

COMES NOW the Defendant, City of Virginia Beach, by counsel, and pursuant to Federal Rule of Civil Procedure 56, in support of its motion for summary judgment in its favor and to dismiss this case in its entirety, states as follows:

STATEMENT OF THE CASE

On November 25, 2020, Plaintiffs David Baust, Elizabeth Beatty, Michael Brown, Nicholas DiCaprio, William Padgett, Erik Svedja, Christopher West, and Kaleigh Zehr (collectively “Plaintiffs”) initiated the instant action by filing a Complaint in the United States District Court for the Eastern District of Virginia. *See* ECF No. 1. Plaintiffs, employees of the City of Virginia Beach (“City”) assigned to the position of Captains in the Virginia Beach Department of Emergency Medical Services (“VBEMS”), allege that they have been improperly denied overtime compensation in violation of the Fair Labor Standards Act (“FLSA”), as amended, 29 U.S.C. § 201, et seq., and the Virginia Gap Pay Act (“VGPA”), Va. Code § 9.1-700, et seq. *Id.*

All discovery deadlines have passed, and, per the parties’ stipulated agreement that any dispositive motion be filed on or before July 1, 2021, the City moves for summary judgment.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. VBEMS created the Captain position in 2006 “to address management gaps in [VBEMS] operations” and “to improve management of field operations.” *See* Internal Correspondence from Chief Brazle at DEF004892, annexed hereto as Exhibit “A”.¹

2. Eight Captains are assigned to rotating shifts within the VBEMS Operations Division, with the goal of providing “leadership and direction to a combination of career and volunteer personnel.” *Id.*

¹ All VBEMS Captains earn more than \$684 hours per week. *See* Relevant Excerpts of Plaintiffs’ Deposition Transcripts annexed collectively hereto as Exhibit “T” (combining excerpts of each Plaintiff’s testimony regarding their salary). While Plaintiff Svejda’s salary is not included, he cannot dispute in good faith that he earns at least \$684 per week.

3. To achieve this goal VBEMS Captains “supervise and direct the delivery of skilled emergency and non-emergency services in a variety of areas including emergency medical and rescue operations, advanced medical assistance, mentoring, training, quality improvement, public education, volunteer agency coordination, [and] mass casualty management.” *See* EMS Captain Job Descriptions dated 2017 and 2021 at DEF005170, annexed collectively hereto as Exhibit “B”.

A. Duties and Responsibilities of VBEMS Captains serving as Shift Captains

5. The majority of VBEMS Captains are “Shift Captains” who are responsible for supervising emergency services across the City. EMS Field Supervisor/Shift Captain Expectations and Responsibilities at DEF007180, annexed hereto as Exhibit “C”; *see also* Ex. B at DEF005170.

6. VBEMS Captains who serve as Shift Captains are directly responsible for the supervision of four to six career paramedics and, while on shift, EMS Captains are also responsible for overseeing the emergency medical services provided by dozens of volunteer paramedics who they are not assigned to directly supervise. *See* EMS Paramedic and Captain Shift Assignments from 2017 to 2021, annexed hereto as Exhibit “D”; *see also* Plaintiff Beatty Deposition Transcript at 107:11-108:8, annexed hereto as Exhibit “E”.² With only 44 career paramedic positions in the City of Virginia Beach, each VBEMS Captain who serves as a Shift Captain directly supervises 9% to 14% of the City’s career paramedics. *See* Ex. D.

7. VBEMS Captains who serve as Captains are responsible for preparing the first draft of their subordinate paramedic employees’ performance evaluations, which include substantive comments and numerical ratings. *See* Ex. E at 62:12-64:12; *see also* Plaintiff West Deposition Transcript at 26:5-28:1, annexed hereto as Exhibit “F”.

² Redactions to transcripts are made pursuant to the Consent Protective Order in this matter. ECF No. 22. Unredacted copies of transcripts will be produced to the Court immediately upon request.

8. VBEMS Captains who serve as Shift Captains base their evaluations on field observations of their subordinates. Ex. E at 63:3-63:10; *see also* Plaintiff Padgett Deposition Transcript at 58:12-58:22, annexed hereto as Exhibit “G”.

9. VBEMS Captains who serve as Shift Captains may routinely respond to certain calls for service for the purpose of observing their subordinate paramedic employees. Ex. G 58:18-58:22.

10. Once a performance evaluation is drafted, it is then submitted to the VBEMS Captain’s supervisor for review. Ex. E at 62:12-64:12; Ex. F at 26:5-28:1. The level of input offered by the VBEMS Captain’s supervisor varies, and can range from simple grammatical changes to substantive input. Ex. F at 27:5-27:22; Ex. G at 57:14-58:2; *see also* Plaintiff Brown Deposition Transcript at 35:1-35:8, annexed hereto as Exhibit “U”.

11. Once the performance evaluation is finalized, the VBEMS Captain meets with his or her subordinates one-on-one to discuss their individual performance and ratings. Ex. E at 68:17-69:3; Ex. G at 58:4-58:11. During this process, VBEMS Captains may review a subordinate’s goals to “set a plan in place” and to assist in “finding out how to meet that goal.” Ex. E at 74:10-74:17.

12. Key Performance Indicators are benchmarks used by VBEMS to evaluate and maintain efficiency. *Id.*; *see also* Ex. F at 66:7-67:6. VBEMS Captains have access to a quarterly Key Performance Indicators Report Card, which allows them to observe their subordinates’ deficiencies and take efforts to rectify areas of concern. Ex. E at 69:12-71:3; Ex. U at 52:9-54:3.

13. VBEMS Captains, serving as Shift Captains, also have the discretion to prepare performance improvement plans (“PIP”) for subordinate employees. Ex. E at 73:13-74:1; Ex. U at 74:15-75:21. A PIP exists to correct an employee’s performance and enable them to meet department standards. Ex. U at 74:19-74:23. As part of a PIP, a VBEMS Captain may follow up with a subordinate in order to ensure that performance is improving and that steps outlined in the applicable plan are followed. *Id.* at 75:16-75:21.

14. VBEMS Captains have the authority and discretion to issue discipline, up to and including 24-hour suspensions. Ex. E at 71:4-72:13; Ex. F at 69:19-70:14; Ex. G at 60:19-61:12; *see* Disciplinary Policy for Career Members, annexed hereto as Exhibit “W”.

15. VBEMS Captains have the authority and discretion to issue counseling letters and may mediate interpersonal disputes that do not necessarily rise to a level necessitating formal discipline. Ex. E at 71:4-72:13, 77:23-78:1; Ex. G at 61:6-61:12.

16. VBEMS Captains, serving as Shift Captains, are also responsible for maintaining EMS vehicle check-off sheets and ensuring that subordinate employee time sheets are timely and accurately submitted. Ex. E at 76:22-77:11; Ex. G at 54:15-55:7, 64:21-65:2; Ex. U at 35:9-37:6.

17. Although VBEMS Captains, serving as Shift Captains, often must keep themselves available to respond to certain types of calls for service, they may remove themselves from service to complete their administrative tasks. Ex. E 95:7-96:7; Ex. F at 61:17-62:17. In these instances, VBEMS Captains, serving as Shift Captains, are not automatically notified of any calls for service. Ex. E 95:7-96:7.

18. As the highest ranking 24-hour employee in VBEMS, VBEMS Captains are vested with a substantial amount of discretionary authority and are relatively free from direct supervision in conducting the agency’s day-to-day operations. Ex. F at 51:25-53:2.

19. VBEMS Captains, serving as Shift Captains, are assigned to rotating shifts in which they work three consecutive twelve hour tours. Ex. F at 71:22-72:9; *see also* VBEMS Deputy Chief Hundley Deposition Transcript at 66:8-66:11, 67:6-68:11, annexed hereto as Exhibit “H”.

20. Although VBEMS Captains have an immediate supervisor on call 24 hours per day, EMS Captains are the highest-ranking employees who are always on duty. Ex. E at 114:7-115:5; Ex. F at 73:9-74:2.

21. VBEMS Captains working at night may need to contact a superior officer, but that officer is merely on-call and at home. Ex. F at 73:9-74:2; Ex. U at 42:18-43:9.

22. Often these superior officers do not dispatch from their homes in response to a call from a VBEMS Captains, serving as a Shift Captain. Ex. F at 73:9-74:2.

23. At any given time, there are two VBEMS Captains, serving as Shift Captains, on duty, each assigned to supervise and respond to certain incidents in a zone comprising approximately 50% of the area of the City (referred to as EMS 1 or EMS 2). *See* Field Operations Procedures and Performance Expectations at DEF004260, annexed hereto as Exhibit "I"; Ex. U at 40:20-41:16.

24. Often, either because he or she is part of VBEMS's response to a call for service or because he or she has taken himself or herself out of service to complete an administrative task, a VBEMS Captains, serving as a Shift Captain, is unavailable to respond to any incident. Ex. E 53:21-53:25, 95:7-96:7; Ex. F at 61:17-62:17; Ex. U at 40:20-41:16. In such circumstances, that VBEMS Captain's Co-Captain, i.e. the other VBEMS Captain serving as an on-duty Shift Captain, is responsible for the administration of all patient care in the City of Virginia Beach. Ex. E 53:21-53:25; Ex. F at 65:25-66:6; Ex. G at 69:5-69:17; Ex. U at 40:20-41:16.

25. VBEMS Captains, serving as a shift Captain, work either a day shift or night shift from 5am to 5pm or 5pm to 5am, respectively. Ex. H at 66:8-66:11, 67:6-68:11. This differs from paramedics, who report at either 6am or 6pm for their twelve hours tours. Ex. H at 248:4-248:6.

26. VBEMS Captains typically arrive 10 to 15 minutes early for their tour and report to the EMS 1 or EMS 2 headquarters to be prepared for shift change. Ex. E at 51:10-51:15, 52:10-52:14; Ex. F at 45:9-45:17; Ex. G 47:10-47:25. VBEMS Captains, serving as Shift Captains, then often have a face-to-face shift change meeting with the outgoing Shift Captain. Ex. G at 48:8-49:12.

27. When a VBEMS Captain serving as a Shift Captain reports for duty, he or she typically logs in to a computer terminal, either in an office that is shared with other Shift Captains

at their respective headquarters or in the EMS vehicle used by Shift Captains in their zone. Ex. E at 52:10-52:21; Ex. G at 48:8-49:12.

28. VBEMS Captains, serving as Shift Captains, arrive one hour before paramedics, review the daily schedule and hold shift change meetings, in part, to resolve any last-minute scheduling matters that may have arisen. Ex. H at 248:16-250:3; Ex. E at 53:4-53:14 (Plaintiff Beatty referred to this scheduling process as “tactical scheduling”).

29. When necessary, VBEMS Captains, serving as Shift Captains, are permitted to “hold over” paramedics to ensure that the VBEMS minimum staffing policy requirements are met. *See* Hire Back and Recall of Career Personnel Policy at DEF003906, annexed hereto as Exhibit “J”. A holdover is when a Shift captain notifies a paramedic that she is “required to remain on-duty until appropriate relief can be provided.” *Id.* at DEF003905, DEF003906.

30. VBEMS Captains may hold over any individual when needed to meet minimum staffing requirements except that VBEMS Captains should seek approval from a Brigade Chief when a holdover would require VBEMS to incur overtime. Ex. G at 50:4-50:11.

31. When necessary, VBEMS Captains, serving as Shift Captains, may gain assistance from a Brigade Chief to cover an extended absence through a hire back, which is a “[v]oluntary or mandatory assignment of any off-duty member to report to supplement staffing for a designated period or assignment in order to supplement routine operations and special event coverage.” Ex. “J” at DEF003905; Ex. E at 61:6-61:19.

32. In addition to holding personnel over, VBEMS Captains, serving as Shift Captains, may “assign or reassign members to any apparatus as needed to compensate for absences, illness, service demand,” or other operational needs. Ex. I at DEF004260; Ex. E at 94:11-94:20.

33. Prior to the beginning of paramedics’ shifts, VBEMS Captains, serving as Shift Captains, may also engage in other administrative tasks such as performing a quality assurance

check on their subordinates' patient care reports. Ex. U at 38:21-39:12. Such quality assurance checks are an ongoing responsibility of VBEMS Captains, serving as Shift Captains. *Id.*

34. During any given scheduled shift, a VBEMS Captain serving as a Shift Captain has as his or her primary responsibility the supervision of VBEMS emergency response across the City. Ex. B; Ex. I at DEF004260.

35. VBEMS Captains, serving as Shift Captains, may be automatically dispatched to certain calls for service. Ex. E at 89:19-91:4; Ex. G at 69:18-70:7. These calls are considered "high-acuity", meaning that large-scale incidents that are life-threatening in nature or involve complex response. Ex. E at 89:19-92:14; Ex. G at 69:18-70:7; Ex. H at 175:21-176:4, 177:12-177:7.

36. When VBEMS Captains, serving as Shift Captains, are automatically dispatched, they are notified that a call bearing a certain classification from the City's Emergency Dispatch center has come in. Ex. E at 89:19-92:14, 91:5-91:14; Ex. G at 75:4-75:12; VBEMS Chief Brazle Deposition Transcript at 82:11-83:2, annexed hereto as Exhibit "K".

37. VBEMS Captains, serving as Shift Captains, have the discretion to listen to the automatic dispatch notification, review call notes in the mobile data terminal in their EMS vehicle and determine that a call does not meet the criteria for one to which they are required to respond. Ex. E at 89:19-92:14, 91:5-91:14; Ex. F at 55:20-59:14. Ex. G at 75:4-75:12; Ex. H at 176:20-177:11; Ex. K at 82:11-83:2. VBEMS Captains may downgrade the call to a lower priority. *Id.*

38. VBEMS Captains, serving as Shift Captains, also have the discretion to cancel calls altogether without ever arriving on the scene of an emergency. Ex. F at 55:20-59:14.

39. Calls are frequently over-prioritized, which is to say that they are frequently misclassified by Emergency Dispatch as more serious than they actually are. Ex. E at 85:23-86:12.

40. While Paramedics may also downgrade a call's status, they may only do so once they have reported to an incident scene and determined, based on firsthand observations, that a call has

been improperly classified. Ex. F at 101:25-102:16; Ex. I at DEF004264. Paramedics do not have the discretion to downgrade a call based solely on the dispatch notification or call notes. *Id.*

41. VBEMS Captains serving as Shift Captains have the discretion *not* to respond to calls; paramedics do not have the discretion *not* to respond to calls. Ex. F at 85:14-85:20; Ex. I at DEF004264.

42. VBEMS Captains serving as Shift Captains also have the discretion to respond to calls to which they are not automatically dispatched. Ex. E at 92:15-93:22, 110:111:24; Ex. G at 73:4-73:15, 75:4-76:10.

43. One way that this may happen is when a VBEMS Captain serving as a Shift Captain hears a call come over the VBEMS, Fire Department, or Police Department radio channels and determines that a call has been misclassified by the Dispatch Center. Ex. E at 92:15-94:2; Ex. G at 75:4-76:10. A Shift Captain may then upgrade the status of a call such that they would be required to respond per VBEMS policy. *Id.*

44. Alternatively, a VBEMS Captain serving as a Shift Captain may simply appear at a call “to see and observe certain patient care providers that may be new or [a Shift Captain] may have heard something about and that [the Shift Captain] wanted to observe.” Ex. G 73:4-73:15; *see also* Ex. E at 110:9-111:24. In these instances a VBEMS Captain serving as a Shift Captain is simply appearing for quality assurance and quality improvement purposes, but he or she could always decide to offer assistance to the paramedics who were automatically dispatched to the call. *Id.*

45. Although VBEMS Captains serving as Shift Captains, like all VBEMS personnel, generally report to the Dispatch Center that they have arrived on the scene of a call, Shift Captains do not always report that they are on scene when they have appeared for quality assurance or quality improvement purposes. *Id.* They do not typically report that they are on scene because this would make them unavailable for higher acuity calls which require their expertise. *Id.*

46. Paramedics have no discretion over the calls to which they respond and may not divert themselves from an incident without permission from their supervisor. Ex. I at DEF004264.

47. As part of their emergency response duties, VBEMS Captains serving as Shift Captains have the discretion to request that various apparatus respond to or be cancelled from the scene of an incident. Ex. G 75:13-76:3; Ex. H at 251:2-251-12. These apparatuses, which include emergency response vehicles and crews, can be requested by a Shift Captain even though he/she has not arrived at an emergency scene. *Id.*

48. Once at an emergency scene, it is the expectation that VBEMS Captains focus on scene management. Ex. B; Ex. C at DEF007180; Ex. H at 252:5-253:5. This includes directing various apparatus that appear on scene, including VBEMS, Fire Department, and Police Department vehicles and crews. Ex. F at 62:18-64:8; Ex. G at 80:18-80-22; Ex. H at 251:2-252:4. Shift Captains' vehicles are outfitted with, among other items, radios and dry erase boards to support their scene management functions. Ex. H at 252:5-252:16.

49. VBEMS Captains serving as Shift Captains monitor services being rendered to ensure that they are effectively rendered. Ex. B; Ex. E at 112:12-112:16, 115:23-116:16.

50. VBEMS Captains serving as Shift Captains also ensure that services are being rendered in a timely fashion and track the amount of time that a patient has been on the scene of an accident. Ex. F at 67:7-67:25; Ex. G at 81:6-82:11; Ex. U at 54:4-54:24. In instances where medical personnel have spent too much time on scene such that that patient's remaining there could cause harm, a VBEMS Captain serving as a Shift Captain has authority to instruct paramedics to continue emergency services in an ambulance and transport a patient to a hospital. Ex. U at 54:4-54:24.

51. When family or friends of a patient are at an emergency scene, VBEMS Captains serving as Shift Captains may also break away from observing emergency response to educate them

as to what is going on. Ex. G at 83:1-84:11. This includes, but is not limited to, communicating with family and friends where the patient will be transported. *Id.*

52. During emergency response, VBEMS Captains serving as Shift Captains make a habit of observing the actions and performance of their subordinates. Ex. E at 112:17-112:23.

53. On particularly large, complex, or high-acuity calls, VBEMS Captains serving as Shift Captains may deploy in an incident command system. Ex. H at 98:15-99:15. In these scenarios, Shift Captains do not direct patient care in any way. *Id.* Instead, they focus on the big-picture aspects of scene management, such as requesting resources. *Id.*

54. Incident commands are often deployed in response to certain types of calls where communication between various responding agencies is necessary. Ex. E at 97:8-97:25; Ex. U at 50:19-52:8. When one is established, a VBEMS Captain may report directly to the incident command without responding to a patient or providing patient care. Ex. F at 98:11-99:5.

55. During a medical call (as opposed to, for instance, a fire call), VBEMS Captains serving as Shift Captains can function as the incident commander and are required to direct the entire emergency scene, including responders from other agencies. Ex. E at 97:8-97:25, 98:8-99:9; Ex. F at 98:11-99:5; Ex. G at 71:23-72:11; Ex. U at 50:19-52:8.

56. A unified command is similar to an incident command, except that a unified command involves multiple agencies responding to an emergency requiring a unique response. Ex. E at 97:8-97:25; Ex. H 252:17-253:5; Ex. U at 50:19-52:7. A VBEMS Captain may serve as the VBEMS representative to the unified command. Ex. E at 98:5-99:9; Ex. H at 98:15-99:15.

57. If the call is not primarily medical in nature, a VBEMS Captain may still function as the medical group supervisor. Ex. G at 71:23-72:11; Ex. H at 98:15-99:15; Ex. Q at 59:1-59:14. In this role, VBEMS Captains are not expected to provide medical care and instead oversee the responding medical personnel, direct resources, and request equipment. *Id.*

58. During emergency response, it may also be appropriate for VBEMS Captains serving as Shift Captains to be directly involved in patient care. Ex. A at DEF004893; Ex. B; Ex. I.³

59. VBEMS Captains do not respond to emergency scenes for the purposes of issuing patient care. *Id*; *see also* Ex. H at 96:17-96:19. Paramedics are the career employees responsible for direct patient care. *Id*.

60. Instead, VBEMS Captains serving as Shift Captains are required to respond to certain high-acuity calls for service to ensure that patient care providers, i.e. paramedics, have the equipment and management structure on scene to effectively render emergency aid. *Id*; *see also* Ex. C at DEF007180; Ex. H at 252:5-253:5.

B. Ancillary Duties and Responsibilities

61. One ancillary duty for VBEMS Captains is serving as the Captain of the SWAT Medic Team. *See* Plaintiff DiCaprio Deposition Transcript at 51:20-52:4, annexed hereto as Exhibit “M”. The SWAT Medic Team, on which Plaintiff DiCaprio serves as Captain, “provides medical force protection to the Virginia Beach Police Department SWAT Team and Special Investigations Division with various high risk and tactical operations. [In 2020 t]he team also assisted with VBPD medical training, providing more than 1,276 hours of total service.” *See* VBEMS Annual Report 2020 at DEF005140, annexed hereto as Exhibit “L”; Ex. M at 51:20-52:4 (Plaintiff DiCaprio testified he spent less than one hour per week functioning as Captain of the SWAT Medic Team).

62. As Captain of the SWAT Medic Team, Plaintiff DiCaprio is “the leader, the manager, the supervisor and the trainer to those individuals reporting to [him].” *See* Interoffice Memorandum dated December 30, 2020, annexed hereto as Exhibit “N”.

³ There is no allegation that VBEMS Captains regularly participate in the transportation of a patient from a scene to a hospital on an ambulance.

63. Another set of duties that stands apart from Shift Captain responsibilities is the Sandbridge Lifeguard Program. This program provides lifeguards for the beaches in Sandbridge and is “organized to provide a safe environment for citizens and visitors.” Ex. “L” at DEF005142.

64. The Lifeguard program is run year-round by Plaintiff Kaleigh Zehr. *See* Plaintiff Zehr Deposition Transcript at 50:17-50:24, annexed hereto as Exhibit “O”; *see also* VBEMS Organizational Chart, annexed hereto as Exhibit “P”.

65. All 70 Sandbridge Lifeguards are part-time, seasonal employees who are hired directly by Plaintiff Zehr. Ex. O at 52:5-52:8, 55:14-55:17.

66. The Lifeguard Captain begins her shift by reporting to Fire Station 17 at 8:30 a.m to obtain her EMS Vehicle and logon for the day. Ex. O at 57:20-58:22, 70:5-70:7.

67. Sandbridge Lifeguards report at 9:00am. *Id.* From 8:30 a.m to 9:00 a.m., the Lifeguard Captain meets with the Lifeguard Supervisor, a part-time, seasonal employee, to develop shift assignments and discuss weather conditions that may impact that day. *Id.* at 57:20-60:4.

68. Once lifeguard shifts have begun, the Lifeguard Captain ensures that calls for service are provided appropriate responses and that all individuals responding to those calls are safe and that the lifeguard program has the appropriate supplies and equipment. *Id.* at 41:6-42:1.

69. The Lifeguard Captain does not respond to all calls for service. *Id.* at 42:2-42:5.

70. Like Shift Captains, the Lifeguard Captain is only automatically dispatched to high-acuity calls such as “drownings, cardiac arrests, boater-in-distress calls, [and] accident waterway calls.” *Id.* at 42:6-42:17. During this process, the Lifeguard Captain may engage in some hands-on patient care. *Id.* at 71:10-72:9.

71. The Lifeguard Captain may respond to calls requiring transport off of the beach “to ensure that adequate patient care is provided, and an appropriate response is dispatched.” *Id.* at 42:6-42:17. Although the Lifeguard Captain is automatically dispatched to certain calls she, like a

Shift Captain, has the authority and discretion to downgrade dispatched calls which have been over-prioritized. *Id.* at 45:4-45:23. Plaintiff Zehr testified in her deposition that this “occurs very frequently on the beach.” *Id.*

72. The Lifeguard Captain also makes rounds to talk with the lifeguards she supervises; and to monitor and support them as best as she can. *Id.* at 48:2-49:1.

73. The Lifeguard Captain is also responsible for approving lifeguards’ time sheets and leave requests, and would, if necessary, be responsible for meting out any discipline. *Id.* at 36:18-36:22; 58:4-58:17; 62:19-63:5; 64:16-65:6.

74. Plaintiff Padgett does not regularly function as a Shift Captain and is instead the VBEMS Captain responsible for logistics (“Logistics Captain”). Ex. G at 34:16-35:7.

75. Plaintiff Padgett has formerly served as a Shift Captain on day shift and night shift, and has been in the position of EMS Captain since January 2015. *Id.* at 18:24-19:1; 34:16-35:7.

76. As the Logistics Captain, Plaintiff Padgett is tasked with ensuring “that there’s a readiness of supplies and uniforms and stuff to outfit the department.” *Id.* at 104:13-104:24. He does this by maintaining an adequate stock of uniforms, personal protective equipment and medical supplies, and moving vehicles, trailers, and ATVs to maintain operational readiness. *Id.*

77. Plaintiff Padgett, along with a subordinate Storekeeper, maintains an Excel spreadsheet that tracks VBEMS’s supplies and equipment. *Id.* at 105:20-106:18.

78. While Plaintiff Padgett does not manage a budget, he does manage inventories to determine what items are needed to ensure that VBEMS can meet the its operational objectives. *Id.* at 110:4-110:14. Plaintiff Padgett does not directly render any patient care as the Logistics Captain. *Id.* at 111:23-112:7.

79. Many VBEMS Captains have also drafted Standard Operating Guidelines (“SOGs”) in addition to their other duties. Ex. F at 70:15-70:20 (developing a dispatch matrix). Ex. O at 51:5-

52:4 (lifeguard policies), Ex. U at 58:8-59:3 (criminal mass casualty incidents); Plaintiff Svejda Deposition Transcript at 94:23-95:17, annexed hereto as Exhibit “Q” (bulletproof vests); Ex. E at 102:15-103:7 (computer aided dispatch systems). Plaintiff Beatty’s policy regarding computer aided dispatch systems has been adopted Department-wide. *Id.* at 103:8-103:11.

80. VBEMS Captains are involved in the hiring process of paramedics and even other Captains. Ex. Q at 85:17-86:14; *see also* Ex. H at 138:16-140:22; Ex. K at 85:17-88:9; Ex. M at 20:16-21:1; Ex. O at 28:19-29:5.

81. VBEMS works to ensure that its Captains are on hiring panels for paramedic and captain positions, and they have significant input into the Department Chief’s hiring decision, particularly in the screening process for their subordinates. Ex. H at 138:16-140:22; Ex. K at 85:17-88:9.

82. At the height of the COVID-19 Pandemic, VBEMS also assigned a VBEMS Captain to work as a liaison to Emergency Communications & Citizen Services (“ECCS Liaison Captain”). Ex. E at 80:2-80:20; Ex. G at 88:14-89:16.

83. In this role, a VBEMS Captain listened to as many incoming calls for service as possible in order to ensure that they have been properly prioritized. Ex. E at 80:24-81:17, 82:4-82:7; Ex. G at 88:14-89:16. VBEMS Captains serving as Shift Captains frequently perform this same function in the field, but an ECCS Liaison Captain provided more efficient call correction where the ECCS call taker may have misapprehended the seriousness of a call for service. Ex. E at 82:8-83:1, 85:23-86:12; Ex. G at 88:14-89:16.

84. The ECCS Liaison was generally able to complete this task without any input or direction from supervisors. Ex. E at 84:3-85:15. This position was eventually discontinued, although VBEMS Captains serving in this role were able to help prevent over-dispatching of calls and misprioritization of resources. Ex. E at 80:24-81:17, 85:23-86:12; Ex. G at 88:14-89:16.

C. Human Resources Review of EMS Captains Position

85. In 2014, the City conducted an audit of the position in response to a concern that VBEMS Captains could be misclassified as exempt employees. *See* Monica Kopin Deposition Transcript at 80:17-80:21, annexed hereto as Exhibit “R”. The audit included a report from VBEMS Chief Brazle, conversations with VBEMS executive staff, a ride-along with VBEMS Captain Rick Baker, and consultation with the Virginia Beach City Attorney’s Office. Ex. K at 37:19-38:6, Exhibit 2; Ex. R at 86:19-87:20, 92:11-93:14, 99:20-102:5, 115:3-115:6; *see also* EMS Captain FLSA Exemption Status Review, dated January 20, 2015, annexed hereto as Exhibit “S”.

86. As a result of this audit, the City produced a document entitled EMS Captain FLSA Exemption Status Review, which synthesized the materials and information obtained and applied them to the relevant legal standards before concluding that VBEMS Captains are not entitled to overtime compensation under the FLSA. Ex. S.

87. In 2016, in response to additional concerns of VBEMS Captains that they had been misclassified, the City opened another inquiry into their exemption status. Ex. R at 127:13-128:7. This additional analysis included a second round of ride-alongs with VBEMS Captains. *Id.*

88. In addition to conducting ride-alongs, the City’s Department of Human Resources also consulted with Chief Brazle to determine whether VBEMS had altered VBEMS Captains’ duties and responsibilities since the last audit. *Id.* at 129:10-130:8.

89. In 2017, representatives of VBEMS Captains met with City management to again discuss Captains’ exemption status and the EMS Captains request. *Id.* at 136:4-140:11.

90. During the meeting, representatives of VBEMS Captains stated that they “seldom” rendered patient care and never got on an ambulance. *Id.*

91. VBEMS Captains raised the issue of their exemption status in September 2020, and VBEMS executive staff promptly met with them to address their concerns. Ex. K at 94:16-97:17.

STANDARD OF REVIEW

Summary judgment is appropriate only when the Court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that there exists “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(a); *see also Seabulk Offshore, Ltd. V. Am. Home Assur. Co.*, 377 F.3d 408, 418 (4th Cir. 2004). Although a court must draw all justifiable inferences in favor of the nonmoving party, in order to successfully defeat a motion for summary judgment, the nonmoving party must rely on more than conclusory allegations, “mere speculation,” the “building of one inference upon another,” the “mere existence of a scintilla of evidence,” or the appearance of “some metaphysical doubt” concerning a material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002). Rather, the evidence must be such that the factfinder reasonably could find for the nonmoving party. *See Anderson*, 477 U.S. at 252.

The moving party has the initial burden to show the absence of an essential element of the nonmoving party’s case and to demonstrate that the moving party is entitled to judgment as a matter of law. *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 185 (4th Cir. 2004); *McLean v. Patten Cmty., Inc.*, 332 F.3d 714, 718 (4th Cir. 2003). When the moving party has met its burden to show that the evidence is insufficient to support the nonmoving party’s case, the burden then shifts to the nonmoving party to present specific facts demonstrating that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Honor*, 383 F.3d at 185; *McLean*, 332 F.3d at 718-19. Such facts must be presented in the form of exhibits and sworn affidavits. *Celotex*, 477 U.S. at 324. “[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

LEGAL STANDARD

The FLSA generally requires employers to compensate employees for all hours worked over 40 hours per week. *See* 29 U.S.C. § 207(a)(1). Such overtime compensation must be at least one and one-half times the regular rate at which the employee is compensated. *Id.* Workers "employed in a bona fide executive, administrative, or professional capacity" are exempt from FLSA's overtime requirements and are not entitled to overtime compensation. *See* 29 U.S.C. § 213(b).

Although executive, administrative, and professional employees are not defined by the FLSA, the United States Department of Labor has promulgated a series of regulations to determine whether an employee is exempt. Among these regulations is 29 C.F.R. § 541.100, which states that the term "employee employed in a bona fide executive capacity" refers to an employee

(1) [c]ompensated on a salary basis . . . at a rate not less than \$684 per week . . . ; (2) whose primary duty is management of the enterprise in which she 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.

An "employee employed in a bona fide administrative capacity" is one that is

(1) [c]ompensated on a salary basis . . . at a rate not less than \$684 per week . . . ; (2) [w]hose primary duty is the performance of office of non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) [w]hose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200.

The Department of Labor has issued further clarification on the issue of first responders' exemption status through 29 C.F.R. § 541.3(b), also referred to as the First Responder Regulation.

29 C.F.R. § 541.3(b) states in relevant part that the FLSA overtime exemptions "do not apply to ...

paramedics, emergency medical technicians, ambulance personnel, rescue workers ... regardless of rank or pay level, who perform work such as . . . rescuing fire, crime or accident victims . . . or other similar work.” The First Responder Regulation makes clear that such employees do not qualify as exempt executive employees because “their primary duty is not management of enterprise” in which they are employed. *Id.* An individual who falls under the First Responder Regulation is thus excluded from FLSA exemptions.

The First Responder Regulation “presupposes, therefore, that the primary duty of [first responders] is not ‘management of the enterprise’ but rather to engage in particular sorts of hands-on activity” incident to emergency response. *See Emmons v. City of Chesapeake*, 982 F.3d 245, 251 (4th Cir. 2020). To that end, the First Responder Regulation further explains that “a police officer or fire fighter [for example] whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the [FLSA] merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.” 29 C.F.R. § 541.3(b)(2). Courts in the Fourth Circuit have further clarified that an employee is not entitled to overtime compensation merely because the words “paramedic” or “emergency medical technician” appear in her title. *See Emmons* at 251. Indeed, “to do so would privilege form over substance in a manner at odds with both the internal logic and the purpose of the FLSA.” *Id.*

ARGUMENT

I. PLAINTIFFS’ PRIMARY ROLE IS TO ENSURE EMERGENCY MEDICAL SERVICES ARE DELIVERED EFFICIENTLY AND EFFECTIVELY BY MANAGING PEOPLE AND EQUIPMENT

The central inquiry regarding the First Responder Regulation is the employee’s primary duty. 29 C.F.R. § 541.700(a) explains that “[t]he term ‘primary duty’ means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary

duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." Consideration of an employee's primary duty should include

[1] the relative importance of the exempt duties as compared with other types of duties; [2] the amount of time spent performing exempt work; [3] the employee's relative freedom from direct supervision; [4] and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

Id. Although the amount of time an employee spends performing exempt work may be a useful datapoint in determining her primary duty, "time alone . . . is not the sole test, and nothing in [29 C.F.R. § 541.700] requires that exempt employees spend more than 50 percent of their time performing exempt work." *Id.* It is therefore possible that "[e]mployees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion." *Id.*

Plaintiffs contend that their primary and most important duty is to deliver patient care during the course of emergency medical response. *See, e.g.*, Ex. O at 85:18-86:2.⁴ Nevertheless, it is neither the expectation of VBEMS nor the reality of their role that VBEMS Captains regularly engage in routine patient care. Instead, it is their responsibility to ensure that patient care is effectively and expertly administered by their subordinates. Ex. C; Ex. I.

"[A]t a certain level of abstraction, all [emergency medical personnel] could be viewed as first responders. However, such a perspective would undermine the Department of Labor's stated intent" in promulgating its regulations regarding overtime exemptions. *See Rooney v. Town of Groton*, 577 F. Supp. 2d 513, 536 (D. Mass 2008); 29 C.F.R. § 541.3(b)(2). Indeed, it strains credulity to believe that any emergency medical personnel would *not* consider saving lives and

⁴ Plaintiffs' contention is not entirely incorrect insofar as it is the overall mission of VBEMS to "deliver valued services to the community that preserve life, improve health, and promote the safety of citizens." Ex. L at DEF005119.

reducing morbidity as their most essential and important duty. The idea that all tasks are considered patient care is so deeply ingrained in emergency medical personnel that Plaintiff Padgett even considered ensuring that supplies are stocked as “dealing with patient care” because “it’s patient care equipment.” Ex. G 111:23-112:7.

It is therefore clear that, particularly in the first responder context, it is necessary to determine a plaintiff’s primary duty based on his/her actual employment responsibilities, not what he/she subjectively considers to be the most important mission from shift to shift. *See Emmons v. City of Chesapeake*, 2019 U.S. Dist. LEXIS 231372, *24, *25 (E.D.V.A. June 19, 2019).

A. *Plaintiffs’ Exempt Duties vs. Plaintiffs’ Non-Exempt Duties*

To determine an employee’s primary duty, 29 C.F.R. § 541.700 first requires a consideration of the relative importance of an employee’s exempt duties and the amount of time spent performing exempt work. Although these are considered two distinct factors in § 541.700’s primary duty test, their plain interrelation makes it sensible to consider them together. *See Emmons* at 251, 252. In *Emmons v. City of Chesapeake*, for instance, the Fourth Circuit considered the extent to which the plaintiffs were engaged in managerial duties before considering the extent to which managerial duties were more important and time consuming than the plaintiffs’ non-exempt duties. Managerial tasks include: interviewing, selecting, and training of employees; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; disciplining employees; controlling the flow and distribution of materials; and directing the work of employees. *See* 29 C.F.R. § 541.102.

The Department of Labor issued further clarification of managerial tasks in the first responder context, describing them as “ensuring operational readiness through supervision and inspection of personnel, equipment and quarters; deciding how and where to allocate personnel; managing the distribution of equipment; maintaining inventory of property and supplies; and

directing operations at crime, fire or accident scenes, including deciding whether additional personnel or equipment is needed.” 69 Fed. Reg. 22,130 (Apr. 23, 2004). Another important factor, as described by the Department of Labor, “is that exempt police and fire executives generally are not dispatched to calls, but rather have discretion to determine whether and where their assistance is needed.” “The picture that emerges is of management as an act of authority, formed in some degree through independent judgment, by which the members of an enterprise, and their affairs, are ordered toward its end.” *Emmons* at 252.

The Circuit Court in *Emmons* found that Chesapeake Fire Department Brigade Chiefs were primarily engaged in managerial, and therefore exempt, tasks. *Id.* at 251-54. The Court first considered the plaintiffs administrative duties before moving on to their emergency response duties. *Id.* It was significant that the plaintiffs were highly involved in daily staffing activities, that is using department “staffing policy to ensure that vital pieces of emergency response equipment . . . are appropriately matched to [personnel] that have the numbers, skill, and experience to operate them.” *Id.* The plaintiffs also monitored the performance of their subordinate officers and enforced discipline. *Id.* Although certain types of discipline could not be issued by the plaintiffs, the Court nonetheless considered that it was within the plaintiffs’ discretion to initiate more serious repercussions “by filing a recommendation for consideration higher up the chair of command.” *Id.*

In the emergency response context, the Court determined that the plaintiffs’ principal role in responding to an emergency was “to strategize and command.” *Id.* The plaintiffs’ primary responsibility when responding to a fire was not “to shout instructions while scaling ladders or handling hoses with his men . . . [but to] rapidly analyze incoming information, decide whether he needs to call in additional units, fashion and plan to achieve core tactical directives, and direct his men accordingly.” *Id.* The plaintiffs also had the ability to remove themselves from service for hours at a time without the permission of their supervisors. *Id.*

The responsibilities of the plaintiffs in *Emmons* contrasted starkly with those in *Morrison v. Cnty. Of Fairfax, VA*, whose duties were primarily non-managerial. 826 F.3d 758, 768-771 (4th Cir. 2016). There, the Fourth Circuit found that the Fire Captain plaintiffs were non-exempt employees as they had no discretion as to which calls they responded. *Id.* The plaintiffs were “part of the core group of firefighter who [were] required to respond to a typical call; an engine [could not] leave the station without its Captain on board.” *Id.* The plaintiffs’ duties could not be primarily managerial because they did not have discretion to determine whether and where their assistance was needed. *Id.* Although the plaintiffs in *Morrison* had some non-firefighting tasks, it was clear to the Court “that fighting fires [was] the more important part of the job.” *Id.*

The duties of Plaintiffs in the instant litigation are far more akin to those in *Emmons* than *Morrisey*. Plaintiffs have significant and meaningful duties that are detached from performing emergency patient care. They ensure that their shift is properly staffed, conduct performance evaluations, issue discipline, and monitor their subordinates’ performance in the field to ensure that emergency medical care is expertly and efficiently administered at all times. Although Plaintiffs are “automatically” dispatched to certain calls, they have the authority to listen to the call and review case notes and determine that a call has been misclassified without ever leaving their offices or command vehicle. Put differently, Plaintiffs are not truly automatically dispatched to calls as much as they are automatically notified of certain types of calls. Plaintiffs have discretion to determine whether they are truly needed on a call based on information provided to emergency dispatch.

Plaintiffs role differs greatly from the emergency response role described in *Morrison* where it was significant to the Fourth Circuit that the plaintiffs were required to respond to all calls for service, regardless of severity. While the plaintiffs in *Morrison* had no opportunity to exercise discretion in the calls to which they responded, Plaintiffs here “have the discretion to determine whether and where their assistance is needed.” 69 Fed. Reg. 22,130 (Apr. 23, 2004).

In terms of actual emergency response, Plaintiffs primary responsibility is not issuance of patient care, but rather scene, personnel, and equipment management. Ex. C; Ex. I; *see also, supra*, Statement of Undisputed Facts ¶¶ 38-95. Even if Plaintiffs do provide some patient care, they are not responding to an emergency for the purpose of patient care. Captains are always expected to prioritize scene management.

Based on the foregoing, particularly Plaintiffs' extensive use of discretion in all aspects of their employment, Plaintiffs spend most of their time performing primarily managerial, and therefore exempt, duties.

B. Plaintiffs' Relative Freedom from Direct Supervision & Salary/Wage Disparity

After considering the first and second factors relevant to primary duties, the Fourth Circuit in both *Emmons* and *Morrison* discussed the third and fourth factors only in brief. It seems as though an analysis of the first and second factors sheds ample light on the extent to which an employee is relatively free from direct supervision. Indeed, it is unclear how an individual could be vested with significant discretion in the performance of his/her duties and yet not be relatively free from direct supervision. With regard to the fourth factor, the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee, the Court in *Emmons* found that there was no significant difference between the plaintiffs' salaries and that of their subordinates, but nonetheless determined that plaintiffs were exempt. The "fourth and final factor does not suffice to overcome the combined force of the first three factors, especially given that the primary duty analysis must be a holistic one that steps back to look at the position questions with a broad lens." *Emmons* at 256 (internal quotation marks and citations omitted).

Turning back to the third factor, it is plain that Plaintiffs are relatively free from direct supervision. In making a similar determination in *Emmons*, the Fourth Circuit concluded that the plaintiffs were the highest 24-hour employee within their department. This was significant because

left the plaintiffs “not only unsupervised but also, in many respects, effectively without a supervisor for much of the time they spend on the job.” 982 F.3d at 255, 256. The Court also found that most supervisory decisions were made without direct supervision. That contrasts sharply with the plaintiffs in *Morrison*, where there was no real expectation that those plaintiffs use independent judgment. 826 F.3d at 771, 772. Indeed, the *Morrison* plaintiffs’ supervisors were physically present at the plaintiffs’ place of work for many shifts and the plaintiffs were expected to have daily telephone or email contact with supervisors even when they were not. *Id.* It was not the role of the *Morrison* plaintiffs to exercise discretion. *Id.* Their primary duty was to execute the orders of their superiors.

Unlike *Morrison*, that Plaintiffs in the instant case are vested with a significant amount of discretion. *See* Statement of Undisputed Facts ¶¶ 38-66. They are expected to manage the emergency operations of the City of Virginia Beach with little to no input from their supervisors. Underscoring this point is that Plaintiffs, as in *Emmons*, are the highest 24-hour employee within VBEMS and therefore are must act without direct supervisor intervention or oversight for at least 50% of tours. Although the position has since been discontinued, the ECCS Liaison role also demonstrates the extreme amount of discretion, and therefore autonomy, with which Plaintiffs are vested. *See* Statement of Undisputed Facts ¶¶ 92-95.

As Plaintiffs are relatively free from direct managerial oversight and their most important and significant duties are related to management of emergency response, their primary duty is management, not first response. The First Responder Regulation therefore does not exclude Plaintiffs from FLSA exemptions.

II. PLAINTIFFS ARE EXEMPT FROM FLSA OVERTIME REQUIREMENTS

As the First Responder Regulation does not exclude Plaintiffs from the FLSA’s overtime exemptions, the next relevant inquiry is whether Plaintiffs qualify for the exemptions.

i. Executive Exemption

As noted above, to qualify as exempt executives, Plaintiffs must be employees

(1) [c]ompensated on a salary basis . . . at a rate not less than \$684 per week . . . ; (2) whose primary duty is management of the enterprise in which she 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.

29 C.F.R. § 541.100(a). It cannot be disputed that Plaintiffs are compensated at least \$684 hours per week and that they regularly direct the work of two or more employees. Each Plaintiff that was asked admitted the same during their depositions. As noted above, Plaintiff’s primary duty is not rendering patient care as alleged in the complaint, but management of the enterprise. *See* Argument Section I, *supra*. What is left unaddressed, then, is the extent to which Plaintiffs’ suggestions and recommendations as to hiring, firing, advancement, or promotion are given particular weight.

Plaintiffs plainly have some role in input, firing, advancement, and promotion of VBEMS employees. Plaintiff sit on hiring panels, have disciplinary authority, can make disciplinary recommendations, and, through their evaluation of subordinates, have a direct effect on performance evaluations. What must be addressed is whether this input is given particular weight.

To determine whether suggestions and recommendations are given “particular weight”, the Department of Labor instructs that “factors to be considered 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 suggestions and recommendations are relied upon.” 29 C.F.R. § 541.100(a). “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.” *Id.*

When addressing the same issue, the Court in *Emmons* considered the plaintiffs' participation in hiring panels and ability to recommend termination or suspension of subordinate employees. 982 F.3d at 257. With regard to hiring panels, it was significant that a division chief or battalion chief (i.e. plaintiffs) always participated, "indicating a belief . . . that the judgment of chief officers contains a degree of insight not shared by lower-ranked officers and that their presence on the panel makes its recommendations more trustworthy." *Id.*

In the instant case, VBEMS Captains almost always participate in hiring panels and it would be highly unusual if a paramedic hiring panel did not include a VBEMS Captain. Ex. K at 85:17-88:9. VBEMS Captains are expected to interpose questions and ask follow-ups during panel interviews (Ex. H at 138:12-140:13) and they are expected to interact with the applicant prior to submitting a recommendation (Ex. H at 138:12-140:13). VBEMS Chief Brazle testified that the panel's collective recommendation has significant input into his ultimate hiring decision. Ex. K at 85:17-88:9. Further highlighting this point is that Plaintiff Zehr has final hiring authority of all 70 Sandbridge Lifeguards under her supervision. Ex. O at 52:5-52:8, 55:14-55:17

Plaintiffs do not have direct authority for termination of their subordinates, but the Court in *Emmons* still found that the department's generally adopting the plaintiffs' recommendations of termination or suspension was sufficient to prove that their input was given particular weight. *Id.* Here, Plaintiffs may institute counseling, PIPs, written reprimands, and any suspension—up to 24 hours—in their own discretion. Ex. W. Though, Plaintiffs have testified that the need to issue counseling or discipline doesn't often arise, it cannot be seriously be disputed that they have the discretion to do so if the circumstances warrant. *Id.* The fact that VBEMS Captains are vested with the authority to suspend without supervisor input further demonstrates that Captains suggestions and recommendations in personnel management are given particular weight.

As Plaintiffs earn more than \$684 per week, are engaged in management, supervise two or more employees, and make suggestions and recommendations as to hiring, firing, suspension, etc., they are executive employees and are not due overtime pay under the FLSA.

ii. *Administrative Exemption & Plaintiff Padgett*

In the event Plaintiff Padgett's primary duty is not management, he is exempt from the FLSA's overtime requirements under the administrative exemption.⁵ To qualify for the administrative exemption, one's primary duty must be work "directly related to the management or general business operations" of VBEMS. 29 C.F.R. § 541.201(a). Such work includes budgeting, purchasing, procurement, and other similar activities. 29 C.F.R. § 541.201(b). As working in manufacturing is not related to management, "courts analyzing whether the directly related element has been satisfied have often focused their inquiry on whether the work is 'production-type' work or analogous thereto." *Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 123 (4th Cir. 2015) (citations omitted).

In *Desmond v. PNGI Charles Town Gaming, L.L.C.*, the Court determined that the plaintiffs did not conduct work directly related to management or general because they had "no supervisory responsibility and do not develop, review, evaluate, or recommend . . . business policies or strategies." 564 F.3d 688, 694 (4th Cir. 2009). The plaintiffs' duties simply consisted "of the day-to-day carrying out of [their employer's] affairs to the public, a production-side role." *Calderon* at 124 (citations omitted). Plaintiff Padgett is not involved in producing the "product" of VBEMS insofar as he has testified that he does not directly administer patient care. Ex. G at 111:23-112:7. He ensures that the agency has the materials and apparatus necessary to fulfill its mission. Although Plaintiff Padgett does not directly procure any materials, he notes inventories, determines what is

⁵ Plaintiff Padgett admitted that he is compensated at least \$684 hours per week. Ex. T.

needed, and makes necessary procurement requests. Plaintiff Padgett's primary duty therefore involves the management or general business operations of VBEMS.

The primary duty of administrative employees must also include "the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(3). Administrative employees' decisions do not need to be free of review, as they may merely "consist of recommendations for action rather than actual taking of action." 29 C.F.R. § 541.202(c). Based on the standards of 29 C.F.R. § 541.202, Plaintiff Padgett exercises independent judgment with respect to matters of significance. Plaintiff Padgett is responsible for assessment of VBEMS inventories. He determines what is needed and makes recommendations as to procurements. There is no allegation that Plaintiff Padgett's recommendations are routinely (or ever) rejected. This would be contrary to Plaintiff Padgett's role with VBEMS; he is employed almost exclusively to determine what must be purchased and what it will cost. Plainly these matters are significant as without them VBEMS would lack material and equipment needed to fulfill its mission.

Plaintiff Padgett is thus not entitled to FLSA overtime compensation as he is an administrative employee earning more than \$684 per week whose primary duty is performance of non-manual work related to management of VBEMS and he exercises discretion and independent judgment with respect to matters of significance.⁶

III. PLAINTIFFS ARE NOT ENTITLED TO COMPENSATION UNDER THE VIRGINIA GAP PAY ACT

Va. Code § 9.1-701(a) requires employers to "pay fire protection . . . employees overtime compensation . . . at a rate of not less than one and one-half times the employee's regular rate of pay for all hours of work between the statutory maximum permitted under 29 U.S.C. § 207(k) and the

⁶ As Plaintiff Padgett's primary duty is not first response, he is also not subject to the First Responder Regulation.

hours for which an employee receives his salary.” Plaintiffs are not considered fire protection employees because a

“fire protection employee” means any person, *other than an employee who is exempt from the overtime provisions of the Fair Labor Standards Act*, who is employed by an employer as a paid . . . emergency medical services provider . . . who is . . . engaged in . . . the response to emergency situations where life, property, or the environment is at risk.

id. (emphasis added). For the reasons set forth above, Plaintiffs are exempt from the FLSA’s overtime provisions, and thus are not considered fire protection employees. Therefore, Plaintiffs are not entitled to gap pay and their claims under the VGPA should be dismissed in their entirety.

IV. PLAINTIFFS DO NOT HAVE EVIDENCE SUPPORTIVE OF THEIR CLAIMS OF WILLFUL AND BAD FAITH VIOLATION OF THE LAW

Assuming, *arguendo*, that the City has not properly classified VBEMS Captains as exempt from the FLSA’s overtime requirements, there is no genuine dispute of fact as to whether the City acted in good faith or engaged in willful violations of the FLSA or VGPA. Although Plaintiffs allege that the City willfully and in bad faith misclassified the VBEMS Captain position and maintain that they are entitled to a three-year statute of limitation⁷ and liquidated damages⁸, ECF No. 1 at ¶¶ 26, 27, 36, 37, that allegation is wholly unsupported by the evidence.

Generally, employers are found to have acted willfully or in bad faith when they “knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.”

⁷ In cases concerning allegations of misclassification, the action must be “commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.” 29 U.S.C. § 255(a).

⁸ The FLSA also requires any employer who violates 29 U.S.C. § 207 by improperly denying overtime compensation to be liable to the employees affected in the amount of their unpaid overtime compensation “and in an additional equal amount as liquidated damages.” 29 U.S.C. § 216(b). Nonetheless, when an employer “shows to the satisfaction of the court that the act or omission giving rise to [a § 207 action] was in good faith and that [it] had reasonable grounds for believing that [the] act or omission was not a violation of the [FLSA],” the court has discretion to reduce or eliminate liquidated damages. 29 U.S.C. § 260.

McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988). Employers who take conscious and proactive steps to comply with the FLSA are generally found to have acted reasonably and with good faith. *See Sec'y of Labor, United States DOL v. Access Home Care, Inc.*, 2019 U.S. Dist. LEXIS 231687, *7 (E.D.V.A. March 20, 2019). Conscious and proactive steps include consultation with an attorney and conducting internal reviews of FLSA compliance. *Id.* at *7-8. In *Roy v. County of Lexington*, for instance, the Fourth Circuit upheld the District Court's denial of liquidated damages to EMS employees where the County of Lexington improperly denied the employees overtime compensation. 141 F.3d 533, 548-49 (4th Cir. 1998). In reaching its conclusion, the Court found that "the County produced evidence that it relied consistently on the advice of . . . its labor counsel, which indicates the County's good faith, even though the advice ultimately proved incorrect." *Id.* at 548.

In the instant case, it is undisputed that City undertook four separate inquiries into Plaintiffs exemption status between 2014 and 2020 and often included VBEMS, Human Resources and the City's employment attorney in that process. *See* Statement of Undisputed Facts ¶¶ 97-102. At every turn, the City has been responsive to Plaintiffs and made detailed and serious attempts to properly classify Plaintiffs under the FLSA. Based on the foregoing, Plaintiffs contention that that City acted in bad faith, with a reckless disregard of Plaintiffs' rights and engaged in willful violations of the FLSA or VGPA is specious. Plaintiffs are therefore only entitled to a two-year statute of limitations and should not be permitted to recover any liquidated damages in this action.

CONCLUSION

WHEREFORE, for all these reasons, the Defendant hereby respectfully requests that this Court grant Defendant's Motion for Summary Judgment, dismiss the Complaint with prejudice and for such other relief as the Court deems appropriate.

