

**COMMONWEALTH OF KENTUCKY
MCCRACKEN CIRCUIT COURT
CIVIL ACTION NO. 07-CI-615**

**BARRY CARTER and TODD WARNER
as Representatives of a Class Consisting
of the Paducah Professional Firefighters,
IAFF Local 168, and its members,**

PLAINTIFFS

v.

CITY OF PADUCAH, KENTUCKY

DEFENDANT

**AMENDED MOTION AND MEMORANDUM IN
PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiffs Barry Carter and Todd Warner, on behalf of the members of the International Association of Fire Fighters, Local Union 168, (hereinafter "Plaintiff") and the Defendant City of Paducah, Kentucky (hereinafter "Defendant") agreed by Memorandum of Understanding (Exhibit A) for declaratory judgment of whether the practice of "work back" or "trading time" as it was previously enjoyed by the Plaintiffs, is lawful. This matter was filed and is ripe for summary judgment.

Plaintiffs filed this action under **KRS 418.040** to prevent Defendant from unilaterally changing the rights and benefits created by the parties' most recent

collective bargaining agreement¹ (hereinafter “CBA”). This Court granted a temporary injunction to safeguard those rights. This Court must declare “work back” or “trading time”, as previously enjoyed by the Union and its members, is lawful under the laws of the Commonwealth of Kentucky.

I. FACTUAL BACKGROUND

“Work back” or “trading time” is a traditional practice in the fire service where one firefighter works in substitution for another firefighter. The tradition is widely practiced nationwide and has been a part of the fire service since fire departments began organizing in the 19th century. Paducah firefighters have enjoyed the practice for more than thirty years. Trading time firefighters make informal agreements as to how and when the “work back” is reciprocated. Traditionally, management’s function had been simply to pre-approve the substitute’s ability to “stand in” for the scheduled firefighter. Management, as the Defendant has done, sometimes keeps track of trading time hours

Firefighting is an essential function of public service. It does not allow for even short time periods of unavailability. Substitutes are not compensated for appearing on behalf of the scheduled firefighters. Scheduled firefighters are paid as if they worked the traded time. Plaintiffs utilized this practice for over thirty years, since the first CBA. Negotiations between Plaintiffs and Defendant for a

¹ Relevant portions of the most recent CBA are attached as Exhibit B.

new CBA broke down. Defendant contested the “work back” provision in the CBA. In relevant part, **Article 8, EXCHANGE OF DUTIES AND UNION**

BUSINESS LEAVE, provides:

Section 1. Upon approval of the Chief of the Department, or to the Assistant Chiefs to whom the Chief has delegated the authority, employees may exchange duty with each other on a voluntary basis in instances including, but not limited to, situations where a member has depleted his sick time and vacation allowances and continues to be unable to return to duty; attendance at professional or Union conferences or schools, any official Union business, and such other situations where the member’s absence could not otherwise be compensated. Work back and exchange of duties as provided herein shall in no way result in credit for extra compensation for the one performing the duty in the form of overtime or other provisions of pay. The approval of the Chief of the Department or the Assistant Chiefs to whom the Chief has delegated the authority shall not be unreasonably withheld. Exchange of duty shall be limited to eighteen (18) twenty-four periods per calendar year, except in the case of official union business work back or sick time work back.²

Unilaterally, Defendant implemented policy that forces scheduled firefighters to give up a shift to reciprocate for a covered shift, and that the reciprocation take place within six months.³ This unilateral change usurps the voluntary nature of work back, trading time and exchange of duty. It does not need to be changed. Defendants provide no examples of grievances or complaints regarding this practice. No other city in the Commonwealth of Kentucky requires

² Exhibit B.

³ Exhibit C, Municipal Order No. 1296.

a firefighter to give up a regularly scheduled shift or portion thereof because he covered for a fellow firefighter in a “work back” situation.⁴

Federal law, specifically the Fair Labor Standards Act (hereinafter) “FLSA”) recognizes and protects the practice of trading time or work back. To ensure the practice became applicable to the states, amendments were passed in 1985.⁵ 29 U.S.C §207(p)(3) specifically exempts “work back” when municipalities calculate hours worked for purposes of overtime. It states:

§207 Maximum Hours

...

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution.

...

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.⁶

(Emphasis added)

FLSA does not permit a firefighter who is covering or substituting for another firefighter to receive overtime pay for “trading time” or “work back”.

⁴ See attached Exhibit D, Affidavit of Bruce Roberts, president Kentucky Professional Firefighters.

⁵ See FLSA Amendments of 1985, PL 99-150 §3(a), 99 Stat. 787 November 13, 1985.

⁶ 29 U.S.C §207(p)(3).

FLSA requires this practice be entirely voluntary. The employer's role is to approve the time trade only.

The Kentucky Revised Statutes 337.285 parrot the FLSA in this regard. 803 KAR 1:063 which interprets KRS 337 is entitled "Trading Time." It provides:

KRS 337.295 authorizes the executive director to issue administrative regulations for special items usual in a particular employer-employee relationship. The function of this administrative regulation is to define the criteria to be met by public employers who wish to permit employees engaged in fire protection activities and any employee of a carrier by air subject to the provisions of 45 USC 181 (title II of the Railway Labor Act) to use the practice of "trading time."

Section 1. A common practice or agreement among employees engaged in fire protection activities and employees of a carrier by air subject to the provisions of 45 USC 181 (title II of the Railway Labor Act) is that of substitution for one another on regularly scheduled tours of duty (or some part thereof) in order to permit an employee to absent himself or herself from work to attend to purely personal pursuits. The practice is commonly referred to as "trading time."

Section 2. The practice of "trading time" will be deemed to have no effect on hours of work if the following criteria are met:

- (1) The trading of time is done voluntarily by the employees participating in the program and not at the behest of the employer.**
- (2) The reason for trading time is due, not to the employer's business operations, but to the employee's desire or need to attend to personal matters; and**
- (3) A record is maintained by the employer of all time traded by his employees.⁷**

(Emphasis added)

⁷ 803 KAR 1:063.

Defendant requested an opinion from the Kentucky Department of Labor. This opinion morphed into three separate clarifications and an informal opinion from the Attorney General.⁸ The Executive Director changed his position from the first to the last letter. He corrected his opinion questioning the legality of “work back” as practiced in the City under the CBA after supporting documentation was presented. The previous Executive Director unilaterally concluded that the practice of work back, as historically practiced by the Union and the City, conformed with **803 KAR 1:063**. This last opinion did not assuage Defendant.

After nearly a year and a half of contract negotiations, the parties herein agreed to settle the dispute by seeking a declaratory judgment as to the current status of the law.

**I. LEGAL ARGUMENT
TRADING TIME AS ENJOYED BY PLAINTIFFS DOES NOT VIOLATE
THE WAGE AND HOUR LAW (KY. REV. STAT. 337.285) AND ITS
CLARIFYING REGULATIONS, AND THE FEDERAL LABOR
STANDARDS ACT**

This matter is before the Court upon motion for summary judgment. This Court is well acquainted with the summary judgment.⁹ Here, there are no genuine issues of material fact. It only a question of law, whether trading time enjoyed in the past by the Plaintiffs violates Kentucky Wage and Hour Law, and the Federal Labor Standards Act. It does not.

⁸ Attached hereto as Exhibits E and F.

⁹ Pile v. City of Brandenburg, 215 S.W.3d 36 (Ky. 2006).

The work back article remained untouched since the first CBA, more than thirty years. Defendant's recent objection, the article is unlawful, is in error. This Court must adjudge this matter accordingly.

A. The FLSA Specifically Acknowledges the Practice of Work Back and the Parties' Agreement Conforms to Federal Strictures.

*Senger v. City of Aberdeen*¹⁰, provides an excellent history of the origin of the FLSA, Section 207(p)(3), cited above. Firefighters who had not been paid overtime for hours in which they had not actually worked by received credit as if they had worked under the practice of "trading time" brought suit against the city. The Eighth Circuit concluded the "trading time" provision in the FLSA mandated firefighters be treated as if they had indeed worked their regularly scheduled shift. This is exactly the result Plaintiffs here seek. *The Court specifically recognized the firefighter entitled to payment was the one who was scheduled, not the substitute. Substitute's compensation is fixed by private agreement between the two firefighters. It is of no consequence to the city.*¹¹ (Emphasis added).

Federal "trading time" regulations, 29 CFR §553.31, provide if two firefighters voluntarily trade shifts with each other, without any pressure or reward by the employer, the exchange of hours has no impact on the firefighters'

¹⁰*Senger*, 466 F.3d 670 (8th Cir. 2006)

¹¹ *Id.* at 672.

hours worked for the purposes of computing their FLSA overtime compensation.¹²

The trade is treated as if there was no substitution.¹³ Simply stated, federal law requires no swap of shifts. The scheduled firefighter may work for the substitute at a later date of his or her choosing, or may simply pay the substitute directly.

*The manner of compensation is determined by the firefighters themselves without interference, coercion or involvement by the employer.*¹⁴

The practice of “trading time” in Paducah as existed prior to Defendant’s policy change, conformed with federal law. Given that substituting a shift is not a requirement to make the trade, Defendant should not be permitted to object to the previous practice because it fails to mandate substitution within a given period of time. The only requirement for Defendant is to treat the traded shift as if the firefighter who was originally scheduled actually worked the shift. Defendant always did this in the past. No Plaintiff has objected. This Court cannot set aside this practice since it is lawful.

B. The Parties’ Agreement Conforms to KRS 337 and its Regulation 803 KAR 1:063.

The Kentucky law goes much further than the FLSA in resolving Defendant’s concerns. Unlike the FLSA, which only exempts the hours for the purpose of overtime, **803 KAR 1:063 Section 2** prohibits “traded time” to be

¹² See H.R. Rep. No. 99-331, at 25 (1985); S. Rep. No. 99-150, at 13 (1985).

¹³ See also Fed. Reg., Vol. 52 No. 11 January 16, 1987 pp. 2018-2019.

¹⁴ *Senger*, 466 F.3d at 672.

calculated as hours worked by the substitute. The CBA complied with the regulation. Traded time had to be approved by 1) supervisor; and 2) was done voluntarily for the personal reasons. No other requirement is necessary to trigger the regulation. The City's argument must fail. The previous arrangement in the CBA conforms to the regulation.

The Kentucky Attorney General's office weighed in on March 27, 2007 to help resolve the City's fear of potential exposure to overtime under the previous "trading time" provision.¹⁵ The attorney general stated

"there is nothing in the regulation [803 KAR 1:063] that refers to two employees exchanging shift for shift, or anything else to imply that the substitution of employees must be reciprocated. Rather, it is one freely volunteering to help another who has 'personal matters' to attend to."

The plain language of the regulation is clear and unambiguous. There is no requirement traded time be paid back in any period. The issue of paying back should not be dictated by management. The only role it should play in the practice is consenting to the traded time and possibly keeping a record of the practice if keeping such records is in the routine operation of the department and not solely to record trading time.

C. Defendant's Position Conflicts with State Regulations.

¹⁵ Letter attached hereto as Exhibit E.

Defendants requirement that time trades be reciprocated within six months violates 803 KAR 1:063. Defendant wants to force a firefighter who covers for a brother or sister firefighter to actually give up equivalent period of paid work time even if he or she does not want to. The trade is a private matter not within the purview of the city. Under both state and federal law, an employer may not any way coerce an employee to engage in “trading time” or “work back.” Requiring the employee to give up an equivalent shift is coercive, especially if neither firefighter wishes to do so. The employee who substituted for an absent firefighter should not be punished for his or her generosity. The Court must conclude Defendant’s position is unreasonable under the regulation.

II. THE CITY’S POSITION ON WORK BACK IS A REACTION TO THE OVERIME COMPLAINT FILED BY THE UNION.

Defendant took a draconian position concerning “work back” after it learned of the Plaintiff’s challenge of overtime compensation in a separate legal matter. Defendant’s reaction to a separate Union overtime lawsuit was to claim that “work back” may result in another wage and hour lawsuit. This “sky is falling” reaction was specious at best, and intentionally harmful to a practice that firefighters around the country take pride in.

Plaintiffs do not believe the work back provision in the CBA entitles them to any compensation. No firefighter in Paducah or Kentucky has ever gone to court to request compensation under this practice. The Court should conclude the status

quo is lawful. It conforms with regulations and the interpretation pertaining to the practice.

A. The City's Position, if True, Would Entitle Firefighters who Engaged in Work Back During the Past Five Years to Compensation.

No Plaintiff working for Defendant is challenging the practice of "trading time" or "work back", nor arguing he should be compensated for that time.

Oddly, it is the City making that argument. The statute of limitations for wage and hour complaints in the Commonwealth of Kentucky is five years.¹⁶

Why Defendant wishes to create an issue where none previously existed is puzzling. If the Court declares Defendant's position is the proper interpretation of the applicable laws, Defendant will expose itself to wage and hour complaints for five previous years of "trading time." Such a conclusion would logically infer the Court to include an Order for the City to calculate unpaid wages for substitute firefighters and compensate them for those hours of work. *Again, Plaintiffs do not desire this result.*

III. CONCLUSION

For the above reasons this Court must declare the parties' previous understanding of "trading time" in Article 8 of their CBA was lawful under the applicable statutes. Plaintiffs also requests permanent injunction enjoining the

¹⁶ *Comm., Labor Cabinet v. Haskin*, 2007 WL 2332072 (Ky. App. 2007); KRS 413.120

Defendant from issuance of policy in violation of KRS 337 as it relates to “trading time” and “work back”.

Respectfully submitted,

CHARLES R. WHEATLEY II, Ky. Bar Reg. No. 93310
1003 Russell Street
Covington, Kentucky 41011
Tel: (859) 912-4847
cwheatley43@hotmail.com
COUNSEL FOR PLAINTIFFS

NOTICE

This matter will come for a hearing before the Hon. Tim Kaltenbach, Judge
McCracken Circuit Court, First Division, on the 5th day of March, 2010 at the hour of 9:30
A.M.

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing Amended Motion for Summary Judgment was sent via United States Mail, first class, on this date, February 27, 2010 to:

David Kelly
Denton & Keuler
P.O. Box 929
Paducah, KY 42002
Counsel for Defendant

Charles R. Wheatley II
Counsel for Plaintiffs