IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

LISA WILKINSON, HEATHER MORRIS, KATHRYN A. BRADLEY, PAMELA STUMPF, and LULA V. DICKERSON,

Plaintiffs,

v.

CIVIL ACTION NO.: 18-C-549
Honorable Thomas Evans III

WEST VIRGINIA STATE OFFICE OF THE GOVERNOR and JIM JUSTICE, in his capacity as Governor, WEST VIRGINIA STATE AUDITOR'S OFFICE and JOHN B. MCCUSKEY, in his official capacity as State Auditor, WEST VIRGINIA STATE TREASURER'S OFFICE and JOHN PERDUE, in his Official capacity as State Treasurer, WEST VIRGINIA OFFICE OF THE SECRETARY OF STATE and Mac Warner in his official Capacity as Secretary of State, WEST VIRGINIA OFFICE OF THE ATTORNEY GENERAL and Patrick Morrisey, in his official capacity as Attorney General, WEST VIRGINIA SUPREME COURT OF APPEALS and CHIEF JUSTICE ELIZABETH D. WALKER, in her official capacity as Chief Justice,

Defendants.

FINAL ORDER GRANTING SUMMARY JUDGMENT FOR ALL DEFENDANTS

On December 4, 2019, came the parties, by their respective counsel, for a hearing on dispositive motions filed by Defendants pursuant to an *Agreed Order Extending Dispositive Motion Deadline and Setting Hearing* entered on August 23, 2019. Upon review of the pleadings, motions, responses, replies, supportive memoranda, oral argument, and the applicable law, the Court finds and concludes as follows:

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FINDINGS OF FACT

Procedural Background

1. Plaintiff Lisa Wilkinson filed her original *Complaint* on April 23, 2018, alleging that the West Virginia State Auditor's Office, Auditor John B. McCuskey, the West Virginia State Treasurer's Office, Treasurer John Perdue, and Kronos Inc., violated W. Va. Code §§ 21-5-1 *et seq.* and 21-5-6 when the State transitioned from semi- or twice-monthly to bi-weekly (every-other-week) pay for State employees.[1] The Court finds that this transition was codified in an amendment to W. Va. Code § 6-7-1.

2. Plaintiff alleged that she and others were shorted pay as a result of the pay-schedule conversion. Specifically, Plaintiff alleged "her paychecks were changed during the year 2017 and as a result of the said change, she has not been paid all of the monies due her based upon her yearly salary."[2] The original *Complaint* sought lost wages, lost benefits, compensatory damages, attorney fees, statutory damages, and class certification "for a class consisting of the group of salaried West Virginia state employees who had not been paid full wages for the year in which their paychecks went from Bi-Monthly [sic] to Bi-Weekly."[3]

3. Plaintiff filed her *First Amended Complaint* on June 22, 2018, asserting the same claims and adding Dataview Consulting, LLC, and ISG as Defendants.

4. Plaintiff filed her *Second Amended Complaint* on June 13, 2019, adding the following Plaintiffs: Heather Morris, Kathryn A. Bradley, Pamela Stumpf, and Lula V. Dickerson; and adding the following Defendants: West Virginia State Office of the Governor, Governor Jim Justice, the West Virginia Office of Secretary of State, Secretary of State Mac Warner, the West

[1] "Semi-monthly" and "twice-monthly" are used interchangeably.
[2] Compl. ¶ 15.
[3] Compl. ¶ 27.

Virginia Office of the Attorney General, Attorney General Patrick Morrisey, the West Virginia Supreme Court of Appeals, and Chief Justice Elizabeth D. Walker. Kronos, Inc., Dataview Consulting, LLC, and ISG were dismissed from the case.

5. Plaintiffs' *Second Amended Complaint* sought relief in mandamus and further alleged that Defendants violated W. Va. § 21-5C-1 *et seq.*; Art. X, § 4 ("no debt shall be contracted by this State"), and Art. III, § 10 (equal protection), of the West Virginia Constitution. The *Second Amended Complaint* also sought lost wages, lost benefits, compensatory damages, attorney fees, statutory damages, liquidated damages, and class certification "for a class consisting of the group of salaried West Virginia state employees who had not been paid full wages for the year in which their paychecks went from Bi-Monthly [sic] to Bi-Weekly."[4] Plaintiffs claim that the pay conversions resulted in a $30,000,000.00 debt to West Virginia state employees.

Factual Background

6. The Court finds that in 2011, the West Virginia Legislature adopted West Virginia Code § 12-6D-1, *et seq.*, which created the Enterprise Resource Planning Board ("ERP Board"), as a result of a 2010 analysis of the State's systems and business processes. The purpose of the ERP Board is to develop, implement, and manage the Enterprise Resource Planning System ("ERP System"). The ERP System is a "unified system that includes the State's financial management, procurement, personnel, payroll, budget development and other administrative business processes." W. Va. Code §12-6D-1(a)-(b). Additionally, the statute created a sixteen-member steering committee to provide routine oversight of the system and perform duties delegated to it by the ERP Board. W. Va. Code § 12-6D-4.

[4] Second Am. Compl. ¶ 102.

7. During the design and implementation of the ERP System, the State's consultant and the steering committee recommended to the ERP Board that the State should move to a bi-weekly pay system. After some initial concerns, the ERP Board agreed to the change. Then, in 2014, the Legislature passed Senate Bill 322 for the purpose of allowing the State to change to bi-weekly pay. The ERP System was then configured to pay exclusively on a bi-weekly schedule. The following year, beginning in May 2015, State employees were transitioned from semi-monthly to bi-weekly pay. The transition occurred over three years and in three waves: Wave 1 - 2015, Wave 2 - 2016, and Wave 3 -2017.

8. Although the transition occurred over three years and in three waves, each transition was handled in a similar manner. For each wave, a date was selected whereby employees would receive their last full semi-monthly paycheck. The following semi-monthly paycheck was shortened by the number of days necessary to line up with the bi-weekly pay schedule. Within that smaller paycheck was an adjustment payment that allowed the new bi-weekly paycheck to be in an amount that would (1) pay out the employees' earnings for the balance of that calendar year and (2) produce a right-sized bi-weekly check for the next calendar year. After the transition pay period, the next paycheck employees received was their first bi-weekly pay check.

9. The Court finds that Plaintiff Lisa M. Wilkinson works on the Joint Commission on Government Finance; Kathryn A. Bradley works for the West Virginia Department of Health and Human Resources; Heather L. Morris (Ewaskey), Pamela A. Stumpf, and Lulu V. Dickerson work for the West Virginia Supreme Court.

10. The transition occurred as follows for Wave 3: On May 16, 2017, employees received a full semi-monthly paycheck for work performed from April 16-30, 2017. Then, employees received their last semi-monthly paycheck on May 31, 2017, which covered earnings

from May 1-12, 2017. This last pay period was short three days in order to match up with the new bi-weekly pay schedule; however, those three days were included in the first bi-weekly pay period, which was paid on June 9, 2017. Moreover, as mentioned above, employees received a one-time payment with the May 30, 2017 pay that (1) allowed the new bi-weekly pay to be at a rate that would pay out the balance of the 2017 earnings of the employees through calendar year 2017 and into the first few days of 2018 and (2) would ensure that the bi-weekly checks would not have to be adjusted for the calendar year 2018. In other words, the amount of the bi-weekly pay was set so that employees would timely receive, under the new schedule, all wages earned during 2018 and going forward.[5]

11. Upon review of the pleadings, the Court finds that Plaintiffs' claims are premised on a legally unsupported assertion that all employees must be paid on a calendar or fiscal year basis because, as Plaintiff alleges, "the yearly work year is established by the Calendar Year or the Fiscal Year which runs from July 1 to June 30 of the next year."[6] The Court finds and concludes that Plaintiff incorrectly assumes that "the State of West Virginia has always paid its salaried employees their full salary that was due and owing so as not to carry over any debt obligation to said employees into the next fiscal year as required by the West Virginia Constitution."[7] Plaintiffs insist that State employees must be paid "their year salaries by the end of the fiscal and/or calendar year."[8] The Court finds no legal merit to Plaintiffs' claims.

[5] See Affidavit of Sue Racer-Troy, attached to *Motion of Defendant Supreme Court Of Appeals Of West Virginia To Dismiss Plaintiffs' Complaint Or In The Alternative For Summary Judgment* as Exhibit A.
[6] Second Am. Compl. ¶ 23.
[7] *Id.* at ¶ 30.
[8] *Id.* at ¶ 34.

STANDARD OF REVIEW

12. A party is entitled to summary judgment "if the pleadings, depositions, interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."[9] Whether a factual dispute is "material," depends upon the substantive law governing the case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."[10] It is not Defendants' burden "to negate the elements of claims on which [plaintiff] would bear the burden at trial."[11] Rather, it is Defendants' burden "only [to] point to the absence of evidence supporting [plaintiffs'] case."[12] Then, "the burden of production shifts to [plaintiffs,] who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)[.]"[13] A party may move for summary judgment at any time.[14]

13. To meet their burden, Plaintiffs "must identify specific facts in the record and articulate the precise manner in which that evidence supports [their] claims."[15] The *Precision Coil* Court further observed that, although a trial court considering a motion for summary judgment must view inferences from the underlying facts in the light most favorable to the party opposing

[9] W. Va. R. Civ. P. 56(c).
[10] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[11] *Powderidge Unit Owners Ass 'n v. Highland Props., Ltd*, 196 W. Va. 692, 698-99, 474 S.E.2d 872, 879 (1996) (citation omitted).
[12] *Id.* at 699 (internal quotations and citations omitted).
[13] Syl. pt. 3, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).
[14] W. Va. R. Civ. P. 56(a).
[15] *Powderidge*, 196 W. Va. at 699, 474 S.E.2d at 879; *see also Precision Coil*, 194 W. Va. at 59, n. 9, 459 S.E.2d at 336, n. 9 (1995) (where the party opposing a motion for summary judgment fails to make a showing sufficient to establish the existence of an essential element of his or her case on which he or she will bear the burden of proof at trial, "Rule 56(e) mandates the entry of a summary judgment[.]").

summary judgment, it should consider only "reasonable inferences."[16] "The evidence illustrating the factual controversy cannot be conjectural or problematic."[17]

DISCUSSION & CONCLUSIONS OF LAW

14. The Court finds no disputes as to any material facts as the payroll records presented to the Court speak for themselves. The Court finds and concludes that this matter turns solely on a question of law.

The Wage Payment and Collection Act

15. The West Virginia Wage Payment and Collection Act ("WPCA") is the only supposed statutory basis for Plaintiffs' claim that State employees experienced a "short fall," "gap," or "deficit" in the pay conversion. The one specific section of the WPCA that Plaintiffs cite is W. Va. Code § 21-5-6. That section, however, merely provides that an employer must pay its employees within five days of the pay periods established per Section 3 of the Act, *i.e.*, the bi-weekly periods.

16. As noted above, the implementing Act specifically states that the intent was to move the State to a bi-weekly payroll. Under W. Va. Code § 21-5-3, West Virginia employers are allowed to pay employees every two weeks. And the State is allowed to pay its employees in arrears. The Court finds and concludes that had been the law long before the bi-weekly pay system was developed. Per W. Va. Code § 6-7-1, State employees are paid one pay cycle in arrears. The Court finds that, even if the WPCA could somehow be interpreted so as to preclude paying

[16] *Id.* at n. 10. ("We need not credit purely conclusory allegations, indulge in speculation, or draw improbable inferences. Whether the inference is reasonable cannot be decided in a vacuum; it must be considered 'in light of the competing inferences' to the contrary.").
[17] *Precision Coil*, 194 W. Va. at 60, 459 S.E.2d at 337.

employees in arrears, the more specific statute controls—that is, the statute that directly addresses the frequency of pay to State employees (§ 6-7-1).[18]

17. The Court finds that the WPCA allows an employer to change "the rate of pay, pay period, place or method of payment, the time of payment, or any other term of employment" provided that the employer furnishes at least one pay period's notice of the change in writing to employees.[19] The Court finds and concludes that it is undisputed Defendants complied with the notice requirement.

18. The Court agrees with Defendants that the problem with Plaintiffs' legal theory is: Plaintiffs claim that they did not *receive in a specific calendar year* what they *earned in a specific calendar year* (a fact that may be correct), yet they can point to no provision of the law that guarantees them the right to receive in a calendar year the same money—or even the same total amount—that they earned in that calendar year. The Court finds and concludes that this right is not grounded in the WPCA. The Court finds that, even under the old system, while typically Plaintiffs coincidentally received the same total amount in a calendar year that they earned in that calendar year, they did not receive in a calendar year the same money that they earned in that calendar year (although their use of the simple metric of comparing W-2s [*i.e.*, calendar year receipts] to annual salaries misled them into thinking that they had).

[18] *See International Union of Operating Engineers, Local Union No. 132 Health and Welfare Fundv. L.A. Pipeline Const. Co., Inc.*, 237 W.Va. 261, 267, 786 S.E.2d 620, 626 (2016) ("Ordinarily, where two statutes apply to the same subject matter, the more specific statute prevails over the general statute. When faced with a choice between two statutes, one of which is couched in general terms and the other of which specifically speaks to the matter at hand, preference generally is accorded to the specific statute."); Syl. pt. 1, *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984) ("The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled."); *Hawkins v. Bare*, 63 W.Va. 431, 436-37, 60 S.E. 391, 393 (1908)("[A] statute may deal with a number of subjects, treating them all in general terms by making a provision common to all. If, in such case, a new statute selects one of the several subjects, and makes a complete special provision as to it, the intention to substitute that provision for the general law to that extent is equally as obvious and apparent[.]").

[19] WVCSR § 42-5-4.2.

19. Moreover, the Court finds and concludes that Plaintiffs' claim ignores West Virginia's longstanding precedent of paying its employees in arrears as allowed by West Virginia law. As early as 1997, West Virginia paid its employees in arrears. The 1997 version of W. Va. Code § 6-7-1 reads as follows:

> All full-time and part-time salaried and hourly officials, officers and employees of the state and the board of trustees of the university system of West Virginia and the board of directors of the state college system shall be paid twice per month, and under the same procedures and in the same manner as the state auditor currently pays agencies on such basis: Provided, That on and after the first day of July, one thousand nine hundred ninety-nine, or any date thereafter, as determined by the auditor, all officials, officers or employees, except elected officials and employees whose compensation is fixed by statute, shall be paid one pay cycle in arrears. Any employee whose employment with the state begins on or after the first day of July, one thousand nine hundred ninety-nine, as determined by the auditor, shall not receive his or her first pay until the end of the second regular payroll cycle after beginning employment. The auditor shall propose a legislative rule in accordance with article three [§ 29A-3-1 et seq.], chapter twenty-nine-a of this code to determine the manner to implement the payment of employees in arrears. Nothing contained in this section is intended to increase or diminish the salary or wages of any official, officer or employee.[20]

20. From 1997 onward, State employees have been paid in arrears. In 2013, two years before the pay conversion, the subject code section, W. Va. Code § 6-7-1, read as follows:

> All full-time and part-time salaried and hourly officials, officers and employees of the state, state institutions of higher education and the Higher Education Policy Commission shall be paid twice per month, and under the same procedures and in the same manner as the State Auditor currently pays agencies: Provided, That on and after the first day of July, two thousand two, all new officials, officers and employees of the state, a state institution of higher education and the Higher Education Policy Commission, statutory officials, contract educators with higher education and any

[20] W. Va. Code § 6-7-1 (1997) (emphasis added).

> exempt official who does not earn annual and sick leave, except elected officials, **shall be paid one pay cycle in arrears.** The term new employee does not include an employee who transfers from one state agency, a state institution of higher education or the Higher Education Policy Commission to another state agency, another state institution of higher education or the Higher Education Policy Commission without a break in service. Nothing contained in this section is intended to increase or diminish the salary or wages of any official, officer or employee.[21]

21. After the July 1, 2014, amendment to W. Va. Code § 6-1-7, now titled "State officials, officers and employees to be paid at least twice per month; new employees paid in arrears," the section currently reads:

> All full-time and part-time salaried and hourly officials, officers and employees of the state, state institutions of higher education and the Higher Education Policy Commission **shall be paid at least twice per month,** and under the same procedures and in the same manner as the State Auditor currently pays agencies: Provided, That on and after July 1, 2002, all new officials, officers and employees of the state, a state institution of higher education and the Higher Education Policy Commission, statutory officials, contract educators with higher education and any exempt official who does not earn annual and sick leave, except elected officials, **shall be paid one pay cycle in arrears.** The term "new employee" does not include an employee who transfers from one state agency, a state institution of higher education or the Higher Education Policy Commission to another state agency, another state institution of higher education or the Higher Education Policy Commission without a break in service: Provided, however, **That, after July 1, 2014, all state employees paid on a current basis will be converted to payment in arrears.** For accounting purposes only, any payments received by such employees at the end of the pay cycle of the conversion pay period will be accounted for as a credit due the state. Notwithstanding any other code provision to the contrary, any such credit designation made for accounting of this conversion will be accounted for by the Auditor at the termination of an employee's employment and such accounting shall be documented in the employee's final

[21] W. Va. Code § 6-7-1 (2013) (emphasis added).

> wage payment. Nothing contained in this section is intended to increase or diminish the salary or wages of any official, officer or employee.[22]

22. The Court finds that it is undisputed that employees paid in a one-pay-cycle arrearage, pre- and post-pay conversion, were and are paid one pay cycle after their services were performed. For example, under the semi-monthly schedule, the second pay period in December 2015 spanned from December 16 to 31, 2015. Employees were issued payment for this period on January 16, 2016. Under the newbi-weekly schedule, the second pay period in December 2015 for affected employees spanned from December 12 to December 25, 2015. Employees were issued payment for this period on January 8, 2016, which was one pay period (two weeks) from December 25, 2015.[23] Thus, under West Virginia law, State employees have historically been paid one pay cycle after services were rendered.

23. The Court finds that State employees have been paid in arrears for over twenty years. Indeed, since 1921, it has been the law of the State that "[n]o money shall be drawn from the Treasury to pay the salary of any officer or employee before his services have been rendered."[24] The West Virginia Supreme Court has accepted that the W. Va. Code § 12-3-13's purpose "may have been to prohibit the payment of salaries of State employees prior to the end of each month."[25] W. Va. Code § 6-7-1 comports with this purpose. State employees have been paid in arrears as required under West Virginia law.

24. Under the old system, the Court finds there were, by definition, exactly twenty-four pay periods in each year, and those pay periods aligned on month boundaries, and (more importantly) on year boundaries: *i.e.*, the end of every month and (more importantly) the end of

[22] W. Va. Code § 6-7-1 (2014); Ex. 1.
[23] Please see charts, attached hereto as Ex. 2.
[24] W. Va. Code § 12-3-13
[25] *State ex rel. Lippert v. Sims*, 143 W. Va. 542, 549, 103 S.E.2d 533, 537 (1958).

every year was a payday. While each employee received in each calendar year the same total amount that she earned in that same calendar year, she did not exactly receive in each calendar year the pay that she earned in that year. These sound similar, but they are not the same. A close examination of the pay flowing to three of the Plaintiffs through the implementation of Wave 3 shows that they were not shorted any pay—in 2017 or at any time.

Plaintiff Lula Dickerson

25. The Court finds that Plaintiff Dickerson had an annual salary of $39,852.00. Under the old payroll system, Ms. Dickerson received her salary in 24 equal installments that were tied neatly to the calendar year.[26] For instance in 2016, Ms. Dickerson earned $39,852.00 and she received $39,852.00. But the $39,852.00 that she received in 2016 was not the "same" $39,852.00 that she earned in 2016. The Court finds that, by statute, Ms. Dickerson and all of her co-workers were paid one pay period – i.e., one-half month – in arrears. So, while Ms. Dickerson did not receive the $1,660.50 of salary that she earned for the last half month of 2016 (i.e., December 16 through 31, 2016) in 2016, she was paid for that half month on January 15, 2017.[27] That same amount was exactly balanced out by the fact that she did receive on January 15, 2016 the $1,660.50 half-month's pay that she had earned in the December 16–31, 2015 pay period. So, it just happened to work out under the old system that the amount that Ms. Dickerson received in 2016 was the same as the amount she earned in 2016, and that was due to the simple math of a half-month delay of pay at the end of 2017 being balanced out by a half-month pay at the end of 2016 sliding forward into 2017. Contrary to Ms. Dickerson's allegations, then, while before 2017 she generally received the same amount of pay in a calendar year that she earned in that calendar year, Ms. Dickerson has

[26] See Affidavit of Sue Racer-Troy, attached to *Motion of Defendant Supreme Court Of Appeals Of West Virginia To Dismiss Plaintiffs' Complaint Or In The Alternative For Summary Judgment* as Exhibit A.
[27] This fact is demonstrated by chart attached to defendants' motions.

never received in a calendar year the pay directly corresponding to the salary that she earned in that same calendar year. If she had believed, prior to 2017, that a calendar year W-2 (receipts) should reflect the same amount that she earned in a year (salary), she would have been technically wrong, but, presumably, not bothered by the wrong thinking due to the math being in balance at the beginning and end of the year.

Under the new system, Ms. Dickerson began receiving $1,532.77 per 14-day pay period. The last payday in 2017 was December 22. So, Ms. Dickerson did not receive the pay that she earned for the 14 days from December 9 through 22, 2017 until January 5, 2018; and she did not receive the pay that she earned for the nine days from December 23 through 31, 2017 until January 19, 2018 (along with the pay that she earned for the five days from January 1 through 5, 2018.)

27. The Court finds that Ms. Dickerson's 2017 W-2 showed that she received an amount in 2017 different than what she earned in 2017 for the following reason: The amount that she received in January 2017 (beginning of year) did not exactly balance out the amount that she did not receive in December 2017 (end of year). The last half of December 2016 was paid under the old system. So, the amount of pay that Ms. Dickerson received on January 15, 2017, was for one-half month of pay that she earned in the last half month of 2016. Thus, on January 15, 2017, Ms. Dickerson received the $1,660.50 half-month's pay that she had earned from December 16 through 31, 2016. But December 31, 2017, was not a payday under the new system (in fact, it was a Sunday, and thus it could not have been a payday). Instead, the last payday in 2017 turned out to be December 22. Ms. Dickerson thus received the pay that she earned for the 14 days from December 9 through 22, 2017 on January 5, 2018, and, furthermore, she received the pay that she earned for the nine days from December 23 through 31, 2017 on January 19, 2018.

28. Thus, the Court finds that, while Ms. Dickerson received a half-month's pay at the beginning of 2017 that she earned in 2016, she did not receive until January 2018 twenty-three days of pay that she earned from December 9 through December 31. That difference is the only reason why Ms. Dickerson did not receive in 2017 the same total dollars that she earned in 2017. It just turned out that in that year, because December 31, 2017 was a Sunday instead of a Friday, the half-month of pay received at the beginning of the year did not exactly balance out the twenty-three days of pay not received at the end of the year. Consequently, the Court concludes that Plaintiff Dickerson was paid every dollar that she earned, and it is of no consequence under the law that she received her annual earnings in pay periods that crossed over into another year.

Pamela Stumpf

29. The Court finds that Plaintiff Stumpf had an annual salary of $52,704.00. Under the old payroll system, Ms. Stumpf received her salary in 24 equal installments that were tied neatly to the calendar year.[28] For instance, in 2016, Ms. Stumpf earned $52,704.00 and she received $52,704.00. But, just like with Ms. Dickerson, the $52,704.00 that Ms. Stumpf received in 2016 was not the "same" $52,704.00 that she earned in 2016. By statute, Ms. Stumpf was paid one pay period – i.e., one-half month – in arrears. So, while Ms. Stumpf did not receive her installment of $2,196.00 that she earned for the last half month of 2016 (i.e., December 16 through 31, 2016) in 2016 (she was paid for that on January 15, 2017), that same amount was exactly balanced out by the fact that twelve months earlier she did receive on January 15, 2016, the $2,196.00 half-month's pay that she had earned under the previous December 16 – 31, 2015.

30. Under the new system, Ms. Stumpf began receiving $2,027.08 per 14-day pay period. The last pay period in 2017 was December 22. So, Ms. Stumpf did not receive the pay that

[28] See Affidavit of Sue Racer-Troy, attached to *Motion of Defendant Supreme Court Of Appeals Of West Virginia To Dismiss Plaintiffs' Complaint Or In The Alternative For Summary Judgment* as Exhibit A.

she earned for the 14 days from December 9 through 22, 2017, until January 5, 2018; and she did not receive the pay that she earned for the nine days from December 23 through 31, 2017, until January 19, 2018 (along with the pay that she earned for the five days from January 1 through 5, 2018).

31. The Court finds that, just as with Ms. Dickerson, Ms. Stumpf received pay for all of her 2017 earnings, but she received a small portion of that pay in the first few weeks of 2018. The Court concludes that the new timeline of payment was permissible under West Virginia law. Moreover, the undisputed evidence of record demonstrates that Ms. Stumpf received all pay which was due her for work performed.

Plaintiff Heather Morris

32. Plaintiff Heather Morris had an annual salary of $38,112.00. Under the old payroll system, Ms. Morris received her salary in 24 equal installments that were tied neatly to the calendar year. For instance, in 2016 Ms. Morris earned $38,112.00 and she received $38,112.00. But the $38,112.00 that she received in 2016 was not the "same" $38,112.00 that she earned in 2016. Just as with Ms. Dickerson and Ms. Stumpf, Ms. Morris was paid one pay period – i.e., one-half month in arrears. So while Ms. Morris did not receive the $1,588.00 of salary that she earned for the last half month of 2016 (i.e., December 16 through December 31, 2016) in 2016 (she was paid for that on January 15, 2017), that same amount was exactly balanced out by the fact that she did receive on January 15, 2016, the $1,588.00 half-month's pay that she had earned under the previous December 16 through 31, 2015.

33. Under the new system, Ms. Morris began receiving $1,465.85 per 14-day pay period. The last pay day in 2017 was December 22. So, Ms. Morris did not receive the pay she earned for the fourteen days from December 9 through 22, 2017 until January 5, 2018; and she did

not receive the pay that she earned for the nine days from December 23 through 31, 2017 until January 19, 2018 (along with the pay that she earned for the five days from January 1 through 5, 2018).

34. In sum, that Plaintiffs were not shorted any pay is clearly demonstrated by their pay records. Explained generally, when the bi-weekly pay schedule was implemented, each of the three Plaintiffs reviewed in detail above went from receiving 24 paychecks to 26 paychecks beginning May 31, 2017. As discussed, under both semi-monthly and bi-weekly systems, employees are paid in arrears. Thus, Plaintiffs received pay in 2018 for pay earned at the end of 2017. Plaintiffs earned their salaries in 2017 and received payment for every hour worked.[29] Specifically, Plaintiffs were paid on January 5, 2018, for pay earned December 9 - 22, 2017. Plaintiffs were paid on January 19, 2018, for pay earned December 23, 2017, to January 5, 2018. Counting all pay earned in 2017, each Plaintiff was paid their salary.[30]

35. The pay records of Plaintiffs Dickerson, Stumpf, and Morris were placed into the record and properly authenticated by affidavit testimony. Plaintiffs do not dispute that Plaintiffs Wilkinson and Bradley were paid in the same fashion as the other three Plaintiffs. The Court finds no reason to draw distinctions between the five Plaintiffs.

36. Based on evidence that is not subject to any genuine dispute, the Court finds and concludes that (1) these Plaintiffs were paid every dollar that they earned, and (2) they were paid according to law—*i.e.*, on the payday one pay period after the last day of the pay period in which the money was earned—just like they had always been paid. The Court finds nothing in the law that requires otherwise. The Court finds that Plaintiffs cannot cite to any law that gives them an

[29] *See* Ex. 3 attached to *Defendants West Virginia State Office of the Governor and Jim Justice's Motion to Dismiss and Joinder in West Virginia Supreme court of appeal's motion for summary judgment*
[30] *Id.*

entitlement to be paid within the confines of a calendar or fiscal year. Simply stated, there was and is no source for Plaintiffs' claim that they were "entitled to be paid all monies budgeted to them in the fiscal year for which it is budgeted."

Second Arrearage

37. Plaintiffs present a novel argument in their *Response to Defendants' Motions* that the implementation of bi-weekly pay created a "second arrearage" for which they have not been paid. The Court finds that, for Plaintiffs' allegation to be true, the conversion must be shown to have added *another* pay cycle or *additional* days between the work performed and the payment received. However, Plaintiffs have not shown such. Again, the pay records speak for themselves. The Court finds that, under the bi-weekly cycle, Plaintiffs are paid *more* frequently. Thus, the arrearage is less under the new system than before. The Court concludes Plaintiffs' allegation is misplaced and appears to be based on a misunderstanding of how an arrearage operates and, again, on an unsupported assumption that a bi-weekly cycle should end on the fourteenth day of each month. Plaintiffs' theory provides them no relief. When the State converted from semi-monthly to bi-weekly pay, the one-pay-cycle arrearage was maintained. No additional pay-cycle and no additional days were added between the time services were performed and compensated.

38. Again, the Court concludes that, under the semi-monthly payment schedule, employees were paid at the middle and end of each month in a one-pay-cycle arrearage as required by W. Va. Code § 6-7-1. For example, under the semi-monthly system, Plaintiff Kathryn Bradley was paid on January 16, 2017, for work performed on December 16–31, 2016. The one-pay-cycle arrearage accounts for January 1–15, 2017.

39. Under the bi-weekly payment schedule, employees are paid every two weeks, and, like before, they are paid in a one-pay-cycle arrearage as required by W. Va. Code § 6-7-1. For

example, under the bi-weekly system, Plaintiff Bradley was paid on January 5, 2018, for work performed on December 9 - 22, 2017. The one-pay-cycle arrearage accounts for December 23, 2017 to January 5, 2018. Continuing the example, on January 19, 2018, Plaintiff was paid for work performed on December 23, 2017 to January 5, 2018. The one-pay-cycle arrearage accounts for January 6–19, 2018.[31] The Court finds that no second arrearage was created by implementation of the new system. The Court further finds that, under a one-pay-cycle arrearage required by W. Va. Code § 6-7-1, Plaintiffs were paid every dollar owed for every day worked.[32]

40. Plaintiffs rely on *State ex rel. Graney v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958), for the proposition that State employees "must . . . be paid on or about 'the end of each month.'"[33] The Plaintiffs ignore key language in *Graney*:

> the Auditor . . . [has] the duty of fixing the time for the different departments of the State government to submit payroll requisitions so that officials and employees shall be paid at least once every thirty-one days on or about the end of each calendar month **though not necessarily for services rendered for a calendar month.**[34]

The Court finds that the emphasized language that Plaintiffs ignore dispels the entirety of Plaintiffs' theory that they must be paid for all time worked in a month *within* the month. *Graney* makes clear that services rendered in one month may be paid in the next month.

41. The Court in *Graney* went on to explain that, while services rendered in one month may be paid in the next month (as the above block quote indicates), the Legislature did not intend as the law was then written to give the Auditor authority to delay payment for services rendered during the month of October until November 15th. As explained below, however, the 1958 version

[31] *See* Defs' Mot. to Dismiss at Ex. 3.
[32] *Id.*
[33] Pls' Resp. at 5.
[34] *State ex rel. Graney v. Sims*, 144 W. Va. 72, 82, 105 S.E.2d 886, 893 (1958) (emphasis added).

of § 6-7-1 did not require or allow an arrearage. The Court in *Graney* accepted the Auditor's argument that, upon the end of the month, time was needed to deduct social security, income taxes, and account for sick days taken by employees.[35] The Court concluded that the petitioner's petition for writ of mandamus seeking to compel payment by the end of the month was without merit as only the Legislature could afford them relief. Thus, the Court finds that, contrary to Plaintiffs' characterization, *Graney* expressly acknowledges and allows payment for services rendered *after* the services were rendered.

42. The decision in *Graney* was based on an older version of W. Va. Code § 6-7-1, which read: "**Salary and Allowances to State Officers to Be Paid Monthly—The salary and allowances of all state officers payable out of the state treasury shall be paid in equal monthly installments at the end of each month.**"[36] This older version applied to State officers and did not provide for pay in arrears. Conversely, the current version of W. Va. Code § 6-7-1, now titled "State officials, officers and employees to be at least twice per month; new employees paid in arrears;" expressly requires that unselected State employees be paid one pay cycle in arrears.

43. Thus, by the design and express language of W. Va. Code § 6-7-1, Plaintiffs are paid one pay cycle in arrears. Again, this means that employees are paid for their services one pay cycle after the work is performed. In other words, under the statute, State employees are paid at least twice per month, "though not necessarily for services rendered for [that] calendar month."[37] As noted, it has long been the law that State employees are paid in arrears. [38] Under the current version of § 6-7-1, the one-pay-cycle arrearage remains intact, contrary to Plaintiffs' allegations.

[35] State ex rel. Graney v. Sims, 144 W. Va. 72, 75,76, 105 S.E.2d 886, 889, 890 (1958).
[36] W. Va. Code § 6-7-1 (1961) (emphasis original)
[37] *See Graney*, 144 W. Va. at 82, 105 S.E.2d at 893 (1958).
[38] Defendants West Virginia State Office of the Governor and Jim Justice's Motion to Dismiss and Joinder in West Virginia Supreme Court of Appeal's Motion for Summary Judgment (hereinafter Defs' Mot. to Dismiss) at § III.

Article X, § 4 of the West Virginia Constitution

44. Plaintiffs contend in Count I of their *Second Amended Complaint* that Defendants are violating Article X, §4 of the West Virginia Constitution because Defendants "are borrowing from employees' pay budgeted for one fiscal year to pay a debt from a prior fiscal year[.]"[39] This contention is without support. In line with the Court's discussion and conclusions *supra*, the Court finds and concludes that Defendants are not borrowing money from one fiscal year to pay their employees from the prior fiscal year. Rather, Defendants spend the money they are appropriated each fiscal year to pay their employees as wages become due within that fiscal year for work performed within that fiscal year.

45. Even assuming, arguendo, that Plaintiffs' factual allegation was true, Article X, §4 is not applicable. That section of the West Virginia Constitution, quoted in full, provides as follows:

> No debt shall be contracted by this state, except to meet casual deficits in the revenue, to redeem a previous liability of the state, to suppress insurrection, repel invasion or defend the state in time of war; but the payment of any liability other than that for the ordinary expenses of the state, shall be equally distributed over a period of at least twenty years.[40]

Indeed, "[t]he restrictions contained in Section 4 of Article X of the West Virginia Constitution deal with the creation of long-term debt by the State or its agencies by way of legislative enactments through revenue bonds or other similar obligations."[41] The Court finds and concludes that the payment of employee wages one pay period in arrears does not constitute a revenue bond or other similar obligation because no debt is being contracted.

[39] *Second Amended Complaint* ¶¶ 118–20.
[40] W. Va. Constitution Article X, §4.
[41] Syl. pt. 4, *Winkler v. State School Bldg. Authority*, 189 W. Va. 748, 434 S.E.2d 420 (1993) (emphasis added).

46. Moreover, the Supreme Court of Appeals has held that,

> [T]he creation of a State board or commission which requires an appropriation of public funds to carry out its purposes is not treated as the creation of a debt, although its generally contemplated continuation from year to year, and for an indefinite period, must necessarily involve future appropriations. Practically all agencies created by the Legislature require appropriations from time to time, and that was necessarily contemplated at the time they were created.[42]

The Supreme Court of Appeals explained that, "[t]he language used in *Dyer* . . . leads us to conclude that although technically, the legislature was prohibited from forcing future legislatures to appropriate funds to cover these particular items, the debts were not prohibited if the services were deemed necessary."[43] Indeed, the payment of employee wages is a necessary operating expense of the State that is known to require future appropriations. As such, the Court concludes it should not be treated as the creation of debt.

47. Furthermore, the Court notes that in *State ex rel. Charleston Bldg. Com'n v. Dial*, the Supreme Court of Appeals held that rental payments from the State to a municipal corporation pursuant to a lease-purchase agreement did not violate the State Constitution's prohibition against the State contracting debt.[44] The Court explained that because rental payments were due at intervals contemporaneous with the State's use of the property, the rental payments did not constitute future indebtedness of the State.[45] That is, the rental payments were mere reimbursements for services it received, i.e., use of the rental property.[46] In addition, the Court

[42] *State ex rel. Dyer v. Sims*, 134 W. Va. 278, 290, 58 S.E.2d 766, 773 (1950), *rev'd on other grounds*, 341 U.S. 22 (emphasis added); *see also Winkler* at 756 ("[B]y creating state agencies, the Legislature was obligating itself, in a constitutionally permissible manner, to pay funds necessary for those agencies' operational expenses from future general revenue funds[.]").
[43] *McGraw v. Caperton*, 191 W.Va. 528, 535, 446 S.E.2d 921, 928 (1994).
[44] 198 W.Va. 185, 200, 479 S.E.2d 695, 710 (1996).
[45] *Id.*
[46] *Id.*

noted that the lease-purchase agreement was not indefinite as the State could terminate the agreement upon thirty days' notice.[47] Thus, the rental payments resulting from the State's lease-purchase agreement did not violate Article X, §4 of the West Virginia Constitution.

48. Similarly, in *McGraw v. Caperton*, the Supreme Court of Appeals held that one-year computer hardware and software contracts with multiple renewals and non-binding cancellation clauses did not violate Article X, §4 of the West Virginia Constitution.[48] The Court explained that the computer equipment that was the subject of the contracts was a "needful thing" and had a "strong public purpose."[49] Additionally, the contracts did not create a present indebtedness because the contracts provided for periodic installments that were paid as services were rendered. Id. Finally, the contracts could be cancelled at any point, and future legislatures could choose not to renew the contracts by refusing to appropriate additional funds.[50]

49. Here, the Court notes that Plaintiffs' salaries are akin to "reimbursements" for services they provide the State and are paid at bi-weekly intervals nearly contemporaneous with their service. Moreover, the payment of State employee wages is a "needful thing" if the State government intends on continuing to operate. Additionally, as in *Dial* and *McGraw*, Plaintiffs' employment with the State is not indefinite. Plaintiffs, like all unelected State employees, are at-will employees. Their employment can be terminated for any reason which is not an illegal reason. Accordingly, the Court concludes that Plaintiffs' argument that Defendants are violating Article X, § 4 of the West Virginia Constitution fails as a matter of law.

50. The Supreme Court of Appeals "has defined 'standing' as a party's right to make a legal claim or seek judicial enforcement of a duty or right. Standing refers to one's ability to bring

[47] *Id.*
[48] 191 W.Va. 528, 536, 446 S.E.2d 921, 929 (1994)
[49] *Id.*
[50] *Id.*

a lawsuit based upon a personal stake in the outcome of the controversy."[51] A plaintiff attempting to establish standing must satisfy three elements:

> First, the [plaintiff] . . . must have suffered an "injury-in-fact"— an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.[52]

"The focus of a standing analysis is not on the validity of the claim but instead is on the appropriateness of a party bringing the questioned controversy to the court. The burden for establishing standing is on the plaintiff."[53]

51. Here, the Court finds that Plaintiffs have not satisfied their burden of proving that they have standing to institute this action because Plaintiffs have failed to establish that they suffered an injury in fact. To satisfy the first element and establish injury in fact,

> [Plaintiffs] must show that [they] suffered an invasion of a legally protected interest that is 'concrete and particularized.' **For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way. To be a 'concrete' injury, it must actually exist.** The injury must also be actual or imminent, not conjectural or hypothetical.[54]

Plaintiffs have not alleged that they have suffered, or will suffer, from a particularized or concrete injury as a result of being paid in arrears. As discussed *supra*, Plaintiffs have not been shorted any money, and thus, they are not owed any money. Plaintiffs receive each and every dollar they are owed each pay day, and any "gap" payments would indeed result in an *overpayment*. The Court

[51] *State ex rel. Healthport Technologies, LLC v. Stucky*, 239 W.Va. 239, 242-43, 800 S.E.2d 506, 509-10 (2017) (internal quotations and footnotes omitted).
[52] Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002).
[53] *State ex rel. Healthport Technologies, LLC v. Stucky*, 239 W.Va. at 243, 800 S.E.2d at 510.
[54] *State ex rel. Healthport Technologies, LLC v. Stucky*, 239 W.Va. at 243, 800 S.E.2d at 510 (internal quotations and footnotes omitted) (emphasis added).

reiterates that the fact that the money used to pay their wages comes from a different fiscal year has no effect, much less a negative effect, on Plaintiffs. Moreover, the Court finds and concludes that, even if paying State employees in arrears does violate Article X, §4 of the West Virginia Constitution, this technical, or "procedural," violation does not create a concrete injury from which Plaintiffs are entitled to recover.[55] *See Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1549 (2016) (noting that the plaintiff could not "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."); *Summers v. Earth Island Institute*, 555 U.S. 488, 496, 129 S.Ct. 1142, 1151 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."). Accordingly, Plaintiffs do not have standing to pursue their claim for violation of Article X, §4 of the West Virginia Constitution.

52. The Court notes that, even if Plaintiffs could show that they have suffered injury in fact, Plaintiffs cannot show that it is likely that their injury "will be redressed through a *favorable* decision of the court." In *Findley*, the Supreme Court of Appeals held that the plaintiff lacked standing to pursue her declaratory judgment action because she was not entitled to the relief sought.[56] The plaintiff brought a declaratory judgment action premised on the Court's holding in *Mitchell v. Broadnax*, 208 W.Va. 36, 537 S.E.2d 882 (2000), which held that insurance companies were required to adjust premiums when it incorporated an exclusion in a motor vehicle insurance policy. The plaintiff complained that her insurance policy included an exclusion to which there was no corresponding adjustment to the premium.[57] The plaintiff's insurance policy, however, was issued in 1991, and the *Mitchell* decision was rendered in 2000.[58] The plaintiff argued that the

[55] Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d. 807 (2002).
[56] *Findley*, at 97, 576 S.E.2d. at 824.
[57] *Findley*, at 94, 576 S.E.2d. at 821.
[58] *Id.*

Court's holdings in *Mitchell* should be retroactively applied to her insurance policy, but the Court disagreed.[59] Thus, the Court held that because the plaintiff was not entitled to the relief sought, she did not have standing to assert her claim.[60]

53. Likewise, the Court concludes, in the present matter, Article X, § 4 of the West Virginia Constitution has never been interpreted to preclude the State or its agencies from carrying over operational expenses, such as employee wages, from one fiscal period to the next as Plaintiffs contend. Thus, Article X, § 4 does not restrict the State and its agencies from paying its employees two weeks in arrears. Therefore, the Court concludes that Defendants are not violating Article X, § 4. As such, Plaintiffs do not have a claim for violation of Article X, § 4 of the West Virginia Constitution, and, as in *Findley*, are not entitled to the relief sought because it is not likely that their injury will be redressed through a favorable decision of the Court. Accordingly, the Court finds and concludes Plaintiffs lack standing to pursue their claim for violation of Article X, § 4 of the West Virginia Constitution.

Article III, § 10 of the West Virginia Constitution

54. Plaintiffs allege in Count IV of their *Second Amended Complaint* that Defendants violated equal protection principles of the West Virginia Constitution because Defendant Supreme Court supposedly "made a one-time, catch-up gap payment" to elected Court officials and not to Plaintiffs or other unelected Court employees.[61] Plaintiffs assert, that "[t]his same act applies to other elected officials who control state Agencies or Departments."[62] Plaintiffs assert that

[59] *Findley*, at 96, 576 S.E.2d. at 823.
[60] *Id.* at 97, 576 S.E.2d. at 824.
[61] *Second Amended Complaint* ¶¶150-51.
[62] *Id.* at ¶ 151.

Defendants have "treated similarly situated people dissimilarly and have denied them the right to equal protection of the laws in derogation of W. Va. Const. Art. III, §10."[63]

55. Section 10 of Article III of the West Virginia Constitution provides that, "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."[64] "Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner."[65] It is well settled that "if the challenged classification does not affect a fundamental right or some suspect or quasi-suspect criterion, the governmental classification will be sustained so long as it is 'rationally related to a legitimate state interest.'"[66] Suspect and quasi-suspect classes include race, national origin, alienage, gender, and illegitimacy.[67] Indeed, none of these classes are at issue here. Accordingly, the rational basis test applies to the Defendant Supreme Court's decision to pay elected officials on a slightly different pay schedule.

56. The rational basis test is a "highly deferential standard" under which "social or economic legislation must be affirmed 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'"[68] Furthermore,

> Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our Equal Protection Clause.' Syllabus Point 7, [as

[63] *Id.* at ¶ 152.
[64] W. Va. Const. Art. III, §10.
[65] Syl. pt. 3, *MacDonald v. City Hosp., Inc.*, 227 W. Va. 707, 715 S.E.2d 405 (2011).
[66] *Morgan v. City of Wheeling*, 205 W. Va. 34, 43, 516 S.E.2d 48, 57 (1999) (quoting *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 594, 466 S.E.2d 424, 445 (1995)).
[67] *See id.*
[68] *Appalachian Power Co.*, 195 W. Va. at 594, 466 S.E.2d at 445 (quoting *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)).

> modified,] *Atchinson v. Erwin*, [172] W.Va. [8], 302 S.E.2d 78 (1983)." Syllabus Point 4, as modified, *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W.Va. 538, 328 S.E.2d 144 (1984).[69]

A disproportionate impact on a classification, alone, does not violate West Virginia's equal protection provision.[70] There must be some proof of a discriminatory purpose.[71] Moreover,

> If a classification has some "reasonable basis," it does not offend the Constitution simply because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. If any state of facts reasonably may be conceived to justify it, a statutory discrimination will not be set aside.[72]

Defendant Supreme Court produced a chart showing the flow of pay to a circuit court judge in 2017. (All active judges would have been paid on the same schedule.) An "adjustment" of $807.00 was paid in March 2017 in anticipation of the conversion to a bi-weekly pay system, but that payment is a red herring. Circuit Court judges were not paid for a shortfall; it was not "catch up pay." Rather, the Court finds it was merely a matter of simple math. For calendar year 2018, the circuit court judges would receive bi-weekly pay checks of $4,846.20. In order to start issuing checks in that amount on June 9, 2017 (and pay the judges their salaries of $126,000), the Court made a payment of $807 to the judges' pay in March 2017. The Court finds and concludes this payment was no different than the pay adjustment made to the pay of unelected employees in May 2017.

[69] Syl. pt. 4, *MacDonald*, 227 W. Va. 707, 715 S.E.2d 405; Syl. pt. 6, *Hartley Hill Hunt Club v. County Com'n of Ritchie County*, 220 W. Va. 382 (2007); Syl. pt. 3, *Gibson v. West Virginia Dept. of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991).
[70] Syl. pt. 6, *Citizens Bank of Weston, Inc. v. City of Weston*, 209 W. Va. 145, 544 S.E.2d 72 (2001).
[71] *Id.*
[72] *Morgan*, 205 W. Va. at 45-46, 516 S.E.2d at 59-60 (internal citations omitted).

57. The Court finds and concludes that elected officials, such as Circuit Court judges, are paid in current status. W. Va. Code § 6-7-1 provides an exception for elected officials to the requirement that State employees be paid in arrears: "officials, officers and employees of the state, a state institution of higher education and the Higher Education Policy Commission, statutory officials, contract educators with higher education and any exempt official who does not earn annual and sick leave, ***except elected officials***, shall be paid one pay cycle in arrears."[73] Moreover, elected officials have been historically treated as current pay employees.[74]

58. Plaintiffs posit the question as to why the elected officials are paid in current status or by year end, whereas Plaintiffs are paid in arrears and will have pay dribble over into the next calendar or fiscal year. The Court concludes that the answer to that question is not found by looking exclusively at what makes the elected officials "special." Rather, the answer lies in the differences between elected officials and unelected employees. An elected official has a salary that is fixed by statute. The payment of his or her monthly salary is not dependent upon the nature or quantum of the services provided by him or her. Elected officials do not accrue vacation and do not accrue sick leave. There is no need for a time lag to review the elected official's hours of work or to account for leaves of absence and such. On the other hand, unelected employees have all of those variables in play and a delay in pay after services are performed is a practical way to do the State's business. The Court finds that having the benefit of a look back at the pay period allows for adjustments and the prevention of errors in accounting or, for that matter, in counting. All of such is a rational basis for a difference in treatment—albeit, a very slight difference.

[73] W. Va. Code §6-7-1; *see also* Op. W. Va. Att'y Gen. 2016 WL 3035136 (May 23, 2016) (noting that the only exception to §6-7-1 is for elected officials).
[74] Op. W. Va. Att'y Gen. 2016 WL 3035136 (May 23, 2016).

59. Finally, as to the slight difference, the Court notes that the Equal Protection Clause argument of Plaintiffs must be viewed in the proper context. The elected officials in the Court system were paid every dollar due; the unelected employees were paid every dollar due. Elected officials received their final pay for the year in December. For some, their term ends in December. Unelected employees, in contrast, as explained above, receive their final pay in January. Thus, the situation is not one where one class of employees is being paid and another class is not. Everyone is being paid. It is just a question of timing—a few days difference. The Court finds and concludes that this timing difference does not sustain an Equal Protection Clause claim, especially considering the deference which is provided on economic matters.

Mandamus Relief

60. It is well established that three elements must co-exist for the issuance of a writ of mandamus:

> (1) A clear legal right in the petitioner to the relief sought; (2) A legal duty on the part of Respondent to do the thing which the Petitioner seeks to compel; and (3) the absence of another adequate remedy.[75]

For the reasons set forth above, the Court finds and concludes that Plaintiffs have not identified any statutory or constitutional basis for their claims. Moreover, the Court reiterates that Plaintiffs have been paid all wages earned and due. Plaintiffs have not suffered any injury; consequently, they have no clear legal right to the relief requested. Accordingly, the Court denies their request for mandamus relief.

[75] Syl. pt. 1, *State ex rel. Maple Creative LLC v. Tincher*, 226 W.Va. 118, 697 S.E.2d 154 (2010); Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

Immunities Defenses

61. The Court notes that all of the Defendants have asserted, in one form or another, either absolute or qualified immunities as defenses to this action. The Court finds no reason to address these defenses; rather, the Court decides this case on the merits under Rule 56. Nothing herein, however, precludes any Defendant from asserting immunity in an appeal where a *de novo* standard is applied.

DECISION

For all reasons set forth above, the Court concludes and ORDERS that Defendants are entitled to judgment as a matter of law as to all claims made by all Plaintiffs.[76] Accordingly, this action is ORDERED dismissed and stricken from the docket of the Court. Plaintiff's objections are noted and preserved.

The Clerk is directed to send a certified copy of this order to all counsel of record.

ENTERED this 6th day of FEBRUARY, 2020.

Honorable Thomas Evans III
Senior Status Judge

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 11 DAY OF Feb 2020
Cathy S. Gatson
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

[76] The Court observes that Plaintiff Wilkinson was not employed by any of the Defendants during the pay conversion. Although her circumstances appear to be indistinguishable from the other Plaintiffs, she is not technically subject to the motions filed by Defendants. She was not their employee. Accordingly, the Court orders Plaintiff Wilkinson's complaint dismissed without prejudice.