by the Council that creates a council role in a particular decision.³¹

The Council’s authority to supervise the CPD is limited to (1) choosing the permissible number of police officers on the CPD police force, (2) promulgating ordinances “for the government of the police department and regulating the powers and duties of its officers and members”, and (3) adopting a budget for the CPD.³²

Whereas the Mayor has charge and control of the entire department, the Chief is required to have “charge and control of all police officers, subject to rules that may be prescribed by ordinance... .”³³ The Chief is required to plan, coordinate, and direct the law enforcement activities of the CPD.³⁴ The Chief is also required to develop policies and procedures for the implementation of directives from Council and/or Mayor.³⁵ The Chief assesses the CPD’s performance and formulates programs or policies to alleviate deficiencies.³⁶ Daily supervision of CPD staff is also the responsibility of the Chief.³⁷ CPD grievances are delegated to the Chief as well.³⁸ All CPD employees are subject to the work hours and schedules developed by the Chief.³⁹

Police officer misconduct is handled by the Mayor or the suspected violator’s immediate supervisor.⁴⁰ The Mayor has the ultimate authority to investigate and adjudicate police officer rules/regulations violations.⁴¹ Unless the Chief is the police officer suspected of committing a violation, the Mayor can require the Chief to investigate and adjudicate in the Mayor’s stead if,

²⁷ <https://dojmt.gov/mlea/law-enforcement-officer-basic-course/>

²⁸ Mont. Code Ann. § 7-3-216; see also Mont. Code Ann. § 7-4-4114 & 7-4-4303(3), and City of Conrad Charter § 3.01.

²⁹ Mont. Code Ann. § 7-32-4103.

³⁰ Mont. Code Ann. § 7-32-4103.

³¹ 46 Op. Attny Gen. Mont. No. 21, at 4.

³² Mont. Code Ann. § 7-31-4104; see also Mont. Code Ann. § 7-32-4301 & City of Conrad Charter § 3.05(10).

³³ Mont. Code Ann. § 7-32-4105(1)(c).

³⁴ City of Conrad Policy Manual, at 145.

³⁵ City of Conrad Policy Manual, at 145.

³⁶ City of Conrad Policy Manual, at 145.

³⁷ City of Conrad Policy Manual, at 145.

³⁸ City of Conrad Policy Manual, at 145.

³⁹ Conrad Police Department Policy and Procedure Manual, Standards of Conduct, at § III(C).

⁴⁰ City of Conrad Policy Manual, at 117.

⁴¹ City of Conrad Policy Manual, at 117.

and only if, the adjudication results in an oral reprimand or a written reprimand.⁴² Only the Mayor has the authority to suspend or demote police officers.⁴³ The Mayor has sole authority to remove from employment the Chief, any police officers, and all other employees of the CPD.⁴⁴

E. Job Duties Common to all CPD Police Officers

The City has five different police officer positions: Police Patrolman I, Police Patrolman II, Police Patrolman III, Police Sergeant, and Chief of Police.⁴⁵ All of the City's police officers are vested with the authority and duty to "maintain public order and make arrests for offenses while acting within the scope of the person's authority."⁴⁶ All police officers are also required to engage in "patrol operations performed for detection, prevention, and suppression of crime and the enforcement of criminal and traffic codes of this state and its local governments."⁴⁷

The City has assigned the following essential duties and responsibilities to all police officers:

- Works on rotating shifts performing security patrols, traffic control, investigation and first aid at accidents, detection, investigation, and arrest of persons involved in crimes or misconduct.
- Works an assigned shift using own judgment in deciding course of action being expected to handle difficult and emergency situations without assistance.
- Carries out duties in conformance with Federal, State, County, and City laws and ordinances.
- Animal Control duties are assigned as an additional set of tasks as set by the Conrad City Council. Any additional compensation is received only while animal control duties are assigned to the Conrad Police Department. Should the decision be made by the Conrad City Council to hire a separate position for animal control, any additional compensation for animal control duties for police officers will be eliminated. (See Animal Control Officer position description for additional information as to specific duties).⁴⁸

The CPD operates seven days per week and three-hundred and sixty-five days per year, providing 24/7 law enforcement coverage for the City.⁴⁹ While interviewing applicants for the Chief position, the interview committee posed the following question to each of the interviewed applicants:

⁴² City of Conrad Policy Manual, at 117-118.

⁴³ City of Conrad Policy Manual, at 118.

⁴⁴ City of Conrad Charter § 3.06(3).

⁴⁵ City of Conrad Policy Manual, at 145-165.

⁴⁶ Mont. Code Ann. §§ 46-1-202(3) & (17).

⁴⁷ Mont. Code Ann. §§ 7-32-103(2) and 7-32-201(3).

⁴⁸ City of Conrad Policy Manual, at 145-165.

⁴⁹ City of Conrad Policy Manual, at 91.

The Conrad Police Department has a total of 5 Officers, including the Chief, who provide 24/7 coverage for the community. Knowing that the Chief is a working chief, how would you go about scheduling the shifts for the officers and yourself?”⁵⁰

Scheduling is based upon two ten hours shifts per day and two two-hour on-call shifts.⁵¹ Every police officer is expected to patrol the City.⁵² The below table, based upon patrol vehicle mileage for March and April of 2023, indicates that all police officers tend to patrol the City in equal amounts:

Officer	Average Miles per Day
All Officers	34.2
Chief Padilla	35.9
Sergeant Smith	11.2
Officer Lund	41.5
Officer Konen	48.1

Based upon the CPD schedule, and as a result of the CPD only employing four to five police officers, all police officers regularly serve the City alone⁵³. The Chief is no exception. During the time period beginning January 1, 2022 and ending May 31, 2023, Padilla was the only police officer on duty during 254 of 388 work shifts (65% of the time).⁵⁴

Not only are the police officers regularly on-duty alone, they are also regularly required to respond to calls to service without other CPD police officers. Again, the Chief is no exception. Dispatch records and Officer Daily Logs for Padilla indicate that he responds to calls for service without the assistance of other CPD police officers 76% of the time.⁵⁵

Police officers are required to live within the City’s boundaries so as to ensure their ability to “safely respond to emergency situations within thirty (30) minutes of notification without unreasonably endangering the public.”⁵⁶ The Chief is not excluded from the requirement to be able to safely respond to emergency situations.⁵⁷ At the time of Padilla’s hire, both the Mayor and Chief requested the Council grant Padilla an exemption because he only lived three miles outside of the City Boundaries and the Mayor and Chief had “no concerns about [Padilla’s] response time.”⁵⁸

⁵⁰ Interview of Chief of Police Applicants: 00:16:00, 1:33:45, and 2:38:30 (Oct. 22, 2021)

⁵¹ Interview of Chief of Police Applicants: 00:16:00, 1:33:45, and 2:38:30 (Oct. 22, 2021)

⁵² City of Conrad Policy Manual, at 145-165.

⁵³ See CPD monthly schedules for 1/1/2022 through 6/30/2023.

⁵⁴ See CPD monthly schedules for 1/1/2022 through 6/30/2023.

⁵⁵ See Police Officer Daily Logs 3/2022, 7/2022, 10/2022, and 1/2023 to 5/2023; see also Pondera County Sheriff’s Office Law Incident Summary Report for 3/2022, 7/2022, 10/2022, and 1/2023 to 5/2023.

⁵⁶ City of Conrad Policy Manual, at 34.

⁵⁷ City of Conrad Policy Manual, at 34.

⁵⁸ See email from Judisch to Council (Mar. 3, 2020).

F. Job Duties Specific to the Chief of Police

The duties imposed upon the Chief by the City are to “present to the council a report, in writing, giving the number of arrests made during the preceding calendar month for offenses against the provisions of this code, the number of prisoners, the number of special police officers employed, and such other facts concerning the business of his office as he may deem advisable for the information of the council.”⁵⁹

The specific duties imposed upon the Chief by the Mayor, excluding those duties listed above that are common to all police officers, are found in the Chief’s job description.⁶⁰

Position Summary:

Performs a variety of complex administrative, supervisory and professional work in planning, coordinating, and directing the law enforcement activities of the Police Department. Serves as Department Head. Performs the duties of subordinate police personnel as needed.

Essential duties and responsibilities include both management and law enforcement activities:

- Plans, coordinates, supervises, and evaluates police department operations.
- Develops policies and procedures for the Department in order to implement directives from the City Council and/or Mayor.
- Plans and implements a law enforcement program for the City to carry out the policies and goals of City Management and Council; review Department performance and effectiveness; formulates programs or policies to alleviate deficiencies.
- Supervises police department staff (Patrolman I, Patrolman II, Police Sergeant, Police Lieutenant) and other assigned staff.
- Provides for the training and development of Department officers.
- Coordinates the information gathered and work accomplished by various officers; assigns officers to special investigations as the need arises for their special skill(s).
- Assures that personnel are assigned to shifts or working units which provide optimum effectiveness in terms of current situations and circumstances governing deployment. Manages personnel schedule to cover all shifts and fills in where needed during staff shortages.
- Evaluates evidence, witnesses, and suspects in criminal cases to correlate all aspects and to assess for trends, similarities, or for associations with other cases.
- Supervises and coordinates the preparation and presentation of an annual budget for the Department, directs the implementation of the Department's budget, plans for and reviews specifications for new or replaced equipment.
- Directs the development and maintenance of systems and records documentation that provides for the proper evaluation, control, and documentation of Police Department operations.

⁵⁹ Conrad City Code §1-8-2.

⁶⁰ City of Conrad Policy Manual, at 145-148.

- Handles Departmental grievances, maintains Departmental discipline and the conduct and general behavior of assigned personnel in accordance with the City of Conrad Policies and Procedures Manual and the Conrad Police Department Policy and Procedure Manual.
- Prepares and submits monthly reports to the City Council regarding the Department's activities and prepares a variety of other reports as appropriate.
- Meets with elected or appointed officials, other law enforcement officials, community and business representatives, and the general public on all aspects of the Department's activities.
- Attends conferences and meetings to keep abreast of current trends in the law enforcement field; represents the City of Conrad Police Department in a variety of local, County, State, and other meetings.
- Cooperates with the County, State, and Federal law enforcement officers as appropriate where activities of the Police Department are involved.
- Works to preserve the peace and enforce the law, to prevent or detect and investigate misconduct involving misdemeanors, felonies, and other law violations and to otherwise serve and protect.
- Ensures that laws and ordinances are enforced and that the public peace and safety are maintained.

While the Chief is required to regularly engage in law enforcement activities that are common to all police officers, the above listed job duties specific to the Chief are generally related to the management of the CPD, with three exceptions.⁶¹ Padilla estimates that on average he spends approximately 10-20 hours per month engaged in managerial tasks. Padilla reports that he prepares an annual budget for the Mayor and Council's approval. However, Padilla requires the Finance Officer, or the Finance Officer's staff, to provide him with all of the necessary budgetary data. The CPD's expenditures must all be budgeted and approved by the Council.

IV. Laws and Analysis

A. Montana Law

Generally, an employer may not employ any employee for a workweek longer than 40 hours unless the employee receives compensation for employment in excess of 40 hours in a workweek at a rate of not less than 1 ½ times the hourly wage rate at which the employee is employed.⁶² However, individuals employed in a bona fide executive, administrative, or professional capacity are exempted from receiving overtime pay.⁶³ Under Montana law, police officers are considered to be professionals and would be exempt from receiving overtime pay.⁶⁴ As an exception to the exemption, the application of the State's overtime provision cannot be applied contrary to the Fair

⁶¹ City of Conrad Policy Manual, at 145-148.

⁶² Mont. Code Ann. § 39-3-405(1).

⁶³ Mont. Code Ann. §39-3-406(1)(j).

⁶⁴ *Billings v. Smith*, 158 Mont. 197, 209, 490 P.2d 221, 228 (1971).

Labor Standards Act nor the regulations promulgated under said act.⁶⁵ This analysis turns now to the FLSA.

B. Federal Law

Much like Montana's wage and hour laws, the FLSA presumes overtime pay to be mandatory unless it can be established that an employee is declared exempt.⁶⁶ Under the FLSA, employers subject to the law must pay employees covered by the law a designated minimum wage, as well as overtime compensation when a covered employee works more than forty hours in one work week, unless an employer is exempt from the FLSA.⁶⁷ When an employer is exempt from the FLSA's provisions, its workers are not entitled to the benefits and protections - including the minimum wage and overtime provisions - afforded by the FLSA.⁶⁸

The FLSA was enacted in recognition of the unequal bargaining power between employer and employee.⁶⁹ As a result, even an arms-reach agreement between employer and employee for an amount of pay that is less than that which is required under the FLSA is prohibited. That is because the FLSA is designed to prevent consenting adults from establishing by agreement sub-minimum wages.⁷⁰

The employer bears the burden of invoking an exemption, which is narrowly construed against the employers seeking to assert it and its application limited to those establishments plainly and unmistakably within their terms and spirit.⁷¹

Although the reach of the FLSA is meant to be broad, its application is not unlimited.⁷² In this regard, the FLSA outlines several situations in which specific employers are exempt from the FLSA's wage and hour requirements. The applicable exemptions which are analyzed herein include the 29 U.S.C.S. § 213(b)(20) law enforcement exemption (the "Section 13(b)(20)" or "13(b)(20)" exemption) and the 29 U.S.C.S. § 213(a)(1) executive exemption, administrative exemption, and professional exemption (the "Section 13(a)(1)" or "13(a)(1)" exemption).

1. Section 13(b)(20) Law Enforcement Exemption

The FLSA provides an exemption for City police officers that are engaged in law enforcement activities when the City employs less than five police officers during any given workweek.⁷³

i. Are employees of the City that are appointed to the Conrad Police Department engaged in "law enforcement activities" under the Section 13(b)(20) exemption?

⁶⁵ Mont. Code Ann. § 39-3-405(4).

⁶⁶ 29 USCS § 207(a)(1).

⁶⁷ 29 USCS § 207(a)(1).

⁶⁸ 29 USCS § 207(b)-(q).

⁶⁹ *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 at 706 (1945).

⁷⁰ *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986).

⁷¹ *Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 222 (2d Cir. 2006); see also *Specht v. City of Sioux Falls*, 639 F.3d 814, 820 (8th Cir. 2011); see also *Visco v. Aiken Cnty.*, 974 F. Supp. 2d 908, 914 (D.S.C. 2013) (internal citations omitted).

⁷² See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947).

⁷³ 29 U.S.C. § 213(b)(20).

According to the Department of Labor's regulations, the term "any employee . . . in law enforcement activities" means an employee:

- (1) who is an officer empowered by State statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes;
- (2) who has the power to arrest; and
- (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.⁷⁴

All of the City's police officers are vested with the authority and duty to "maintain public order and make arrests for offenses while acting within the scope of the person's authority."⁷⁵ All police officers are also required to engage in "patrol operations performed for detection, prevention, and suppression of crime and the enforcement of criminal and traffic codes of this state and its local governments."⁷⁶ Once a police officer is appointed by the City, they are engaged in law enforcement activities as required by the Section 13(b)(20) exemption.

ii. During the applicable time period, has the City employed less than five police officers?

The FLSA provides an exemption for City police officers engaged in law enforcement activities when the City employs less than five police officers during any given workweek.⁷⁷ The regulations explain that, for the purpose of counting employees towards section 13(b)(20)'s exemption, "[n]o distinction is made between full-time and part-time employees, or between employees on duty and employees on leave status, and all such categories must be counted in determining whether the exemption applies."⁷⁸

The City appointed Padilla to Chief of Police effective February 1, 2022.⁷⁹ Padilla has occupied the position since that date. During the time period beginning February 1, 2022 and ending December 31, 2022, the City employed five or more police officers (1) from February 1, 2022 to March 31, 2022 and (2) from June 1, 2022 to December 14, 2022.⁸⁰ During the time period beginning January 1, 2023 and ending June 30, 2023, the City employed five or more police officers from May 17, 2023 to June 30, 2023.⁸¹

2. Conclusion: Section 13(b)(20) Law Enforcement Exemption

The City employed five or more police officers during the time period beginning February 1, 2022 and ending June 30, 2023 (1) from February 1, 2022 to March 31, 2022, (2) from June 1, 2022 to December 14, 2022, and (3) from May 17, 2023 to June 30, 2023. During the weeks in the

⁷⁴ 29 C.F.R. § 553.211.

⁷⁵ Mont. Code Ann. §§ 46-1-202(3) & (17).

⁷⁶ Mont. Code Ann. §§ 7-32-103(2) and 7-32-201(3).

⁷⁷ 29 U.S.C. § 213(b)(20).

⁷⁸ 29 C.F.R. § 553.200(b).

⁷⁹ See Offer Letter from Mayor to Padilla (Jan. 31, 2022).

⁸⁰ See CPD monthly schedules for 1/1/2022 through 6/30/2023.

⁸¹ See CPD monthly schedules for 1/1/2022 through 6/30/2023.

foregoing three time periods, the FLSA Section 13(b)(20) overtime exemption would be inapplicable and Chief Padilla would be entitled to overtime pay. During the entire applicable period the City budgeted for, and attempted to maintain, five police officers on staff. Despite said plans, the FLSA Section 13(b)(2) exemption would render Chief Padilla exempt from overtime pay when the City employed less than five (5) police officers.

3. Section 13(a)(1) Exemption

Under the FLSA, any employee employed in a bona fide executive or administrative capacity is exempt from the statute's overtime and minimum-wage requirements.⁸² Determining whether an employee's primary duty is management depends upon "all the facts in a particular case."⁸³ "Job title alone is insufficient to establish the exempt status of an employee."⁸⁴

The Department of Labor's regulations define "employed in a bona fide executive capacity" as any employee: (1) Compensated on a salary basis at a rate of not less than \$455 per week; (2) Whose primary duty is management of a department that is a subdivision of the enterprise in which the employee is employed; (3) Who customarily and regularly directs the work of two or more other employees; and (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.⁸⁵ As a general rule, the regulations provide that if an employee spends over 50% of his time on managerial duties, his primary duty is management.⁸⁶

The above test for determining if an employee is "employed in a bona fide executive capacity" is conjunctive. Each of the four criteria listed above must be satisfied in order for the section 13(a)(1) exemption to apply.

The regulations contain a first responder exception to the Section 13(a)(1) exemption for field law enforcement work. The Section 13(a)(1) exemptions do not apply to police officers, regardless of rank or pay level, who perform work such as preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.⁸⁷ Such employees do not qualify as exempt executive employees, administrative employees, nor professionals.⁸⁸ Thus, for example, a police officer whose primary duty is to engage in the above listed activities cannot become exempt under Section 13(a)(1) merely because the police officer also directs the work of other police officers in the conduct of the above listed activities.⁸⁹

⁸² 29 U.S.C. § 213(a)(1).

⁸³ 29 C.F.R. § 541.103.

⁸⁴ 29 C.F.R. § 541.2 ("The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.")

⁸⁵ 29 C.F.R. § 541.100(a).

⁸⁶ *Auer v. Robbins*, 65 F.3d 702, 712 (8th Cir. 1995).

⁸⁷ 29 C.F.R. § 541.3(b)(1).

⁸⁸ 29 C.F.R. § 541.3(b)

⁸⁹ 29 C.F.R. § 541.3(b)(3).

Under the first responder regulation and the definition of "primary duty," if the principal benefit conferred to the City by a police officer is the police officer's performance of law enforcement duties in the field and concomitant supervision of lower-ranking officers while performing such duties, the police officer is not subject to the Section 13(a)(1) exemption.⁹⁰ Such work is "considered 'non-exempt' under the first responder regulation, the limited amount of exempt management duties undertaken by [police officers] is insufficient to render their primary duty 'management'."⁹¹

Criteria (1) and (3) of the section 13(a)(1) exemption are not in dispute and are presumed to be satisfied.

i. Is the Chief of Police's primary duty the management of the Conrad Police Department?

"Primary duty," as used in the second prong of the above-stated test for the section 13(a)(1) exemption, is the work that is the "principal, main, major or most important duty that the employee performs."⁹² Where an employee concurrently performs both exempt and non-exempt duties, his status is "determined on a case-by-case" inquiry into the above-stated factors.⁹³ "Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for success or failure of business operations under their management while performing the nonexempt work."⁹⁴

In *Terry v. City of Ola*, the chief of police of a police department of four to five police officers claimed that the City of Ola violated the FLSA because it required the chief to work overtime without pay.⁹⁵ The Court found the following facts to be pertinent in its analysis of the applicability of the section 13(a)(1) exemption:

- As Chief of Police, Stafford spends approximately twenty percent of his time performing managerial duties, such as deciding whether to place officers on administrative leave or administrative furloughs, ensuring officers have proper certification, ensuring the police department has sufficient equipment, making out work schedules, and reviewing reports.
- Stafford spends between seventy-five and eighty percent of his time on patrol and performing investigations, in the same capacity as other officers, as he is the only officer on duty during his shifts.
- Stafford also spent time on call — i.e., time where they were not on duty but had to be available to respond to calls for officer assistance. While on call, Stafford had to remain in the City of Ola, available by home or cell phone, in a modified uniform,

⁹⁰ Mullins v. City of New York, 653 F.3d 104, 118-119.

⁹¹ Mullins v. City of New York, 653 F.3d 104, 118-119.

⁹² 29 C.F.R. § 541.700.

⁹³ 29 C.F.R. § 541.106 (a).

⁹⁴ 29 C.F.R. § 541.106 (a).

⁹⁵ Terry v. City of Ola, 2013 U.S. Dist. LEXIS 203234, 1-6 (Ark. Eastern Dist. Ct., Mar. 8, 2013).

and not more than three minutes away from a vehicle from which he could respond to calls.

- Stafford has worked at the police department longer than the other officers who currently work at the police department, and he is paid more than the other officers.
- Ola's Mayor and City Council supervise the Ola Police Department. Though Stafford gives hiring recommendations to the Mayor and City Council, the City Council is in charge of hiring new officers.
- The Mayor or City Council must give permission for any police-department purchases over \$500, and the Mayor or City Council decides how to spend any grant money that is available to the police department.
- The Department of Labor conducted an investigation of the City of Ola and found that Stafford worked in the same capacity as the other police officers.⁹⁶

The Court held that the chief of police was not exempt from overtime pay under the section 13(a)(1) exemption:

“Even if Stafford is paid more than other officers because of his position and is intimately involved in the hiring process, these factors are not enough to overcome the conclusion that when viewing his job as a whole, Stafford's primary duty is patrolling the City of Ola, not performing managerial duties.”⁹⁷

Similarly, the Chief is required to perform a variety of complex administrative, supervisory and professional work in planning, coordinating, and directing the law enforcement activities of the CPD. Much like Stafford, the Chief's managerial authority are circumscribed by the statutory duties of the Council and the Mayor. Padilla must account for the CPD's expenditures but cannot expend City funds without the permission of the Council via an approved budget or budget amendment. Padilla can make recommendations to the Council and the Mayor pertaining to hiring and promotions. Those recommendations are undoubtedly influential. However, without the Police Commission's certification, the Mayor's appointment, and the Council's approval, Padilla cannot hire new police officers. The Chief has the authority to issue verbal and written reprimands, but only the Mayor can suspend, demote, or terminate police officers.

The ratio of the amount of time Padilla spends engaged in managerial activities as opposed to law enforcement activities appears similar to that of Stafford's. Stafford estimated that he spent 15-20% of his time on managerial duties and 80-85% of his time engaged in law enforcement activities. Padilla estimates that he spends 10 to 20 hours per month (6.25-12.5%) engaged in managerial activities. The CPD vehicle mileage records indicate that Padilla is on patrol, on average, the same number of miles as are his subordinate police officers who do not have any managerial duties. Per the CPD's monthly duty records, 65% of the time Padilla is the only officer on duty during his regularly scheduled shifts. According to the CPD's officer daily logs and Pondera County Sheriff's Office dispatch records, Padilla responds to approximately 76% of calls for service without the support of any other CPD police officer.

⁹⁶ Terry v. City of Ola, 2013 U.S. Dist. LEXIS 203234, 4 & 33 (Ark. Eastern Dist. Ct., Mar. 8, 2013).

⁹⁷ Terry v. City of Ola, 2013 U.S. Dist. LEXIS 203234, 33-34 (Ark. Eastern Dist. Ct., Mar. 8, 2013).

Even if Padilla spent 32 hours per month (20% of his time) on managerial duties, it would still be the case that without Padilla on the regular schedule as a patrolling police officer the City would not be able to provide 24/7 law enforcement. Padilla was told by the City that the Chief did not have the discretion to avoid being regularly scheduled for patrol duties prior to Padilla's appointment as Chief. The interview committee, with whom Padilla interviewed after applying for the Chief position, explained to Padilla that the Chief's position was that of a "working chief". According to the interview committee, the Chief would need to regularly schedule both subordinate police officers and himself for regular patrol shifts in order to provide 24/7 law enforcement coverage. Padilla does in fact regularly schedule himself for 10 hour shifts just as he regularly schedules the other police officers. While on duty the Chief and CPD police officers engage in patrol operations to detect, prevent and suppress crime; investigate accidents; arrest persons involved in crimes or misconduct; interview witnesses; prepare investigative reports; and engage in similar work.

Padilla is subject to the same on-call requirements as are the other police officers. All CPD police officers, including Padilla, are required to live in or near the City such that they can safely respond to emergency situations within 30 minutes of having received notice thereof. CPD police officers all have a duty mobile phone with which they are required to respond to calls for service, wear similar uniforms, engage in patrol with CPD patrol vehicles, and are issued similar law enforcement gear (including body armor, restraints, firearms, and less lethal tools such as tasers).

The first responder regulations make clear that managerial/administrative activities exercised concurrently with law enforcement activities do not de facto result in the employee's exemption from FLSA requirements if the principal benefit conferred by the City is the law enforcement activities. Padilla does not have the discretion to exclude himself from regular patrol. More often than not Padilla is the only CPD police officer on duty. If Padilla were excluded from regular patrol duties, the City would no longer be able to offer 24/7 law enforcement coverage. Furthermore, the amount of time Padilla is engaged in managerial duties is far less than 50% and more likely closer to 10-20%. Padilla's primary duty is to engage in law enforcement activities.

ii. Does the Chief have authority to hire or fire other employees, or, are his suggestions as to hiring, firing, advancement, or any other change of status of other employees given particular weight?

The fourth element for determining if an employee is exempt from overtime pay pursuant to the section 13(a)(1) exemption requires an employer to prove that the employee had the authority to hire or fire other employees, or that their recommendations regarding other employee(s) change of status were given "particular weight" by the decisionmaker.⁹⁸

Factors to consider to determine whether an employee's suggestions and recommendations are given "particular weight," include, but are not limited to: "whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's

⁹⁸ 29 C.F.R. § 541.100(a)(4).

suggestions and recommendations are relied upon.”⁹⁹ “An employee’s suggestions and recommendations may still be deemed to have ‘particular weight’ even if a higher level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee’s change in status.”¹⁰⁰

A change of status is a tangible employment action that constitutes "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."¹⁰¹ De minimis actions, or actions that are not materially adverse, are not changes of status because they constitute an employment disruption or are a mere inconvenience.¹⁰²

Padilla does not have the authority to hire any employees of the CPD. Padilla does have the authority to solicit applications for employment. However, statutorily Padilla has no actual role in hiring and can be excluded entirely after he has solicited applications. Only the Mayor can refer an applicant to the police commission. Only the police commission can issue a certification that an applicant is qualified to engage in law enforcement activities. Only the Mayor can offer an appointment to the CPD. Lastly, the Council must authorize the Mayor’s appointment. Nonetheless, the Chief’s opinion undoubtedly carries weight for both Council’s and the Mayor’s roles. There does not appear to be an occasion where the Chief’s recommendations as to hiring a CPD employee were not accepted.

Padilla does not have the authority to fire or suspend CPD employees. Padilla also does not have the authority to promote or demote employees. None of the foregoing activities are part of the Chief’s job description.¹⁰³ However, Padilla is required to evaluate his subordinate employees on an annual basis, in part, for the purpose of promotions and demotions.¹⁰⁴ While the foregoing activities are the province of the Mayor and Council, the Mayor and the members of the Council are civilians elected as part-time public officials whose expertise generally has not been assessing the quality or quantity of law enforcement activities. The Chief’s recommendations are nearly always followed.

The Chief’s recommendations as to changes in status of employee of the CPD are generally considered and accepted by the Council and the Mayor. The police commission acts independently of the Chief. It is more likely than not that the fourth element for determining if an employee is exempt from overtime pay pursuant to the section 13(a)(1) exemption would be satisfied because Padilla’s recommendations would be given particular weight.

4. Conclusion: Section 13(a)(1) Exemption

⁹⁹ 29 CFR 541.105.

¹⁰⁰ 29 CFR 541.105

¹⁰¹ Keeton v. Flying J, Inc., 429 F.3d 259, 263 (6th Cir. 2005)(internal quotation omitted); see also Pa. State Police v. Suders, 542 U.S. 129, 144, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004).

¹⁰² White v. Burlington N. & Santa Fe Ry., 364 F.3d 789, 795 (6th Cir. 2004); see also Sanford v. Main St. Baptist Church Manor, Inc., 327 Fed. Appx. 587, 597 (6th Cir. 2009)..

¹⁰³ City of Conrad Policy Manual, at 145-148.

¹⁰⁴ City of Conrad Policy Manual, at 26.

The burden of proof to establish that the Chief is exempt from overtime pay under the FLSA is on the City.¹⁰⁵ "[I]f the record is unclear as to some exemption requirement, the [City] will be held not to have satisfied its burden."¹⁰⁶

Elements one and three of the section 13(a)(1) exemption are indisputably satisfied because there is no question of fact that Padilla receives a salary in excess of \$455 per week and he customarily directs the work of more than two employees.

Element four is more likely than not satisfied. Although Padilla has no authority to hire, fire, promote or demote any CPD employee, his recommendations in that regard nearly always coincide with the decisions of the Mayor and Council.

Element two, however, is not satisfied. Padilla is required to exercise supervisory control over subordinate police officers. However, the CPD is required to provide the City with 24/7 law enforcement coverage. Padilla does not have the authority to exclude himself from the regular patrol schedule and he engages in law enforcement activities at nearly the same rate as his subordinate officers. Exemptions are narrowly construed against the employer asserting the exemption and the first responder regulations explicitly exclude from the section 13(a)(1) exemption police officers, regardless of title, who are regularly engaged in law enforcement activities. Therefore, Padilla is not subject to the Section 13(a)(1) executive, administrative, or professional exemptions.

V. Conclusion

Padilla is entitled to overtime pay pursuant to the FLSA during the weeks that five or more police officers were employed by the CPD. Even if Padilla worked overtime hours during the weeks when the CPD had four or less police officers employed, he is not entitled to overtime pay for those particular weeks pursuant to the Section 13(b)(20) exemption. Padilla is not exempt from overtime pay under the executive, administrative, or professional Section 13(a)(1) exemptions because his primary duty is to engage in law enforcement activities. The applicable time periods during which Padilla was entitled to overtime pay are (1) from February 1, 2022 to March 31, 2022, (2) from June 1, 2022 to December 14, 2022, and (3) from May 17, 2023 to June 30, 2023.

Office of the City Attorney

/s/ Daniel T. Jones

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¹⁰⁵ City. Friedrich v. U.S. Computer Serv., 974 F.2d 409, 412 (3d Cir. 1992).

¹⁰⁶ Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 900 (3d Cir. 1991).