

**IN THE SUPREME COURT OF APPEALS  
OF THE STATE WEST VIRGINIA**

MARY CATHERINE LEHMAN  
PATRICIA ANN POWELL

Plaintiffs/Petitioners,

v.

No. 101486  
Appeal from the Circuit Court of Berkeley  
County, West Virginia,  
Civil Action Nos. 09-C-613 and 09-C-616  
(Consolidated for appeal)

UNITED BANK, INC.,

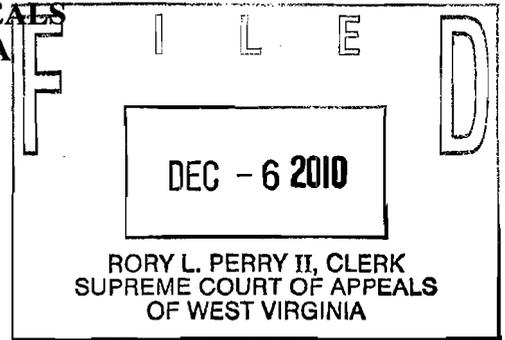
Defendant/Respondent

---

**RESPONSE TO PETITION FOR APPEAL**

---

Brian M. Peterson, Esq. (WVSB #7770)  
Bowles Rice McDavid Graff & Love LLP  
101 South Queen Street  
Post Office Drawer 1419  
Martinsburg, West Virginia 25402-1419  
Ph: (304) 263-0836  
Fax: (304) 267-3822  
*Counsel for Defendant/Respondent*



**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**.....ii

**I. KIND OF PROCEEDING AND NATURE OF RULING BELOW** ..... 1

**II. STATEMENT OF UNDISPUTED FACTS** ..... 2

**III. POINTS AND AUTHORITIES AND LEGAL ANALYSIS** ..... 3

**A. The Circuit Court correctly ruled that the Plaintiffs were laid off, not “discharged.”** ..... 4

**B. The Circuit Court correctly ruled that the severance payments were not “wages” or “fringe benefits.”** ..... 6

**1. Severance pay does not fall within the definition of “wages.”** ..... 7

**2. Severance payments are not “fringe benefits” under the WPCA.** ..... 9

**C. CONCLUSION**..... 10

**APPENDIX**

## TABLE OF AUTHORITIES

### WEST VIRGINIA CASES

<i>Howell v. City of Princeton</i> , 210 W. Va. 735, 738 n.3 (2001).....	7, 9
<i>Southern v. Emery Worldwide</i> , 788 F. Supp. 894, 897 (S.D. W. Va. 1992) .....	9

### FOREIGN CASES

<i>ACAS Acquisitions (Precitech) Inc. v. Hobert</i> , 923 A.2d 1076 (N.H. 2007) .....	8
<i>Babb v. United Food and Commercial Workers Dist. Union, Local 271</i> , 448 N.W.2d 168 (Neb. 1989) .....	8
<i>Bellino v. Schlumberger Tech., Inc.</i> , 753 F. Supp. 391 (D. Me. 1990) .....	8
<i>Dep't. of Labor ex rel. Commons v. Green Giant Co.</i> , 394 A.2d 753 (Del. Sup. Ct. 1978) .....	8
<i>Design Industries, Inc. v. Cassano</i> , 776 N.E. 2d 398 (Ind. Ct. App. 2002) .....	8
<i>Drybrough v. Acxiom Corp.</i> , 172 F. Supp. 2d 366 (D. Conn. 2001) .....	8
<i>Heimbouch v. Victorio Ins. Serv., Inc.</i> , 369 N.W.2d 620 (Neb. 1985) .....	8
<i>Hinshaw v. Ligon Industries, L.L.C.</i> , 551 F. Supp. 2d 798 (N.D. Iowa 2008) .....	8
<i>McGowan v. Administrator, Unemployment Compensation Act</i> , 220 A.2d 284 (Conn. 1966) ...	8
<i>Prozinski v. Northeast Real Estate Servs., LLC</i> , 797 N.E.2d 415 (Mass. Ct. App. 2003) .....	8

### STATUTES

W.Va. Code § 21-5-1(c).....	6, 7
W.Va. Code § 21-5-1(l).....	6, 9
W.Va. Code § 21-5-4(b).....	4
W.Va. Code § 21-5-4(c).....	4
W.Va. Code § 21-5-4(d).....	4, 6
W.Va. Code § 21-5-4(e) .....	5

**REGULATIONS**

W.Va. Code of State R. § 42-5-2.10.....5, 6

**OTHER AUTHORITIES**

*Merriam-Webster's Collegiate Dictionary* (10th Ed. 1998) ..... 6

## I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is a suit for liquidated damages under the West Virginia Wage Payment and Collection Act, W.Va. Code 21-5-1, *et seq.* (“WPCA”). When United Bank, Inc. (“United Bank”) merged with Premier Community Bankshares (“Premier Bank”) in the summer of 2007, it laid off a number of employees. Among those laid off were the Plaintiffs, Mary Catherine Lehman and Patricia Ann Powell. The two were given **five months** of notice that their positions would be eliminated, and were told they would receive severance pay on the next scheduled pay date following their job end dates. United kept its word by timely paying the Plaintiffs their severance pay on the employees’ next regular pay date (one week after their termination) in accordance with West Virginia law and United Bank’s severance payment plan. The Plaintiffs claim that they were “discharged” and not laid off, and that their severance payments should have been paid within 72 hours of termination. They sued United Bank for three times their severance payments as liquidated damages.

The parties filed cross-motions for summary judgment. The Circuit Court of Berkeley County, Hon. Gina M. Groh, presiding, granted summary judgment in favor of United Bank. Judge Groh based her ruling on two independent grounds: (1) that the Plaintiffs were “laid off,” not discharged, and timely paid their severance pay on their next regular payday following their separation from employment; and (2) even if they were “discharged,” the severance pay was not due within 72 hours because it was neither “wages” nor “fringe benefits” due and owing at the time of termination. Instead, the terms of the severance policy controlled, and those terms were complied with. This part of the decision was based, in part, on a 2008 order from Judge Pomponio that severance pay is not “wages” or “fringe benefits,” which order was appealed this Court and refused by a 4-0 vote.

## **II. STATEMENT OF UNDISPUTED FACTS**

The facts of this case are not in dispute. Mary Catherine Lehman was Vice President of Operations for Premier Bank before it merged with United Bank, Inc, in July 2007, while Patricia Ann Powell was Premier Bank's Chief Financial Officer. By letters dated March 1, 2007, United Bank informed the two that their positions would be eliminated after the merger. Because of their positions, United Bank kept the Plaintiffs employed after the merger to help with the transition. It is undisputed that they were satisfactorily performing their jobs, but their positions were being eliminated because of the merger. Their last day of work was Friday, August 3, 2007.

Upon their terminations, United Bank owed Ms. Lehman and Ms. Powell salary for the first three days of August, payment for unused vacation, and in the case of Ms. Lehman, a bonus. There is no dispute that these amounts were "wages" or "fringe benefits" earned during employment and "due and owing" to the Plaintiffs at the time of their separation. None of these payments are the subject of this lawsuit.

However, pursuant to a written severance plan contained in the merger agreement between United Bank and Premier Bank, United Bank was required to pay a severance to employees laid off because of the merger. The plan provided:

(b) United agrees that each Premier employee who is involuntarily terminated by United (other than for cause) within six (6) months of the Effective Date, shall receive a severance payment equal to two (2) weeks of base pay (at the rate in effect on the termination date) for each year of service at Premier (with credit for partial years of service), with a maximum payment equal to twenty-six (26) weeks of base pay.

(Merger Agreement, attached hereto as Ex. A at § 7.12(b) (excerpt)). In their March 1, 2007, letters informing the Plaintiffs they would be laid off, the above severance plan terms were communicated to them. Then, by letters dated June 20, 2007, Lehman and Powell were informed of their estimated severance payments, and that “severance payments will be made the next scheduled pay date after your job end date.” (See June 20, 2007 Letters, attached as Exs. C and D to Petition for Appeal) They were told that they “must perform satisfactorily through [their] job end date[s]” “in order to receive any severance ... payments for which [they] may be eligible.” (*Id.*)

On August 10, 2007, the Plaintiffs’ next regular payday after termination, United Bank paid the Plaintiffs all salary, bonuses and severance payments they were entitled to receive. The Plaintiffs retained an attorney and claimed they were paid their final wages, bonuses and severance pay late. They claimed all of their final payments, including the severance payments, should have been paid within 72 hours of August 3, 2007, and not by the next regular pay date because they were “discharged” employees. In an attempt to avoid litigation (which was obviously unsuccessful), United Bank paid the Plaintiffs amounts equal to the liquidated damages on the wages, bonus and fringe benefits, but refused to pay liquidated damages on the severance payments. United Bank believed the matter was resolved until, more than a year later the two Plaintiffs hired new counsel and filed suit to recover the liquidated damages on the severance pay. This suit followed.

### **III. POINTS AND AUTHORITIES AND LEGAL ANALYSIS**

The Plaintiffs’ petition for appeal must be denied because Judge Groh correctly ruled (1) that the Plaintiffs were laid off and timely paid on their next regular pay date following

their last day of employment; and (2) that the severance payments were not covered by the Wage Payment and Collection Act's 72-hour rule, even if it did apply to such payments. Because this ruling was correct, it should not be disturbed. The authority supporting these two rulings is set forth below.

**A. The Circuit Court correctly ruled that the Plaintiffs were laid off, not "discharged."**

The WPCA prescribes various timetables for the payments of an employee's final pay. Employees who are "discharge[d]" must be paid "wages in full within 72 hours." W.Va. Code § 21-5-4(b). Employees who "quit[]" or "resign[]" must be paid their "wages no later than the next regular payday" unless they provide at least one pay period's notice of intention to quit, in which case they must be paid "at the time of quitting." W.Va. Code § 21-5-4(c). Finally, employees who are "suspended as a result of a labor dispute" or who are "for any reason whatsoever ... laid off," must be paid "not later than the next regular payday ... wages earned at the time of suspension or layoff." W.Va. Code § 21-5-4(d).<sup>1</sup> The term "layoff" is not defined in the statute, but is defined as follows in the West Virginia Code of State Rules:

2.10. "Lay-off" means any involuntary cessation of an employee for a reason not relating to the quality of the employee's performance or other employee-related reason. An employee who is laid off shall be paid all wages not later than the next regular payday through regular pay channels, or by mail if requested.

---

<sup>1</sup> The full text of the applicable provision reads:

(d) When work of any employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the person, firm or corporation shall pay in full to such employee not later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.

W.Va. Code § 21-5-4(d) (emphasis added).

W.Va. C.S.R. §42-5-2.10 (effective date March 29, 1990). An employer that fails to adhere to the timetables established in W.Va. Code § 21-5-4(b), (c) and (d) “shall, in addition to the amount which was unpaid when due, be liable to the employee for three times that unpaid amount as liquidated damages,” W.Va. Code § 21-5-4(e) (2006).

Applying these statutory and regulatory provisions to the undisputed facts of this case, the lower court correctly ruled that the Plaintiffs were laid off and that no violation of the WPCA occurred with regard to the severance pay. As defined in the Code of State Rules, a “lay-off” is “any involuntary cessation of an employee for a reason not relating to the quality of the employee’s performance or other employee-related reason.” W.Va. Code State R., § 42-5-2.10. The Plaintiffs’ separations fit squarely within this definition. The Plaintiffs were given notice on March 1, 2007 that Premier Bank was merging with United Bank, and as a result of restructuring, their positions were being eliminated. The Plaintiffs do not dispute that their employment ceased involuntarily, and for “reason[s] not relating to the quality of [their] performance or other employee-related reason.” *Id.* Indeed, in order to claim entitlement to the severance pay at issue in this case, they had to maintain satisfactory job performance through their last day of employment. (*See* June 20, 2007 Letters, attached as Exs. C and D to Petition for Appeal) United Bank does not dispute that they both performed their job duties satisfactorily to the end. Accordingly, the Plaintiffs were “laid off” employees entitled to all of their final pay (including severance) on their next regular pay day of August 10, 2007—not within 72 hours of their last day of employment.

The Plaintiffs contend that they were not laid off because their separations from employment were not temporary. The Circuit Court correctly rejected the Plaintiffs’ invitation to read the word “temporary” into the statute and the regulation that defines a lay-off. The statute

provides that “when an employee for any reason whatsoever is laid off,” she is entitled to “wages earned at the time of ... layoff” “not later than the next regular payday.” W.Va. Code § 21-5-4(d). It does not say the layoff must be “temporary” in order to operate. On the contrary, it applies to layoffs “for any reason whatsoever” and for any length of time.<sup>2</sup>

Likewise, the word “temporary” does not appear in the regulation’s definition of lay-off. The regulation defines a layoff as “any involuntary cessation of an employee for a reason not relating to the quality of the employee’s performance or other employee-related reason.” W.Va. Code State R., § 42-5-2.10. The common dictionary definition of “cessation” is “a temporary or final ceasing (as of action): STOP.” *Merriam-Webster’s Collegiate Dictionary* at 187 (10th Ed. 1998). A layoff or “cessation” of employment then, *need not be temporary* because that requirement is not included in the rule’s definition or in the statute itself. Either could easily have stated that a layoff is a “temporary cessation of an employee,” but neither does.

Because the undisputed facts surrounding the elimination of the Plaintiffs’ jobs fits perfectly within the definition of layoff, the Circuit Court correctly ruled that the Plaintiffs were timely paid everything they were owed on August 10, 2007.

**B. The Circuit Court correctly ruled that the severance payments were not “wages” or “fringe benefits.”**

“Severance pay” is not included in the definition of “wages” or “fringe benefits” under the West Virginia Wage Payment and Collection Act. *See* W.Va. Code § 21-5-1(c) (defining “wages”) and 21-5-1(l) (defining “fringe benefits”). Severance pay is also not mentioned in the applicable Code of State Rules. But, based on the plain statutory language and

---

<sup>2</sup> A rule that applies only to “temporary” layoffs would be unworkable. Employers often lay off employees believing that the layoff will be temporary, only to find later that they are unable to bring the employees back.

prior case authorities, the Circuit Court correctly concluded that severance pay is neither “wages” nor “fringe benefits.”

**1. Severance pay does not fall within the definition of “wages.”**

The WPCA defines wages as follows:

The term “wages” means *compensation for labor or services rendered by an employee*, whether the amount is determined on a time, task, piece, commission or other basis of calculation. As used in sections four, five, eight-a, ten and twelve of this article, the term “wages” shall also include *then accrued fringe benefits* capable of calculation and payable directly to an employee: Provided, That nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his employees which does not contradict the provisions of this article.

W.Va. Code § 21-5-1(c) (emphasis added). Severance pay, by its very nature, is not paid to an employee while the employment relationship exists. It takes complete *severance* of that relationship for it to become due and owing to the employee. Therefore, severance pay is not “compensation for labor or services rendered” by the employee. It is a special payment that is over and above compensation owed to the employee for labor or services rendered and is made only after the employment relationship has ended.

Although this Court has not had occasion to issue a written opinion on point,<sup>3</sup> it has recently refused to disturb a circuit court judgment concluding that an employee’s severance pay was not “wages” or “fringe benefits” covered by the WPCA. In November 2008, this Court refused an appeal of an order entered by the Circuit Court of Greenbrier County (Judge Pomponio) dismissing a suit alleging that severance pay is a form of “wages” as defined in the WPCA. See October 30, 2008 Calendar of the West Virginia Supreme Court of Appeals,

---

<sup>3</sup> *But see Howell v. City of Princeton*, 210 W. Va. 735, 738 n.3 (2001) (noting that the plaintiff’s severance pay “would constitute a specific promise by [the employer to the plaintiff], not a fringe benefit.”) (emphasis added).

attached here as Ex. B at ¶21; and June 24, 2008 *Opinion and Order Granting Defendants' Motion to Dismiss Plaintiff's Wage Payment Act Claim, Denying Defendants' Motion to Dismiss Plaintiff's Tortious Interference Claim, and Denying Plaintiff's Motion for Partial Summary Judgment*, p. 11, ¶2, attached as Ex. C (emphasis added)). The court held that “unlike wages, severance pay does not constitute “compensation for labor or services rendered [under the WPCA].”” (Ex. C, p. 7, ¶1). The Court will see from the findings of fact that this case is not materially distinguishable from the present case, contrary to the Plaintiffs' suggestion. The reasoning is readily transferable to the case *sub judice*.

In addition, there is a wealth of case law from other states soundly rejecting the notion that severance is a form of “wages” governed by final wage payment laws. Courts in **Delaware**, *Dep't. of Labor ex rel. Commons v. Green Giant Co.*, 394 A.2d 753, 755 (Del. Sup. Ct. 1978), **Connecticut**, *McGowan v. Administrator, Unemployment Compensation Act*, 220 A.2d 284, 286 (Conn. 1966) and *Drybrough v. Acxiom Corp.*, 172 F. Supp. 2d 366, 371 (D. Conn. 2001), **Massachusetts** *Prozinski v. Northeast Real Estate Servs., LLC*, 797 N.E.2d 415, 419-420 (Mass. Ct. App. 2003), **Indiana**, *Design Industries, Inc. v. Cassano*, 776 N.E. 2d 398, 404 (Ind. Ct. App. 2002), **Maine** *Bellino v. Schlumberger Tech., Inc.*, 753 F. Supp. 391, 393 (D. Me. 1990), **Iowa**, *Hinshaw v. Ligon Industries, L.L.C.*, 551 F. Supp. 2d 798 (N.D. Iowa 2008), **New Hampshire**, *ACAS Acquisitions (Precitech) Inc. v. Hobert*, 923 A.2d 1076 (N.H. 2007) and **Nebraska**, *Heimbouch v. Victorio Ins. Serv., Inc.*, 369 N.W.2d 620 (Neb. 1985) and *Babb v. United Food and Commercial Workers Dist. Union, Local 271*, 448 N.W.2d 168, 172 (Neb. 1989) have all held that severance is not a form of wages under those states' similar wage payment acts.

**2. Severance payments are not “fringe benefits” under the WPCA.**

Likewise, neither the statute, regulations, nor West Virginia case law support a finding that severance pay is a fringe benefit under the WPCA. The statutory definition of “fringe benefits” is as follows:

(l) The term "fringe benefits" means any benefit provided an employee or group of employees by an employer, or which is required by law, and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses, sickness and accident benefits and benefits relating to medical and pension coverage.

W. Va. Code § 21-5-1(1). There is no mention of severance pay in the statute, nor are there any reported West Virginia cases specifically holding that severance pay is a “fringe benefit” within the meaning of the Act. In fact, this Court has stated the severance pay is *not* a fringe benefit. *See Howell v. City of Princeton*, 210 W. Va. 735, 738 (2001) (noting that the plaintiff’s severance benefit “would constitute a specific promise by [the employer to the plaintiff], not a fringe benefit.” *Id.* at 738, n.3. (emphasis added); *see also Southern v. Emery Worldwide*, 788 F. Supp. 894, 897 (S.D. W. Va. 1992) (applying West Virginia law and specifically holding that “[s]everance benefits are unaccrued, unvested benefits provided to employees upon their separation from employment”). Therefore, the Plaintiff’s argument is not supported by West Virginia law.

This Court has never found severance pay to be within the definition of “wages” or “fringe benefits” under the WPCA, and doing so would nullify many severance pay plans. As a severance package, employers often agree to continue an employee’s salary for one or more weeks following termination. If the employer was required to pay the entire severance in a lump sum within 72 hours of discharge, the employer might refuse to offer any severance at all. The Court should not invalidate severance plans calling for continued payment of salary on regularly

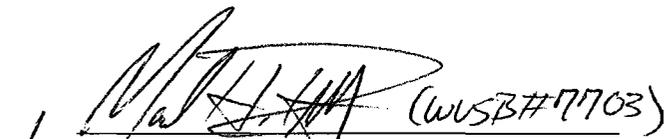
scheduled pay dates following termination. Severance pay is not compensation for hours worked, and should not be treated as such.

**C. CONCLUSION**

The Court should exercise its discretion not to grant certiorari in this appeal because no error has been committed by the trial court. Judge Groh's well-reasoned decision concluding that severance pay is not "wages" or "fringe benefits" under the West Virginia Wage Payment and Collection Act has essentially been reviewed by this Court through its review of Judge Pomponio's 2008 decision (Ex. C), which this Court refused to disturb by a 4-0 vote. (See Ex. B) Moreover, even if severance pay is deemed wages, the severance pay in this case was timely received by the Plaintiffs on their her next regular payday—the day it was promised by United Bank, and more importantly, the day the West Virginia Code required it to be paid, given that the Plaintiffs were laid off and not discharged.

Therefore, summary judgment was properly entered against the Plaintiffs and the case properly dismissed. For these reasons, the Petition for Appeal should be refused.

UNITED BANK, INC.  
Defendant  
By counsel

  
for Brian M. Peterson (WVSB #7770)  
Bowles Rice McDavid Graff & Love LLP  
101 South Queen Street  
Post Office Drawer 1419  
Martinsburg, West Virginia 25402-1419  
Phone: (304) 263-0836  
Fax: (304) 267-3822

**CERTIFICATE OF SERVICE**

I, Brian M. Peterson, hereby certify that a true and exact copy of the foregoing **RESPONSE TO PETITION FOR APPEAL** has been served by United States mail, postage prepaid, upon the following individual:

Tammy Mitchell McWilliams, Esquire  
Trump & Trump, L.C.  
307 Rock Cliff Drive  
Martinsburg, West Virginia 25401

this 6<sup>th</sup> day of December, 2010.

  
for Brian M. Peterson (WSBA# 9703)

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**