

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division**

**SHEAN EMMONS, *et al.*,**

**Plaintiffs,**

**v.**

**Case No. 2:18cv402**

**CITY OF CHESAPEAKE,**

**Defendant.**

**MEMORANDUM OPINION AND ORDER**

This matter is before the Court on Plaintiffs Shean Emmons, John Gibson, Kevin Smith, Brian Francher, Carlton Ackiss, Michael Winslow, and Christine Dosmann's (collectively "Plaintiffs") Motion for Summary Judgment on Liability, ECF No. 18, and Defendant City of Chesapeake's ("Defendant") cross Motion for Summary Judgment on Liability,<sup>1</sup> ECF No. 21. On January 8, 2019, the parties consented to jurisdiction before the undersigned United States Magistrate Judge ("undersigned") pursuant to 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73. ECF No. 14. The matter has been fully briefed and the Court heard argument on the parties' cross Motions for Summary Judgment on Liability on May 20, 2019. ECF No. 31. For the following reasons, Plaintiffs' Motion for Summary Judgment, ECF No. 18, is **DENIED**, and Defendant's Motion for Summary Judgment, ECF No. 21, is **GRANTED**, and Plaintiffs' Complaint, ECF No. 1, is **DISMISSED WITH PREJUDICE**.

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<sup>1</sup> Although Defendant captions its cross-motion as a Motion for Summary Judgment on Liability, should the Court find for Defendant such a finding would dispose of the entire case and there would be no need to proceed with any trial with respect to damages.

## I. INTRODUCTION

Plaintiffs are all active Battalion Chiefs (“BCs”) working for the Chesapeake Fire Department (“CFD”), an organization responsible for emergency medical response, firefighting, and other emergency services for Defendant and within Chesapeake city limits. ECF No. 1 at 2. Plaintiffs filed suit on July 24, 2018, contending they have been denied overtime (“OT”) pay to which they are entitled under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 203, *et seq.* *Id.* at 1. Plaintiffs also assert a violation under the Virginia Gap Pay Act, Va. Code. § 9.1-700, *et seq.*<sup>2</sup> *Id.*

The FLSA generally requires, *inter alia*, that employers pay OT to employees who work more than forty hours in a work week. 29 U.S.C. § 207(a)(1). However, some employees are exempt from the FLSA’s OT pay requirement, including those who fall under the executive, administrative, or highly compensated employee (“HCE”) exemptions. 29 U.S.C. § 213(a). Defendant contends that Plaintiffs fall under these exemptions and subsequently are not entitled to OT pay.<sup>3</sup> ECF No. 22 at 38-40. The executive exemption applies if the employee is one:

- (1) [Who earns at least \$455 per week];<sup>4</sup>
- (2) Whose primary duty is management of the enterprise in which the employee is

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<sup>2</sup> Under the Virginia Gap Pay Act, an employer “shall pay fire protection or law-enforcement employees overtime compensation or leave, as under the Fair Labor Standards Act, 29 U.S.C. § 207(o), 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 hours for which an employee receives his salary, or if paid on an hourly basis, the hours for which the employee receives hourly compensation.” Va. Code § 9.1-701(A). As such, a determination of whether Plaintiffs may prevail under the Virginia Gap Pay Act necessarily requires Plaintiffs first prevail on their FLSA claim.

<sup>3</sup> Defendant contends that Plaintiffs all fall under the executive and administrative exemptions, but only five of the seven Plaintiffs fall under the HCE exemption. ECF No. 22 at 38-40.

<sup>4</sup> The actual language of 29 C.F.R. § 541.100(a)(1) states the employee must be

Compensated on a salary basis pursuant to § 541.600 at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (or 84 percent of that amount per week, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary amount pursuant to § 541.607[.]

However, Defendant has represented, and Plaintiffs have not contested, that as it relates to this case the operative amount is \$455 per week. *See* ECF No. 22 at 18; *see generally* ECF Nos. 19, 25, 27.

- employed or of a customarily recognized department or division thereof;
- (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 is given particular weight.

29 C.F.R. § 541.100(a). The administrative exemption applies if the employee is one:

- (1) [Who earns at least \$455 per week];<sup>5</sup>
- (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200(a). The HCE exemption applies if the employee is one:

- (1) [Who] receives total annual compensation [of at least \$100,000];<sup>6</sup> and
- (2) [Who] customarily and regularly perform any one or more exempt duties or responsibilities of an executive, administrative, or professional employee identified in subpart B, C, or D of this part.

29 C.F.R. § 541.601(a).

However, these exemptions “do not apply to . . . fire fighters, . . . regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; . . . or other similar work.” 29 C.F.R. § 541.3(b)(1) (hereinafter “First Responder Regulation”) (defining the scope and applicability of the exemptions). This is because such employees necessarily cannot “qualify as exempt executives

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Compensated on a salary basis pursuant to § 541.600 at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (or 84 percent of that amount per week, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary amount pursuant to § 541.607[.]

However, Defendant has represented, and Plaintiffs have not contested, that as it relates to this case the operative amount is \$455 per week. *See* ECF No. 22 at 18; *see generally* ECF Nos. 19, 25, 27.

<sup>6</sup> The actual language of 29 C.F.R. § 541.601(a)(1) states the employee must “receive[] total annual compensation of at least the annualized earnings amount of the 90th percentile of full-time nonhourly workers nationally.” However, Defendant has represented, and Plaintiffs have not contested, that as it relates to this case the operative amount is \$100,000 of total annual compensation. *See* ECF No. 22 at 18; *see generally* ECF Nos. 19, 25, 27.

because their primary duty is not management of the enterprise” and cannot “qualify as exempt administrative employees because their primary duty is not performance of work directly related to the management or general business operation of the employer.” 29 C.F.R. § 541.3(b)(2)-(3). Whether an employee is categorically non-exempt under the First Responder Regulation or is considered exempt under the executive, administrative, or HCE exemptions depends largely on that employee’s primary duty. An employee’s “primary duty” is the “principle, main, major or most important duty that the employee performs.” 29 C.F.R. § 541.700(a).

Plaintiffs contend that their primary duty is emergency response,<sup>7</sup> that they fall under the First Responder Regulation, that the exemptions do not apply, and because of this they are non-exempt employees entitled to OT and gap pay. ECF No. 19 at 19; ECF No. 25 at 24, 26-27, 30, 38; ECF No. 27 at 2, 7, 12-20. Defendant contends that Plaintiffs’ primary duty is management, that they do not fall under the First Responder Regulation, that the exemptions do apply, and because of this Plaintiffs are exempt employees not entitled to OT or gap pay. ECF No. 22 at 19, 21-22, 30, 38-40; ECF No. 24 at 17-18, 20-23, 25-31.

## II. STANDARD OF REVIEW

Summary judgment under Federal Rule of Civil Procedure 56 is appropriate when the Court, viewing the record as a whole and in the light most favorable to the nonmoving party, finds there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986). A court should grant summary judgment if the nonmoving party, after adequate time for discovery, has failed to establish the existence of an essential element of that party’s case, on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To defeat a motion

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<sup>7</sup> Plaintiffs also characterize their primary duty as “first response,” ECF No. 19 at 19, “fire protection,” ECF No. 25 at 34, and “fight[ing] fires,” ECF No. 27 at 11.

for summary judgment, the nonmoving party must go beyond the facts alleged in the pleadings and instead rely upon affidavits, depositions, or other evidence to show a genuine issue for trial. *See id.* at 324. Conclusory statements, without specific evidentiary support, are insufficient. *Causey v. Balog*, 162 F.3d 795, 802 (4th Cir. 1998). Rather, “there must be evidence on which the jury could reasonably find for the [party].” *Anderson*, 477 U.S. at 252. A party opposing summary judgment must present more than “a scintilla of evidence.” *Id.* at 251. Importantly, Eastern District of Virginia Local Civil Rule 56(b) provides: “In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.” E.D. Va. Loc. Civ. R. 56(b).

### **III. UNDISPUTED MATERIAL FACTS**

The Court has fashioned its undisputed material facts from those undisputed facts put forth by both Plaintiffs and Defendant. While the parties appear to disagree about the characterization of some facts put forth by the opposing party or feel the need to supplement or qualify the opposing party’s stated facts, Plaintiffs and Defendant do not have any genuine disputes regarding facts necessary and material to resolution of the instant case. As such, this Court resolves the cross Motions for Summary Judgment, ECF Nos. 18, 21, pursuant to the following undisputed material facts:

Plaintiffs have each worked as BCs for the CFD at some point during the three years prior to the filing of Plaintiffs’ Complaint. ECF No. 22, Def.’s SOF ¶ 1; ECF No. 19, Pl.’s SOF ¶ 1. The CFD employs ten BCs, and BCs are one of four types of Chief positions within the CFD. ECF No. 22, Def.’s SOF ¶ 1. In charge of the CFD is Fire Chief Elliot, and ranking directly below him is Deputy Chief Fermil, followed by Fire Operations Division Chief Donald Wooten (“Chief

Wooten”), to whom the BCs directly report. *Id.*; ECF No. 19, Pl.s’ SOF ¶ 2. Ranked below BCs in the CFD are captains and lieutenants, who are Company Officers (“COs”) responsible for command of a company, which is a ground vehicle providing specified equipment capability and personnel (Engine Company, Ladder Company, Rescue, etc.) that cannot leave unless the CO or Acting CO is on board.<sup>8</sup> ECF No. 22, Def.’s SOF ¶ 2. Ranking below captains and lieutenants are several ranks of firefighter, including trainees, specialists, senior firefighters, and master firefighters. *Id.* BCs directly supervise between six and seven COs and indirectly supervise between thirty-one and forty-six firefighters. *Id.*

BCs are the highest-ranking officers in the battalions and are the highest-ranking CFD members who work on a 24-hour shift. *Id.*; ECF No. 19, Pl.s’ SOF ¶¶ 3, 5. The City of Chesapeake is divided into three battalions that cover the entire geographical area of the City, BCs are assigned to one of three rotating 24-hour shifts, and BCs generally work ten shifts per month. ECF No. 22, Def.’s SOF ¶ 3; ECF No. 19, Pl.s’ SOF ¶¶ 3, 5. Each battalion includes five fire stations, and each BC has an office at one of the fire stations in his battalion. ECF No. 22, Def.’s SOF ¶ 3. Defendant classifies BCs as exempt employees under the FLSA and BCs are paid at least \$455 per week. *Id.*, Def.’s SOF ¶ 5. BCs are paid annual salaries and the salaries paid to Plaintiffs in 2017-2018 are as follows: Ackiss – \$112,126.02; Dosmann – \$87,049.43; Emmons – \$78,141.98; Fancher:

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<sup>8</sup> Defendant’s facts refer to the commanding captains and lieutenants as COs. Plaintiffs contend that “in his or her emergency response vehicle, a [BC] is [also] a company and company officer.” ECF No. 25 at 2-3. Only Chief Smith asserts BCs are COs, *see* Smith Dep. 34, 13-21, which is inconsistent with other facts put forth by Plaintiff that distinguish between BCs and COs as well as evidence put forth by Defendant, *see* Incident Management System Manual at 36; Dossmann Dep. 95:1-4, Elliot Dep. 28:25, 29:1-5; Emmons Dep. 103:23-25 (identifying BC subordinates as COs). Regardless of whether BCs may be considered COs, it is undisputed that commanding captains and lieutenants are COs. It is also undisputed that, in responding to an incident, BCs travel alone in an emergency equipped SUV-type vehicle while captains and lieutenants command and oversee personnel staffed on engines, ladders, rescue, and medic units. ECF No. 19, Pl.s’ SOF ¶ 12; ECF No. 22, Def.’s SOF ¶¶ 3, 13, 14. The overwhelming evidence establishes BCs are not COs, but regardless, whether they are or are not is not a material fact because such a title has no bearing on the BCs’ work functions, which is the focus of the instant inquiry. As such, this does not create a genuine dispute of material fact.

\$106,073.49; Gibson – \$105,923.21; Smith – \$109,963.49; and Winslow – \$101,469.56. *Id.* Plaintiffs’ average salary for the 2017-2018 year was \$98,774.65. *Id.* Defendant classifies captains as non-exempt. *Id.* For the 2017-2018 fiscal year, Captains had a base salary of \$61,182.97 and received on average gross compensation (including OT, paid leave, holiday, and other compensation) of \$97,980.65. *Id.*

A BC is the leader of his battalion and directs the operations of that battalion both on-scene and off-scene in order to accomplish the CFD’s mission to protect and improve citizens’ quality of life by providing responsive and caring service. *Id.*, Def.’s SOF ¶ 8; ECF No. 25 at 6 (quoting Ackiss Dep. at 9). BCs receive more than twenty calls and texts every shift dealing with battalion issues of every kind. ECF No. 25 at 10. BCs monitor the radio for the duration of their 24-hour shift in order to be prepared to respond to incidents. ECF No. 19, Pl.s’ SOF ¶ 14. Emergency calls are received by a dispatcher who consults the CFD’s “Run Prescription” to link the type of call with the number and type of units to be dispatched, which ensures the right equipment and personnel are sent to the incident. *Id.*, Pl.s’ SOF ¶ 8; ECF No. 22, Def.’s SOF ¶ 9. BCs are dispatched to forty of the seventy incident types identified in the Run Prescription to provide the level of command needed to manage those incidents. ECF No. 19, Pl.s’ SOF ¶ 8; ECF No. 22, Def.’s SOF ¶ 9. BCs respond to between 8% and 10% of all calls.<sup>9</sup> ECF No. 22, Def.’s SOF ¶ 10; *see* ECF No. 25 at 7. While BCs are expected to and almost always do take immediate action in response to a dispatch, BCs have authority to wait for more information before responding or to make themselves unavailable for dispatch.<sup>10</sup> ECF No. 19, Pl.s’ SOF ¶ 19; ECF No. 22, Def.’s SOF

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<sup>9</sup> Plaintiffs take issue with Defendant’s 8% figure and argue that Plaintiffs respond to up to 10% of all calls. ECF No. 25 at 7. This does not create a genuine dispute of material fact.

<sup>10</sup> BCs can take themselves out of service without prior approval of a superior officer; however, they often must coordinate with other BCs to ensure emergency response coverage and will notify Chief Wooten if they will be out of service for more than a few hours. ECF No. 22, Def.’s SOF ¶ 11; ECF No. 25 at 7-8.

¶ 11; ECF No. 25 at 7. BCs have authority to add themselves to a call, add additional units to a call, cancel a unit's response to a call, or cancel a call entirely. ECF No. 22, Def.'s SOF ¶¶ 11-12. However, no BC has ever cancelled a call. ECF No. 25 at 7; ECF No. 26 at 3.

When a BC is en route to a scene, the BC is analyzing information received from dispatch and the first arriving company to try and develop an incident action plan. ECF No. 22, Def.'s SOF ¶ 12. BCs typically do not arrive on scene before other units but often arrive at the same time as other units. *Id.*, Def.'s SOF ¶ 13. A CO who arrives on scene before the BC is the Incident Commander ("IC") for that scene until the BC shows up and takes over command. *Id.* The IC is the supervisory authority at that incident. *Id.*, Def.'s SOF ¶ 14. When a BC arrives on scene the BC is expected to assume command as the IC and almost always does so.<sup>11</sup> *Id.*, Def.'s SOF ¶¶ 13-14. After assuming command, the BC will return to his SUV-command vehicle and manage the incident from that location. *Id.*, Def.'s SOF ¶ 13; ECF No. 25 at 8. On scene, BCs must be able to immediately assume command of all fire suppression and rescue operations; establish a strategy or general plan of action and priorities regarding an incident; assign tactical responsibilities to COs for search, rescue, fire containment, fire extinguishment, limiting exposure and/or engaging in salvaging or overhaul; assign responsibilities to other BCs; direct positioning or repositioning of companies to meet requirements of suppression strategy; anticipate the need for additional resources during the course of fighting a fire to ensure that adequate personnel, apparatus, and equipment are available when needed; assign tactical responsibilities to companies at a fire scene;

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<sup>11</sup> However, a BC may leave the scene and allow the CO to continue as IC and also has discretion to permit a CO to continue as IC so that the BC may evaluate the performance of the CO and allow them to develop command skills. ECF No. 22, Def.'s SOF ¶ 15. On larger incidents, the second-arriving BC may assume a variety of roles within the command system, including acting as Staging Officer, Safety Officer, Accountability Officer, or Division Officer. *Id.*, Def.'s SOF ¶ 16. As a Staging Officer, the BC tracks and monitors incoming resources. *Id.* As a Safety Officer, the BC walks around and ensures all crews are operating in a safe manner. *Id.* As an Accountability Officer, the BC tracks resources in the hazard zone. *Id.* As a Division Officer, the BC manages resources and crews for a particular geographical area of the incident. *Id.* Regardless of what role he takes, a BC manages the CFD's responses to incidents whenever he is on scene, even if not acting as the IC. ECF No. 19, Pl.s' SOF ¶ 20.



evaluate possible risks and benefits before initiating actions that could endanger firefighters or the general public; establish appropriate command structures by assigning officers to command system positions as they arrive on scene; monitor the physical and mental status of personnel for signs of fatigue or loss of composure; monitor the scene for hazardous conditions; correct unsafe or improper firefighting methods; evaluate the effectiveness of fire suppression and rescue tactics continuously during the incident and make changes as necessary; coordinate activities and command of companies at a fire scene; develop contingency plans to address changes in the firefighting situation; preserve a fire or crash scene to protect evidence; update emergency dispatch center with information from the scene; coordinate emergency operations with other departments and agencies; correct improper emergency medical treatment or override any inappropriate decisions made by personnel; and coordinate activities of personnel at the emergency scene. ECF No. 25 at 17-19. As a rule, ICs typically do not participate in hands-on firefighting such as grabbing a fire hose to put out a fire, climbing ladders, ventilating a building, or going into a burning structure. ECF No. 22, Def.'s SOF ¶ 14. BCs will engage in hands-on firefighting if necessary, but that is not a part of their regular duties. *Id.*, Def.'s SOF ¶¶ 15-16 (noting that a BC is on-scene and not acting as IC in only two circumstances: (1) when the BC allows a CO to take command to develop their skills; and (2) when the BC is a second-arriving BC acting as a Staging, Safety, Accountability, or Division Officer. Further, Plaintiff Fancher has engaged in hands-on firefighting on only one occasion while acting as a Division Officer).

Off-scene, BCs rotate as Acting Staffing Chief, and in this role are charged with implementing the Defendant's staffing policy and ensuring minimum staffing levels. *Id.*, Def.'s SOF ¶ 26; ECF No. 19, Pl.s' SOF ¶ 21. A computerized staffing program auto-fills vacancies with available personnel, but the Staffing Chief is required to supervise staffing levels throughout the

day to address any staffing issues that may arise, including a firefighter's sickness, injury, or emergency. ECF No. 19, Pl.s' SOF ¶ 21; ECF No. 22, Def.'s SOF ¶ 26. Vacancies are first filled by unassigned available on-duty firefighters. ECF No. 22, Def.'s SOF ¶ 26. Consistent with the staffing policy, the Staffing Chief may move firefighters from station to station within the battalion to fill vacancies and can move firefighters between units if necessary for mission readiness. *Id.* Where there are not enough unassigned on-duty firefighters available to fill every vacancy, the Staffing Chief may rehire off-duty firefighters to work in an OT capacity. *Id.*; ECF No. 25 at 10. The only limit on the Staffing Chief's ability to rehire an off-duty firefighter is that the Staffing Chief may not hire back more firefighters than there are vacancies. ECF No. 22, Def.'s SOF ¶ 26. The Staffing Chief does not need approval to rehire but does coordinate with the other two BCs on duty to ensure adequate staffing across all three battalions. *Id.* The BCs may run companies on less than optimal staffing, including reducing the number of people in a company or taking a company out of service entirely. *Id.*, Def.'s SOF ¶ 27; ECF No. 25 at 10. BCs work in coordination to make sure that when units are taken out of service, staffing does not drop below acceptable levels. ECF No. 22, Def.'s SOF ¶ 27. BCs may cancel training if it would cause a station to fall below minimum staffing. *Id.* Relatedly, BCs review, monitor, and approve or deny sick leave requests for their battalion members consistent with Defendant's leave policy.<sup>12</sup> *Id.*, Def.'s SOF ¶ 28; ECF No. 19, Pl.s' SOF ¶ 23. Under the leave policy, BCs have discretion in setting their own leave schedule. ECF No. 22, Def.'s SOF ¶ 29. Battalion members are required to call in sick by 6:30 a.m., but if a battalion member calls in late, the BC may deny the request for sick time. *Id.*; ECF No. 25 at 10. BCs can question a battalion member's use of sick leave for abuse and

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<sup>12</sup> Plaintiffs state staffing and leave are "dictated" by Defendant's staffing and leave policies and contend that BCs have no discretion in implementing the same. *See* ECF No. 19, Pl.s' SOF ¶ 21; ECF No. 25 at 10. The substantial weight of the evidence indicates BCs are required to follow these policies but also have at least some discretion within the parameters of the policies. Thus, Plaintiffs' contention here does not create a genuine dispute of material fact.

determine if the reason for that use is legitimate. ECF No. 22, Def.'s SOF ¶ 28. BCs may use a battalion member's annual leave instead of sick leave and have leeway to decide if a member must provide a note justifying the use of sick leave. *Id.* BCs manage five annual leave slots per shift, which are allotted to COs and firefighters on a first-come-first-serve basis. *Id.*, Def.'s SOF ¶ 29. BCs may deny a leave request if it would cause a station to fall below minimum staffing. *Id.*, Def.'s SOF ¶ 27. BCs can take disciplinary action against a battalion member who takes unauthorized leave. *Id.*, Def.'s SOF ¶ 29; ECF No. 25 at 10.

BCs are ultimately responsible for providing oversight on all battalion staff performance and provide such oversight mainly through verbal counseling, counseling forms, and annual performance reviews. ECF No. 22, Def.'s SOF ¶ 17. BCs keep notes on their COs' behavior and any issues regarding a CO's conduct, and BCs are tasked with identifying any areas in which a CO needs to improve. *Id.* BCs complete annual reviews of their COs. *Id.* BCs review the performance evaluations completed by COs of their firefighters and must sign off on a CO's completed evaluation before it may be submitted. *Id.*, Def.'s SOF ¶ 18. BCs also give feedback to firefighters through their respective COs and resolve disputes that may arise between COs and firefighters. *Id.* BCs visit between two and three of their fire stations each shift and, during those visits, BCs meet with COs to critique a call, review incidents, talk about fire reports, and discuss upcoming training. *Id.*, Def.'s SOF ¶ 19. BCs regularly critique CO responses to calls, discuss with the CO what went right or wrong, and offer feedback on how the CO could improve. *Id.* BCs review incident reports for accuracy, to make sure the battalion is hitting benchmarks, and provide feedback to the report's author if needed. *Id.*, Def.'s SOF ¶ 31. BCs also give feedback and address issues involving an entire stationhouse when necessary. *Id.*, Def.'s SOF ¶ 19. BCs review and sign monthly probationary firefighter status reports and accident reports. *Id.*, Def.'s SOF ¶ 31. BCs may issue

discipline by counseling a subordinate verbally or using a written counseling form without prior approval. *Id.* BCs may also recommend discipline to a superior officer, including high-level disciplinary action such as suspension, demotion, or termination. *Id.*, Def.'s SOF ¶ 21; ECF No. 19, Pl.s' SOF ¶ 29; ECF No. 25 at 10; ECF No. 26 at 15. BC disciplinary recommendations are often, but not always, supported by the deciding superior. ECF No. 22, Def.'s SOF ¶ 21. Additionally, a Field Medical Office ("FMO") is assigned to each battalion per shift to act as an expert on medical issues. *Id.*, Def.'s SOF ¶ 4. Although FMOs report directly to the Chief Medical Officer, the BCs indirectly supervise FMOs, participate in their evaluations, and review and approve their timecards. *Id.* BCs also review the timecards of their battalion members daily and approve timecards for COs. *Id.*, Def.'s SOF ¶ 30.

The Defendant establishes the required training listed on a training matrix and schedules it on the training calendar. ECF No. 19, Pl.s' SOF ¶ 15. BCs manage the training of their battalion for emergency response, ensure the battalion members are in compliance with training requirements, and identify members who need correction for failing to meet training requirements. *Id.*, Pl.s' SOF ¶ 17; ECF No. 22, Def.'s SOF ¶ 33; ECF No. 25 at 20. BCs can schedule battalion-wide training where they feel the battalion needs to review or improve on something. ECF No. 22, Def.'s SOF ¶ 33. BCs can schedule station-specific training to improve performance based on the needs of a particular station. *Id.* BCs can cancel training if it would cause a station to fall below minimum staffing requirements. *Id.*, Def.'s SOF ¶ 27. BCs attend drills to observe and evaluate their battalion members and may require a crew repeat a drill if the BC is dissatisfied with a crew's performance. *Id.*, Def.'s SOF ¶ 34. BCs approve training requests from COs and firefighters and may disapprove such training if that training would affect daily operations or if the BC felt the member did not qualify for the type of training requested. *Id.* BCs are expected to

complete two hours of individual training per day. ECF No. 19, Pl.s' SOF ¶ 16. BCs are not required to participate in station or battalion training and may choose to complete their individual training through online training modules. ECF No. 22, Def.'s SOF ¶ 33. However, BCs are required to complete the same type of training as fire captains, firefighters, EMTs, and lieutenants with the exception of fire engine driver-operator training. ECF No. 19, Pl.s' SOF ¶ 15.

BCs do not hire individuals directly but are involved in hiring. *Id.*, Pl.s' SOF ¶ 26. BCs interview applicants as members of a panel, and each member of the panel individually scores the applicant. *Id.* In the past, BCs have recommended that an applicant be hired and the CFD has followed those recommendations and hired the applicant. ECF No. 22, Def.'s SOF ¶ 22. BCs sit on promotional panels, review candidates for promotion via videotape, and individually score the candidate based on the candidate's responses to questions posed to them. *Id.*, Def.'s SOF ¶ 23. The BCs' scores are used to rank candidates for promotion. *Id.* BCs can request or recommend a firefighter be assigned to a certain station, be transferred from one station to another, or be assigned to specialty teams, and those requests and recommendations are sometimes granted. *Id.*, Def.'s SOF ¶ 22; ECF No. 25 at 9. Chief Wooten is ultimately responsible for making assignments and transfers. ECF No. 25 at 9. BCs also pick which firefighters will serve as Acting CO for their company in the event the permanent CO is unavailable and may reject a firefighter's request to become an Acting CO if the BC determines the firefighter is not ready. ECF No. 22, Def.'s SOF ¶ 24. BCs are also tasked with identifying and recommending any Captains they believe would make a good Acting BC, and Chief Wooten has never rejected a BC's recommendation that a particular captain be made an Acting BC. *Id.*

## IV. DISCUSSION

In order for the Court to determine whether Plaintiffs are subject to the executive, administrative, or HCE exemptions, the Court must first ascertain Plaintiffs' primary duty and whether Plaintiffs' fall under the purview of the First Responder Regulation.<sup>13</sup>

### A. Plaintiffs' Primary Duty and the First Responder Regulation

#### 1. *Standard for Determining an Employee's Primary Duty*

An employee's "primary duty" is the "principle, main, major or most important duty that the employee performs" after analyzing "all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." 29 C.F.R. § 541.700(a). An employee's primary duty "will usually be what [he or] she does that is of principal value to the employer." *Morrison v. Cty. of Fairfax*, 826 F.3d 758, 773 (4th Cir. 2016) (quoting *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1227 (5th Cir. 1990)). To aid courts in determining the primary duty of an employee, the Department of Labor ("DOL") has identified four non-exhaustive factors. These 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," and (4) "the relationship between the employee's salary and the wages

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<sup>13</sup> At the May 20, 2019 hearing on the cross Motions for Summary Judgment, ECF No. 31, Plaintiffs contended that what constitutes Plaintiffs' "primary duty" is a fact question reserved for resolution by a jury. Plaintiffs further argued that, by extension, it is for the jury to decide whether Plaintiffs qualify as non-exempt under the First Responder Regulation and whether Plaintiffs are exempt under the executive, administrative, and HCE exemptions. It is clear based on the applicable case law that such questions are not solely within a jury's purview. See *Morrison v. Cty. of Fairfax*, 826 F.3d 758, 765, 773 (4th Cir. 2016) ("Summary judgment is appropriate if no reasonable jury could find for the nonmoving party" based on clear and convincing evidence); *Mullins v. City of New York*, 653 F.3d 104, 113 (2d Cir. 2012) (finding a district court's conclusion on plaintiffs' primary duty is a question of law subject to *de novo* review). While there is "no doubt that application of . . . exemptions calls for a fact-intensive inquiry," it is "how employees actually spend their time" that is a "question of fact" that may require resolution by a jury, not the application of such facts to the law. *Id.* at 773 (citing *Vela v. City of Houston*, 276 F.3d 659, 677 (5th Cir. 2001) and *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 453 (4th Cir. 2004)). As explained *supra*, because there is no material dispute of fact regarding what Plaintiffs actually do or did in their capacity as BCs for the CFD, a jury is not necessary to resolve this case and this matter may properly be resolved on summary judgment.

paid to other employees for the kind of nonexempt work performed by the employee.” 29 C.F.R. § 541.700(a); *accord Morrison*, 826 F.3d at 769.

However, in the context of fire protection, the Court’s consideration of what constitutes an employee’s “primary duty” is necessarily informed by the First Responder Regulation. *See Mullins v. City of New York*, 653 F.3d 104, 116 (2d Cir. 2011); *Barrows v. City of Chattanooga*, 944 F. Supp. 2d 596, 603 (E.D. Tenn. 2013). The First Responder Regulation “clarifies the application of the primary duty test as to first responders” and appears to slightly modify that test to ensure that a “firefighter whose primary duty is to . . . fight fires is not [exempt] merely because the . . . firefighter also directs [or manages] the work of other employees [while] . . . fighting a fire.” 29 C.F.R. § 541.3(b)(2); *see also Maestes v. Day & Zimmerman, LLC*, 664 F.3d 882, 828 (10th Cir. 2012). The First Responder Regulation makes clear that an employee whose primary duty is “preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; . . . or other similar work” does not become a manager, exempt from OT, merely because the employee directs others while performing his or her primary duty as a first responder. 29 C.F.R. § 541.3(b)(1). This makes sense because if an employee’s primary duty is to fight fires or engage in first response, that employee necessarily cannot “qualify as [an] exempt executive because [the employee’s] primary duty is not management of the enterprise” and cannot “qualify as [an] exempt administrative employee[] because [the employee’s] primary duty is not performance of work directly related to the management or general business operation of the employer.” *Id.* at § 541.3(b)(2)-(3).

Notably, the First Responder Regulation does not replace the primary duty test as the key inquiry nor does it automatically make first response the primary duty of all police, fire, or emergency medical employees. “[H]igh-level police and fire officials” may have a “primary

duty [of] performing managerial tasks such as . . . directing operations at crime, fire or accident scenes, including deciding whether additional equipment is needed” and may, as a result, be exempt from OT pay. *Mullins*, 653 F.3d at 115 (quoting 69 Fed. Reg. at 22,130 (Apr. 23, 2004)). To this end, the DOL has provided a list of emergency response tasks that are decidedly managerial, including:

Evaluating personnel performance; enforcing and imposing penalties for violations of rules and regulations; making recommendations as to hiring, promotions, discipline, or termination; coordinating and implementing training programs; maintaining company payroll and personnel records; handling community complaints, including determining whether to refer such complaints to internal affairs for further investigation; preparing budgets and controlling expenditures; 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 . . . fire . . . scenes, including deciding whether additional personnel or equipment is needed.**

69 Fed. Reg. 22,130 (Apr. 23, 2004) (emphasis added). The DOL, as aided by applicable case law, has attempted to define the line between hands-on first responders who directly fight fires and rescue victims, and their high-level superiors who, although unquestioningly necessary to effective emergency response, are primarily engaged in the management aspects of a fire or police department. *See Rooney v. Town of Groton*, 577 F. Supp. 2d 513, 536 (D. Mass. 2008) (“[A]t a certain level of abstraction, all [firefighters] could be viewed as first responders. However, such a perspective would undermine the [DOL]’s specifically stated intent.”). As such, this Court is now tasked with determining the primary duty of Plaintiffs in their capacity as BCs for the CFD based on their employment activities.<sup>14</sup>

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<sup>14</sup> As noted in *Morrison*, the DOL’s regulations make clear “that ‘[a] job title alone is insufficient to establish the exempt status of an employee.’ 29 C.F.R. § 541.2; *see also Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 453 (4th Cir. 2004) (to determine an employee’s exempt status, ‘courts must focus on the actual activities of the employee’).” 826 F.3d at 768. As such, in analyzing Plaintiffs’ primary duty in the instant case and taking into consideration the relevant case law, the Court considers the activities performed rather than the employees’ job title.



*2. Plaintiffs Do Not Engage in First Response Activity as a Primary Duty*

The undisputed facts demonstrate BCs rarely, if ever, engage in hands-on fire suppression or victim assistance. Despite this, Plaintiffs argue that their primary duty is first response because BCs are regularly dispatched to calls and, in responding to those calls, constitute a “part of the core group of firefighters” tasked with first response. ECF No. 27 at 6 (quoting *Morrison*, 826 F.3d at 669). At the May 20, 2019 hearing, Plaintiffs contended further that, because Plaintiffs’ primary duty is first response, all Plaintiffs’ on-scene management as well as Plaintiffs’ off-scene managerial tasks directly relate to first response, and therefore may not be considered managerial pursuant to the First Responder Regulation. *See* ECF No. 19 at 21; ECF No. 27 at 11.

Addressing Plaintiffs’ second argument first, tasks that are so attenuated from any direct firefighting activity cannot be deemed non-managerial simply because those activities relate, in some abstract or indirect way, to the type of hands-on firefighting contemplated by the First Responder Regulation. The DOL’s preamble to the First Responder Regulation includes a laundry list of tasks that are decidedly managerial. *See* 69 Fed. Reg. 22,130. As such, Plaintiffs engage in a variety of important managerial-type tasks, untethered from any direct first response activity. For example, BCs ensure battalion members receive all training Defendant deems necessary, and assign additional training if a BC thinks additional training is needed for operational readiness. BCs manage their battalion to make sure it does not fall below minimum staffing unless absolutely necessary, which includes granting or denying leave requests for battalion members, reassigning firefighters temporarily to another station or team, rehiring firefighters to work OT, and cancelling or rescheduling training that may interfere with minimum staffing. BCs supervise their battalion members and confirm all battalion members are academically, physically, and emotionally fit to

respond to emergencies to the best of their ability. BCs provide constructive feedback, either directly or indirectly, by delivering oral and written comments, reviews, coaching, and discipline to COs and battalion members. BCs make recommendations for more serious discipline, including suspension, demotion, or termination, to a higher authority and those recommendations are given at least some weight. BCs do not unilaterally transfer, promote, or hire and fire employees, but participate in transfers, promotions, and hiring panels, and their observations and recommendations are also given consideration by higher authority. As such, the above-identified off-scene tasks that BCs perform may not be considered non-managerial tasks under the First Responder Regulation because those tasks have no direct connection to and are not performed in conjunction with any first response or front-line firefighting duty of the BCs.

Considering whether Plaintiffs' duties on-scene constitute first response under the First Responder Regulation, Plaintiffs' activities at an emergency scene are not the kind of activities contemplated by the DOL or authoritative case law as falling under the First Responder Regulation. BCs respond to several types of emergency incidents, many of which require a BC's experience, expertise, strategy, and leadership for safe and successful resolution. BCs do not directly fight fires or engage in hands-on on-scene emergency response; rather, BCs often oversee incidents from their SUV-command vehicle, and strategize, supervise, and direct the actions of personnel and allocation of equipment and resources to most effectively resolve an emergency or crisis situation. In explaining the scope and bounds of the First Responder Regulation, the DOL specifically identified that "directing operations at . . . fire . . . scenes, including deciding whether additional personnel or equipment is needed," is a managerial task. 69 Fed. Reg. 22,130 (Apr. 23, 2004).

In a similar case involving BCs in Michigan, the Sixth Circuit recently determined that the

primary duty of BCs was not firefighting or first response, but instead was management of the fire department. *Holt v. City of Battle Creek*, No. 18-1981, 2019 U.S. App. LEXIS 16561, at \*12-13 (6th Cir. June 3, 2019) (affirming the lower court’s determination that the plaintiffs’ primary duty was management). The *Holt* BCs supervised firefighting personnel and served as ICs at all incidents. *Id.* at \*2. In their role as IC at fire scenes, the *Holt* BCs remained “in the vehicle and ‘manage[d], lead, and direct[ed]’ the fire suppression efforts by ‘monitoring the situation [and] taking input from the [COs].’” *Id.* at \*4 (quoting from the district court record). This role, which is virtually identical to that performed by Plaintiffs, was determined to be managerial in nature and, as such, did not constitute the kind of front-line firefighting or first response that falls under the purview of the First Responder Regulation. *Id.* at \*12-13.

Plaintiffs’ role on-scene is also decidedly distinct from the role of those employees whose primary duty is first response or firefighting. Most germane to the instant inquiry is the Fourth Circuit’s opinion in *Morrison v. County of Fairfax*, 826 F.3d 758. In *Morrison*, the Fourth Circuit concluded the primary duty of fire captains was first response because “front-line firefighting . . . [was] at the center of the [c]aptains’ job[;]” the captains had to immediately respond to a fire or emergency call; the captains worked “side-by-side at the scene of a fire” with their subordinates “fighting fires, rescuing victims, and administering emergency aid[;]” and the captains spent most of their time off-scene waiting for or preparing to respond to an emergency. *Id.* at 773. Likewise, in *Mullins v. City of New York*, the Second Circuit determined that “directing operations at a crime, fire or accident scene[.]” is not management when done in conjunction with a police sergeant’s “primary field law enforcement duties,” which included “conduct[ing] investigations and inspections[,] . . . verifying whether probable cause to arrest a suspect exists, . . . making tactical decisions such as when to retreat from a crime scene[,] . . . handling suspects, . . . [and] performing

law enforcement duties alongside patrol officers in the field.” 653 F.3d at 117. Specifically, the *Mullins* Court determined that, pursuant to the First Responder Regulation, the fact that the police sergeants directed on-scene operations and oversaw their subordinates in the field did not change the sergeants’ primary duty from “field law enforcement” to “management.” *Id.* at 117-19 (finding unpersuasive the reasons cited by the district court in concluding that the sergeants’ primary duty was management). *Barrows v. City of Chattanooga* also considered the primary duty of fire captains, who performed duties such as “overseeing fire station operations on an assigned shift or at an assigned fire station, responding to fire/medical emergency calls, driving/operating fire apparatus, fighting/suppressing fires, and providing basic life support to sick/injured persons.” 944 F. Supp. 2d 596, 598 (E.D. Tenn 2013). The fire captains in *Barrows* worked on five-person teams and were the leaders of their respective teams, but also “participated in interior attacks and rescues alongside . . . team members.” *Id.* at 599-600, 604. The *Barrows* Court concluded that the fire captains’ primary duty was firefighting, as the fire captains’ most important duty was the active involvement in fire suppression and victim rescue on-scene. *Id.* at 604-05. As such, these employees fell under the First Responder Regulation despite the obligation to manage their team members because such management was done in conjunction with their own front-line firefighting duties. *Id.* Collectively, these cases stand for the proposition that employees covered by the First Responder Regulation are those emergency personnel whose primary duty is first response and are on the front line with direct, hands-on contact with the incident.

While Plaintiffs’ role on-scene is unquestionably crucial to successful emergency response, overseeing, strategizing, supervising, directing personnel, and allocating resources does not constitute “firefighting” as contemplated by the primary duty test or the First Responder Regulation.

*3. Plaintiffs' Primary Duty is to Ensure the Battalion and its Members are Response Ready*

In addition to the First Responder Regulation, as stated *supra*, the DOL has identified four non-exhaustive factors to assist courts in determining a plaintiff's primary duty. These 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," and (4) "the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." 29 C.F.R. § 541.700(a); *accord Morrison*, 826 F.3d at 769. As such, the Court considers each of these factors in turn.

First, regarding the relative importance of the exempt duties as compared with other types of duties, while Plaintiffs' exempt duties when considered in isolation may not seem very dramatic, when considered in conjunction, the BCs oversight and management is absolutely essential to the CFD's smooth operation and to the battalions' ability to be response ready and effective on-scene.<sup>15</sup> Consistent with Fourth Circuit authority, the Court concludes the second factor—the amount of time performing exempt work—is of little probative value when applied to fire employees. *See Morrison*, 826 F.3d at 770. This is because fire protection employees typically spend a majority of their time waiting and preparing to respond to emergencies and therefore "it [is] illogical to give much weight to how much time [fire employees] devote[]" to their respective

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<sup>15</sup> The Court looks to DOL's example of exempt duties identified in 69 Fed. Reg. 22,130. Considering this list in light of Plaintiffs' employment activities, BCs perform exempt duties such as evaluating personnel performance; enforcing and imposing penalties for violations of rules and regulations; making recommendations as to hiring, promotions, discipline, or termination; overseeing and implementing training; ensuring operational readiness through supervision and inspection of personnel and quarters; and directing operations at . . . fire . . . scenes, including deciding whether additional personnel or equipment is needed. 69 Fed. Reg. 22,130. Along this same vein, BCs also ensure minimum staffing, approve and deny requests for leave, and can move personnel to other fire stations or teams as well as rehire personnel.

activities. *Id.* Regarding the third factor—Plaintiffs’ relative freedom from direct supervision—Plaintiffs enjoy a relatively high degree of freedom from supervision as BCs are the highest-ranking CFD members on the 24-hour shift schedule and, if at a scene, are almost always the highest-ranking authority on site. However, Plaintiffs’ are not entirely autonomous as a BC’s discretion is circumscribed by Defendant’s policies and BCs do attend regular meetings with their superiors. Lastly, with regard to the salary comparison between BCs and nonexempt captains, for the 2017-2018 year, Plaintiffs’ average salary was \$98,774.65 and captains had an average gross salary (including OT, paid leave, holiday, and other compensation) of \$97,980.65, with base salary of \$61,182.97.

Using the four factors as a guide, and considering all of Plaintiffs’ employment activities taken as a whole, it strikes the Court that absent the essential leadership, guidance, and oversight of BCs over the battalions and battalion members, the CFD would be seriously handicapped in executing its fire suppression and emergency medical services missions. *See* ECF No. 19 at 3 (citing to the Elliot Dep. at 36-37). As such, the Court **FINDS** that BCs are leaders of their battalion and, as the highest-ranking CFD members operating on a 24-hour shift, their primary duty is to manage and ensure the operational readiness of their battalion and battalion members twenty-four hours a day.

**B. Plaintiffs are Exempt Employees**

Defendant asserts that Plaintiffs are exempt from the FLSA requirement that employees who work more than forty hours a week are entitled to OT pay because Plaintiffs’ are subject to the executive, administrative, and/or HCE exemptions.<sup>16</sup> ECF No. 22 at 38-40. Defendant bears

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<sup>16</sup> Plaintiffs frame the OT threshold somewhat differently, stating that a fire protection employee is entitled to OT pay if that employee works more than 159 hours in a twenty-one-day period. ECF No. 19 at 15 (citing 29 U.S.C. § 207(a), (k) and 29 U.S.C. § 553.230). Regardless, the parties do not contest that Plaintiffs have exceeded the requisite number of hours that, to the extent Plaintiffs are not exempt, would entitle them to receive OT pay under the FLSA.

the burden of demonstrating, by clear and convincing evidence, that Plaintiffs' are covered by the executive, administrative, and/or HCE exemptions, giving the exemptions a fair reading.<sup>17</sup> See *Encino Motor Cars v. Navarro*, 138 S. Ct. 1134, 1142 (2018); *Morrison*, 826 F.3d at 768 (citing *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 691 (4th Cir. 2009); *Shockley v. City of Newport News*, 997 F.2d 18, 21 (4th Cir. 1993). Because the Court has ascertained Plaintiffs' primary duty and determined that Plaintiffs' are not categorically exempt under the First Responder Regulation, as discussed *supra*, the Court may now consider whether Plaintiffs are subject to the executive, administrative, and/or HCE exemptions.

*1. Executive Exemption*

By way of review, the executive exemption applies to an employee:

- (1) [Who earns at least \$455 per week];
- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or division thereof;
- (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 is given particular weight.

29 C.F.R. § 541.100(a).

The parties do not contest that Plaintiffs earn at least \$455 per week and Plaintiffs customarily and regularly direct the work of two or more employees under prongs one and three. However, hotly contested is (2) whether Plaintiffs' primary duty is management of the enterprise or a customarily recognized department or division thereof and (4) whether Plaintiffs have the authority to hire and fire or whether their suggestions and recommendations as to the hiring, firing,

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<sup>17</sup> Plaintiffs argued at the May 20, 2019 hearing that the Court must apply the "narrow" construction standard regularly applied in the Fourth Circuit, and most recently used in *Morrison*, 826 F.3d at 768, rather than the "fair" reading standard mandated by *Encino Motor Cars v. Navarro*, 138 S. Ct. at 1142. Because the Supreme Court explicitly rejected the "narrow" standard in favor of the "fair" standard post-*Morrison*, this Court is bound by the Supreme Court's holding in *Encino Motor Cars*.

advancement, promotion or any other change of status of other employees is given particular weight.

As to prong two, the Court determined *supra* that Plaintiffs' primary duty is to manage and ensure the operational readiness of their battalion and battalion members twenty-four hours a day. Considering this in the context of the executive exemption, Plaintiffs' primary duty as BCs is, at bottom, management of the battalion, which is a customarily recognized department of the larger enterprise that is the CFD. As such, Plaintiffs clearly meet prong two of the executive exemption.

As to prong four, it is clear based on the undisputed material facts that Plaintiffs do not have authority to hire or fire employees. BCs do not hire individuals directly but are involved in hiring. *See* ECF No. 19, Pl.s' SOF ¶ 26. Further, BCs do not have authority to fire employees but instead recommend high-level discipline, including termination, to a superior officer for consideration. *See* ECF No. 22, Def.'s SOF ¶ 21; ECF No. 19, Pl.s' SOF ¶ 29; ECF No. 25 at 10; ECF No. 26 at 15. However, the uncontroverted material evidence demonstrates that Plaintiffs' do make suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees and that those suggestions/recommendations are given particular weight as summarized below:

Hiring: BCs interview applicants as members of a panel, and each member of the panel individually scores the applicant. ECF No. 19, Pl.s' SOF ¶ 26. BCs have recommended that an applicant be hired, and the CFD has followed those recommendations and hired the applicant. ECF No. 22, Def.'s SOF ¶ 22.

Firing: BCs recommend high-level discipline, including termination, to a superior officer for consideration. *See Id.*, Def.'s SOF ¶ 21; ECF No. 19, Pl.s' SOF ¶ 29; ECF No. 25 at 10; ECF No. 26 at 15. BC disciplinary recommendations are often, but not always, supported by the deciding superior. ECF No. 22, Def.'s SOF ¶ 21.

Advancement/Promotion: BCs sit on promotional panels, review candidates for promotion via videotape, and individually score the candidate based on the candidate's responses to questions posed to them. *Id.*, Def.'s SOF ¶ 23. The BCs' scores are used to rank candidates for promotion. *Id.* BCs pick which firefighters will serve as Acting CO for their company.



*Id.*, Def.'s SOF ¶ 24. BCs also identify and recommend any captains they believe would make a good Acting BCs; no recommendation made for Acting BC has ever been rejected. *Id.*

Other Changes of Status: BCs may request or recommend a firefighter be assigned to a certain station, be transferred from one station to another, or be assigned to specialty teams, and those requests and recommendations are sometimes granted. *Id.*, Def.'s SOF ¶ 22; ECF No. 25 at 9.

As such, the Court **FINDS** that Plaintiffs are executive employees exempt from OT pay pursuant to 29 C.F.R. § 541.100(a).

## *2. Administrative Exemption*

By way of review, the administrative exemption applies to an employee:

- (1) [Who earns at least \$455 per week];
- (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200(a).

The parties do not contest that Plaintiffs earn at least \$455 per week under prong one. However, the parties dispute (2) whether Plaintiffs' primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers and (3) whether Plaintiffs' primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Addressing prong three first, Plaintiffs contend their primary duty does not include the exercise of discretion and independent judgment with respect to matters of significance because, in their capacity as BCs, Plaintiffs merely implement the directives of Defendant's many policies. *See* ECF No. 19 at 13-14; ECF No. 25 at 10. However, the undisputed material facts demonstrate that, while Plaintiffs are bound to implement Defendant's various policies, such policies afford

Plaintiffs a fair amount of discretion. More important to this prong is the fact that on-scene Plaintiffs' strategy decisions and direction of front-line firefighters could be the difference between life and death—a matter of ultimate significance. *See* ECF No. 22, attach. 13 (demonstrating that BCs rely on their own expertise and professional experience, in consideration of Defendant's policies, to make "split second strategic decisions" on-scene and any strategic or decisional mistake can "be catastrophic" and result in "severe injury, loss of life, . . . alteration of the lives of families[,] "loss of equipment, and loss of property.""). As such, it is clear that Plaintiffs primary duty does include the exercise of discretion and independent judgment with respect to matters of significance.

Returning to prong two, the DOL has identified several functional areas that decidedly relate "to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.200(a)(2); *see* 29 C.F.R. § 541.201(b). These include:

tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

29 C.F.R. § 541.201(b). Of these, only personnel management is arguably encapsulated within Plaintiffs' primary duty. To determine whether an employee meets the requirements of prong two, Courts often consider whether an employee's activities are similar to manufacturing production line-type work, which is cited by § 541.201(a) as being the kind of work that is not directly related to the management or general business operations of the employer. *See Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 123 (4th Cir. 2015). At bottom, "the critical focus regarding this element remains whether an employee's duties involve 'the running of a business,' *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990), as opposed to the mere 'day-to-day carrying out of

the business's affairs,' *Desmond I*, 564 F.3d at 694." *Id.* As discussed at length *supra*, Plaintiffs' primary duty is to manage and ensure the operational readiness of their battalion and battalion members twenty-four hours a day. Plaintiffs' ultimate duty is essentially to ensure the smooth day-to-day carrying out of CFD business. As such, the Court cannot now find, based on clear and convincing evidence, that Plaintiffs meet prong two of the administrative exemption.

### 3. HCE Exemption

The HCE exemption applies if the employee is one:

- (1) [Who] receives total annual compensation [of at least \$100,000]; and
- (2) [Who] customarily and regularly perform any one or more exempt duties or responsibilities of an executive, administrative, or professional employee identified in subpart B, C, or D of this part.

29 C.F.R. § 541.601(a). Additionally, the HCE exemption only applies to those employees whose primary duty includes the performance of office or non-manual work.<sup>18</sup> 29 C.F.R. § 541.601(d). Defendant contends that five of the seven Plaintiffs—Ackiss, Fancher, Gibson, Smith, and Winslow—each exceed the monetary threshold required by prong one, and the same is demonstrated by the undisputed material facts of this case. ECF No. 22 at 38 n.20; *see* ECF No. 22, Def.'s SOF ¶ 5. These five Plaintiffs also meet prong two of the HCE exemption because they perform exempt duties pursuant to the executive exemption.<sup>19</sup>

Lastly, these five Plaintiffs perform office and non-manual work as a part of their primary duty, consistent with 29 C.F.R. § 541.601(d). The activities performed by Plaintiffs, that are encompassed in Plaintiffs' primary duty, include receiving calls and texts regarding battalion issues; monitoring the radio; supervising staffing levels throughout the day and addressing any

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<sup>18</sup> 29 C.F.R. § 541.601(d) indicates that an employee engages in manual work when that employee does "work involving repetitive operations with their hands, physical skill and energy."

<sup>19</sup> 29 C.F.R. § 541.601(c) states that "An employee may qualify as a [HCE] employee, for example, if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements for the executive exemption under § 541.100."

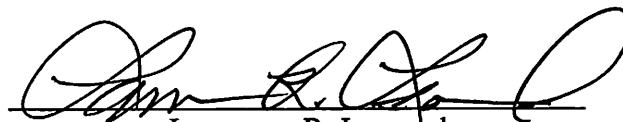
staffing issues that may arise, including a firefighter's sickness, injury, or emergency; rehiring off-duty firefighters to fill vacancies; reviewing, monitoring, and approving or denying sick leave requests; monitoring battalion staff performance and providing oversight mainly through verbal counseling, filling out counseling forms, and writing annual performance reviews; reviewing performance evaluations completed by COs; reviewing incident reports for accuracy; signing monthly probationary firefighter status reports and accident reports; and deciding to approve or disapprove training requests from COs and firefighters. As such, Plaintiffs primary duty includes office or non-manual work. As such, the Court **FINDS** Plaintiffs Ackiss, Fancher, Gibson, Smith, and Winslow are HCE employees and are exempt from OT pay pursuant to 29 C.F.R. § 29 C.F.R. § 541.601.

#### V. CONCLUSION

For the aforementioned reasons, Defendant is entitled to judgment as a matter of law. The Court **FINDS** Plaintiffs are exempt employees not entitled to OT pay under the FLSA. Therefore, Defendant's Motion for Summary Judgment, ECF No. 21, is **GRANTED**, Plaintiffs' Motion for Summary Judgment, ECF No. 18, is **DENIED**, and Plaintiffs' Complaint, ECF No. 1, is **DISMISSED WITH PREJUDICE**.

The Clerk is **DIRECTED** to forward a copy of this Order to all counsel of record.

It is so **ORDERED**.



Lawrence R. Leonard  
United States Magistrate Judge

Norfolk, Virginia  
June 18, 2019