

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION NO. 3

JAYSON NICEWARNER
(Lieutenant), *et al.*,

Plaintiffs,

v.

Civil Action No. 19-C-167
Honorable Phillip D. Gaujot

THE CITY OF MORGANTOWN,
a municipal corporation,

Defendant.

ORDER

On the 15th day of December 2021, the above-captioned matter came before the Court for a hearing on the Plaintiffs' "Motion to Alter or Amend the Court's Judgment Pursuant to W.Va. R.C.P. Rule 59(e)," filed on October 8, 2021. The Plaintiffs, Jayson Nicewarner, *et al.*, appeared by their counsel, Teresa C. Toriseva, Esq., and Joshua D. Miller, Esq.; the Defendant, The City of Morgantown, appeared by its counsel, Ryan P. Simonton, Esq., Erin J. Webb, Esq., and Matthew D. Elshiaty, Esq.

At the outset, the parties were advised that the Court entered its "Order Granting Summary Judgment, in part, to The City of Morgantown, Denying Plaintiffs' Motion for Summary Judgment, and Appointing Special Commissioner" on September 28, 2021, prior to receiving Plaintiffs' timely filed objections thereto. As such, the Court **VACATES** its Order entered on September 28, 2021, and will reconsider its rulings on Morgantown's Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment with respect to the parties' proposed orders and respective objections thereto.

Upon thorough consideration of the record in this matter, the filings of the parties, specifically including the parties' proposed orders, as well as their respective objections thereto, and the parties' presentation at oral argument, the Court finds Plaintiffs' arguments and enumerated objections to be unpersuasive and hereby **GRANTS** Morgantown summary judgment, in part, **DENIES** Plaintiffs' Motion for Summary Judgment, and **DENIES** Plaintiffs' Motion to Alter or Amend the Court's Judgment.¹

I. PROCEDURAL HISTORY

1. Plaintiffs initiated this civil action with the filing of their Complaint (the "Complaint") on June 7, 2019.

2. The Complaint asserted three counts or causes of action demanding relief: Count I, entitled "Negligent Failure to Pay Statutory Holiday Premium"; Count II, entitled "Claims Made Pursuant to *W. Va. Code* §§ 21-5-1 [the West Virginia Wage Payment and Collection Act]"; and Count III, entitled "Declaratory Judgment Action pursuant to *W. Va. Code* § 55-13-1 *et seq.* and Motion for Appointment of Special Commissioner to Calculate Individual Damages."

3. Morgantown filed its "Answer" on July 11, 2019, denying Plaintiffs' entitlement to relief; asserting, *inter alia*, the affirmative defense of laches; and requesting dismissal of the Complaint and additional relief.

4. This Court entered its "Scheduling Order" on August 29, 2019; its "Amended Scheduling Order" on September 28, 2020; and its "Second Amended Scheduling Order" on February 8, 2021.

¹ Although the Court vacated its Order entered September 28, 2021, the Court's conclusions of law, as provided *infra*, and the Court's conclusions of law, as set forth in the September 28, 2021 Order, are substantively indistinguishable.

5. Pursuant to the "Second Amended Scheduling Order," discovery was to be completed in this case by May 28, 2021. A Final Pretrial Conference was set for June 16, 2021, with all pretrial motions due by June 7, 2021.

6. On June 2, 2021, Morgantown filed its "Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment" and its "Memorandum of Law in Support of The City of Morgantown's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment" (Morgantown's "Motion for Summary Judgment"), together with a "Notice of Hearing" setting Morgantown's Motion for Summary Judgment for hearing on June 16, 2021.

7. On June 7, 2021, Plaintiffs filed "Plaintiffs' Motion for Summary Judgment Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure and Combined Memorandum in Support" (Plaintiffs' "Motion for Summary Judgment").

8. On June 14, 2021, Morgantown filed its "Response to 'Plaintiffs' Motion for Summary Judgment Pursuant to Rule 56 of The West Virginia Rules of Civil Procedure and Combined Memorandum in Support."

9. Also on June 14, 2021, Plaintiffs filed "Plaintiffs' Response to Defendant's Motion for Summary Judgment."

10. On June 16, 2021, Morgantown filed its "Supplemental Response to 'Plaintiff's Motion for Summary Judgment Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure and Combined Memorandum in Support.'"

11. On June 16, 2021, this Court heard partial arguments on Morgantown's Motion for Summary Judgment and on Plaintiffs' Motion for Summary Judgment. Further hearing on the motions was continued until July 29, 2021, by order of the Court. By separate order of the Court

entered July 29, 2021, hearing on the parties' Motions for Summary Judgment was rescheduled for September 16, 2021.

12. On September 13, 2021, Morgantown filed its "Supplement in Support of Summary Judgment."

13. On September 14, 2021, Plaintiffs filed "Plaintiffs' Motion to Amend Complaint Pursuant to West Virginia Rules of Civil Procedure Civ. R. 15(a)," whereby Plaintiffs sought leave to amend their Complaint to include a time period of additional past lost wages, and to name additional firefighters that were hired after the filing of the Complaint but before Morgantown altered its method of providing holiday pay.

14. On September 15, 2021, Plaintiffs filed "Plaintiffs' Response to The City of Morgantown's Supplement in Support of Summary Judgment."

15. At the duly noticed hearing on September 16, 2021, the Court ordered that Morgantown's Motion for Summary Judgment be granted, that Plaintiffs' Motion for Summary Judgment be denied, and that a special commissioner be appointed to review Plaintiffs' evidence in support of their claims that they are owed additional time off for holidays. Furthermore, the Court ordered Morgantown to submit a proposed order memorializing its rulings by September 24, 2021, and ordered Plaintiffs to submit objections thereto by October 7, 2021.

16. On September 28, 2021, the Court, prior to receiving Plaintiffs' objections, entered its "Order Granting Summary Judgment, in part, to The City of Morgantown, Denying Plaintiffs' Motion for Summary Judgment, and Appointing Special Commissioner."

17. On October 7, 2021, Plaintiffs filed "Plaintiffs' Objections to this Court's Order Granting Summary Judgment, in part, to The City of Morgantown, Denying Plaintiffs' Motion for Summary Judgment, and Appointing Special Commissioner."

18. On October 8, 2021, Plaintiffs filed “Plaintiffs’ Motion to Alter or Amend the Court’s Judgment Pursuant to W.Va. R.C.P. Rule 59(e).”

19. On November 19, 2021, Plaintiffs filed “Plaintiffs’ Motion to Hold Live In-Person Hearing Rather Than Virtual Hearing.”

20. On November 29, 2021, the Court entered an “Order Granting Plaintiffs’ Motion for Live Hearing.”

21. On December 10, 2021, Morgantown filed its “Response in Opposition to Plaintiffs’ Motion to Alter or Amend the Court’s Judgment Pursuant to W.Va. R.C.P. Rule 59(e).”

22. At the duly noticed hearing on December 15, 2021, the Court held its ruling in abeyance pending Plaintiffs’ submission of their proposed order on the parties’ competing motions for summary judgment and Morgantown’s submission of its objections thereto.

II. FINDINGS OF FACT

1. As initially filed, fifty-eight (58) individual Morgantown firefighters (“Plaintiffs”) brought the present suit alleging claims of “Negligent Failure to Properly Pay Statutory Holiday Premium,” “Claims Made Pursuant to W. Va. Code § 21-5-1 *et seq.* [the West Virginia Wage Payment and Collection Act] and Demand for Interest and Attorneys’ Fees,” and “Declaratory Judgment Action Pursuant to W. Va. Code § 55-13-1 *et seq.* and Motion for Appointment of Special Commissioner to Calculate Individual Damages.” *See* Complaint pp. 7-8.

2. Since filing their initial Complaint, Plaintiffs have stipulated to the dismissal of four of the individual Plaintiffs due to those individuals not being subject to the applicable Holiday Leave provisions. *See* “Stipulated Entry of Dismissal pursuant to West Virginia Rules of Civil Procedure Civ. Rule 41(a)(1)(ii).”

3. Morgantown operates a paid fire department pursuant to Chapter 8, Article 15 of the West Virginia Code.

4. Plaintiffs are members, or former members, of Morgantown's paid fire department and are, or were, entitled to time off or additional pay for legal holidays pursuant to W. Va. Code § 8-15-10a (sometimes hereinafter referred to as the "Holiday Statute").

5. Morgantown grants time off to fire department members for legal holidays pursuant to W. Va. Code § 8-15-10a.

6. Based on all evidence produced to date and representations from the parties, it is undisputed that Morgantown has never elected to grant premium pay, rather than time off, for legal holidays pursuant to W. Va. Code § 8-15-10a.

7. Morgantown historically granted time off for legal holidays by the following method: as of January 1st each year, Morgantown would calculate the number of legal holidays occurring that year according to W. Va. Code § 2-2-1 and accrue a bank of leave hours for each fire department member equal to 12 hours of leave for each holiday in the year. *See* Exhibit 1 to Morgantown's Motion for Summary Judgment, "Defendant's Responses to 'Plaintiffs' First Set of Combined Discovery to Defendant City of Morgantown," at Interrogatory No. 1 for a succinct overview of Morgantown's practice.

8. During the pendency of this lawsuit, Morgantown's City Council adopted a Resolution restating Morgantown's historical and continued use of time off for legal holidays rather than premium pay and authorizing and supporting the city manager in accruing additional leave time to firefighters during the pendency of this lawsuit such that, since January 1, 2020, Morgantown has accrued Plaintiffs 24 hours of leave for each legal holiday in each calendar year.²

² Morgantown voluntarily adopted this Resolution in January 2020 to avoid ongoing disputes with its employees during the pendency of this lawsuit—not in acquiescence to Plaintiffs' legal claims.

9. These specially designated holiday leave hours are in addition to the hundreds of hours received in vacation and sick leave. All leave—whether it be sick, vacation, or holiday leave—is provided in hours to be used at the employee’s discretion/need, in conjunction with the City’s rules for use of the particular leave.

10. Fire department members were permitted to use the accrued leave hours at their discretion, including before any holidays occurred in the year the hours were accrued.

11. The Plaintiffs in this present suit (and the other non-litigant firefighters of Morgantown) work an average of fifty-six (56) hours per week, or one hundred and twelve (112) hours per bi-weekly pay period. *See* W. Va. Code § 8-15-10.

12. Plaintiffs work regular 24-hour shifts that begin at 8:00 a.m. on one calendar day and end at 8:00 a.m. on the following calendar day.

13. The nature of the 8:00 a.m. start time on a 24-hour shift necessarily means that an employee will actually work only 16 hours on a “scheduled” day (8:00 a.m. to 11:59 p.m.).

14. Thus, barring any emergency situations, 16 hours is the most time any firefighter would work on any given day, including any holiday.

15. Further, it is undisputed that this type of scheduling means that employees’ “workdays” carry over into the following calendar day, meaning that employees work 8 hours on some days, including some holidays (midnight to 8:00 a.m.).

16. Morgantown contends that it compensated Plaintiffs for all hours worked and for all paid leave hours taken.

17. Plaintiffs assert that Morgantown did not grant them sufficient time off for legal holidays and contend that they are entitled to either 24 hours of paid time off or 36 hours of premium pay, regardless of whether they work the holiday or not.

18. The record shows that Plaintiffs knew or should have known of their claims for years and delayed filing a claim against Morgantown until June 2019. Plaintiffs admitted in discovery that they were aware their claims were raised with Morgantown in 1985, 1990, 1997, 2000, and 2002.

III. CONCLUSIONS OF LAW

1. Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c).

2. “Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. Pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

3. “Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is ‘designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,’” if there essentially “is no real dispute as to salient facts” or if it only involves a question of law. *Painter*, 192 W. Va. at 192 n. 5, 451 S.E.2d at 758 n. 5 (quoting *Oakes v. Monongahela Power Co.*, 158 W. Va. 18, 22, 207 S.E.2d 191, 194 (1974)). Indeed, it is one of the few safeguards in existence that prevent frivolous lawsuits from being tried which have survived a motion to dismiss. Its principal purpose is to isolate and dispose of meritless litigation.” *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995).

4. West Virginia Code § 8-15-10a is the law controlling this case, adopted in 1976 and amended in 2004. It provides as follows:

From the effective date of this section, if any member of a paid fire department is required to work during a legal holiday as is specified in subsection (a), section one, article two, chapter two of this code, or if a legal holiday falls on the member's regular scheduled day off, he or she shall be allowed equal time off at such time as may be approved by the chief executive officer of the department under whom he or she serves or, in the alternative, shall be paid at a rate not less than one and one-half times his or her regular rate of pay: Provided, That if a special election of a political subdivision other than a municipality falls on a Saturday or Sunday, the municipality may choose not to recognize the day of the election as a holiday if a majority of the municipality's city council votes not to recognize the day of the election as a holiday.

Id.

Cities and counties requested guidance from the Office of the Attorney General as to the application of *W. Va. Code* § 8-15-10a to paid firefighters working 24-hour shifts in 1977, the year after the law was adopted. 57 W. Va. Op. Atty. Gen. 171 (August 19, 1977), *available at* 1977 WL 36078.

5. In response to the requests of these cities and counties, the Attorney General issued a formal opinion in 1977 advising that paid firefighters working 24-hour shifts were entitled to time off for the hours worked on a legal holiday, or the hours that would have been worked if the holiday fell on a regular scheduled day off. *Id.* at *3 (Response to Question No. 1).

6. The Attorney General advised that firefighters working 24-hour shifts are not entitled to 24 hours of time off when they only work part of the shift during a legal holiday. *Id.*

7. Specifically, the Attorney General advised cities and counties that “when a regularly scheduled duty shift established according to the provisions of Code 8-15-10, or any part of such shift, falls on or within the 24-hour period of a legal holiday or on or within any day proclaimed or to be taken as a legal holiday by virtue of Code 2-2-1, each fireman working that shift or each off-duty fireman, on whose regularly scheduled day off the holiday has occurred, is entitled to be credited, as time off, with the number of off-duty hours equivalent to the number of

duty hours worked by him (or which would have been worked by him in the case of an off-duty fireman) which fall within the 24-hour holiday period or, in lieu thereof, to receive pay at the rate of not less than one and one-half times his regular rate of pay for each such duty hour embraced within the 24-hour holiday period.” *Id.*

8. The Attorney General provided the following example describing the time off owed to firefighters working a part of their 24-hour shift on a legal holiday: “As an example, if the legal holiday falls on a Sunday, the following Monday will be taken as the legal holiday (Code 2-2-1) and firemen working on a regularly scheduled duty shift commencing at 6:00 p.m. on Monday and ending at 6:00 p.m. on Tuesday will be entitled to 6 hours of credited time off, or, in lieu thereof, to not less than one and one-half their regular rate of pay for 6 hours, whereas those firemen whose shift had ended at 6:00 p.m. on that Monday (the day taken as the holiday) would be credited with 18 hours of time off, or, in lieu thereof, to not less than one and one-half times their regular rate of pay for 18 hours.” *Id.*

9. In the same opinion, the Attorney General concluded and advised that the governing body of the municipality is entitled to choose whether to grant time off or premium pay for holidays, stating “Undoubtedly, the Legislature, recognizing that substantial additional funds raised by tax levy would be required in order to meet the premium wage specified in the two statutes, purposely left to the municipal governing bodies themselves, rather than to the chief of the fire department and the chief of the police department, the decision as to whether the additional compensation on account of holidays would take the form of time off or extra wages, and, in the event the decision is in favor of extra wages, the amount thereof. We are of the opinion that the decision as to whether the additional compensation for holiday work afforded by Code 8-14-2a

and Code 8-15-10a shall be equivalent time off or additional pay belongs to the municipal governing body as defined in Code 8-1-2(b)(1).” *Id.* at 5-6.

10. In 1986, the Supreme Court of Appeals of West Virginia considered, *inter alia*, the two questions addressed in the foregoing portions of the Attorney General opinion when it decided *Pullano v. City of Bluefield*, 176 W. Va. 198, 342 S.E.2d 164 (1986).

11. In *Pullano v. City of Bluefield*, the Supreme Court considered multiple claims by police officers and firefighters employed by the City of Bluefield involving time periods when Bluefield used time off for legal holidays and periods when Bluefield used premium pay for legal holidays pursuant to *W. Va. Code* § 8-15-10a and the parallel provision applicable to police officers at *W. Va. Code* § 8-14-2a. *Id.*

12. The firefighters involved in the *Pullano v. City of Bluefield* decision were working 24-hour shifts that began at 8:00 a.m. on one calendar day and ended at 8:00 a.m. on the next calendar day at all times relevant to the opinion. See Morgantown’s “Response to ‘Plaintiffs’ Motion for Summary Judgment Pursuant to Rule 56 of The West Virginia Rules of Civil Procedure and Combined Memorandum in Support”” at Exhibit 1 (Bluefield firefighter payroll records); Morgantown’s “Supplemental Response in Opposition to ‘Plaintiffs’ Motion for Summary Judgment Pursuant to Rule 56 of The West Virginia Rules of Civil Procedure and Combined Memorandum in Support”” at Exhibit 1 (portion of the record before the Supreme Court in *Pullano v. City of Bluefield*).

13. In the Circuit Court decision underlying the *Pullano v. City of Bluefield* opinion, the Mercer County Circuit Court held the following:

(d) For holiday hours worked between April 30, 1978 and December 31, 1979 the City shall grant its firefighters equal time off or pay as will entirely compensate them for all time spent at work during holidays as identified above under *W. Va. Code* 8-15-10a.

See Morgantown's "Supplemental Response in Opposition to 'Plaintiffs' Motion for Summary Judgment Pursuant to Rule 56 of The West Virginia Rules of Civil Procedure and Combined Memorandum in Support'" at Exhibit 1, p. 6.

14. The *Pullano v. City of Bluefield* opinion includes three holdings relevant to the present case: (1) cities are entitled to choose whether to grant time off for holidays, or instead grant premium pay; (2) firefighters are entitled to time off for "time spent at work" during legal holidays, not for the entire length of their shifts; and (3) if cities using time off for legal holidays do not give sufficient time, they can correct the deficiency with additional time off. 176 W. Va. 198, 205, 342 S.E.2d 164, 171-2.

15. With respect to a city's option to grant time off rather than premium pay, and the proper remedy in the event that the city grants insufficient time off, the *Pullano v. City of Bluefield* Court held as follows:

Originally, the city gave its firefighters equal time off for legal holidays, as provided in W. Va. Code, 8-15-10a, rather than additional compensation. Although on appeal the firefighters contend the circuit court erred in its ruling on the question of whether the firefighters had been given adequate time off, we conclude the circuit court ruled correctly. Essentially, the circuit court ruled that if any firefighter could establish as a matter of fact that he had not been granted sufficient time off during the time period in question, then that firefighter would be entitled to additional time off. We believe the circuit court's resolution of this issue was appropriate since it did accord relief if specific facts could be shown to warrant it.

Id.

16. With respect to the amount of time off required for each legal holiday, when firefighters work a portion of a 24-hour shift during the legal holiday, the *Pullano v. City of Bluefield* Court held as follows:

Beginning January 1, 1980, the city changed its method of compensating firefighters for holidays. Instead of receiving additional time off, a firefighter who worked on a legal holiday received one and one-half times his regular rate of pay

for the number of hours worked. A firefighter who did not work on a legal holiday because it fell on his regular scheduled day off received one and one-half times his regular rate of pay for sixteen hours. This sixteen-hour figure represented the maximum number of hours a firefighter could work in a shift on a legal holiday under the firefighters' work schedule.

Id.

17. This Court concludes that, in its opinion in *Pullano v. City of Bluefield*, the Supreme Court of Appeals of West Virginia confirmed the opinion of the Attorney General regarding *W. Va. Code § 8-15-10a*.

18. In accordance with the opinion of the Attorney General and the binding precedent in *Pullano v. City of Bluefield*, this Court concludes that Morgantown is entitled to grant time off for legal holidays rather than premium pay under *W. Va. Code § 8-15-10a*.

19. In accordance with the opinion of the Attorney General and the binding precedent in *Pullano v. City of Bluefield*, this Court concludes that Plaintiffs are entitled to time off for each legal holiday equal to the time spent at work during the holiday or the time they would have worked during the holiday—not for the full length of their 24-hour shift.

20. In accordance with the opinion of the Attorney General and the binding precedent in *Pullano v. City of Bluefield*, this Court concludes that, if any Plaintiff establishes that he was not granted sufficient time off for legal holidays during the time period established in this Order, Morgantown shall grant him additional time off equivalent to the additional hours of time off he should have received.

21. Plaintiffs' Complaint in this matter states three counts allegedly entitling Plaintiffs' to relief: "Count One: Negligent Failure to Properly Pay Statutory Holiday Premium"; "Count Two: Claims Made Pursuant to W. Va. Code §21-5-1 *et. seq.* [the West Virginia Wage Payment and Collection Act] and Demand for Interest and Attorneys' Fees"; and "Count Three: Declaratory Judgment Action Pursuant to W. Va. Code § 55-13-1 *et seq.* and Motion for Appointment of

Special Commissioner to Calculate Individual Damages.” See Plaintiffs’ “Complaint for Declaratory Relief and Compensatory Damages General Recitals to All Counts” filed June 7, 2019.

Plaintiffs’ Count One: Negligent Failure to Properly Pay Statutory Holiday Premium”

22. In Count One of their Complaint, Plaintiffs allege that “The City of Morgantown and its employees in charge of payroll negligently failed to pay plaintiffs the proper amount of holiday pay due them pursuant to W. Va. Code § 8-15-10a” Complaint, ¶16.

23. West Virginia Code § 8-15-10a provides that “... if any member of a paid fire department is required to work during a legal holiday ... he or she shall be allowed equal time off ... or, in the alternative, shall be paid at a rate not less than one and one-half times his or her regular rate of pay[.]” *Id.*

24. The Holiday Statute is unambiguous that it is optional whether to grant time off for legal holidays or premium pay for holidays. The Court considers the Attorney General’s opinion issued soon after *W. Va. Code* § 8-15-10a went into effect, which opines that it is the decision of a city’s governing body whether to grant time off or additional pay for legal holidays to be reasonable, and relies upon the decision in *Pullano v. City of Bluefield*, which upholds a Circuit Court order approving the time off method, in making this conclusion.

25. Morgantown grants time off for legal holidays pursuant to *W. Va. Code* § 8-15-10a rather than premium pay. It is undisputed that Morgantown has not paid premium pay for legal holidays at any time relevant to this lawsuit.

26. Because Morgantown is entitled to award Plaintiffs time off rather than premium pay under *W. Va. Code* § 8-15-10a, and because Morgantown has undisputedly awarded time off

rather than premium pay for legal holidays under *W. Va. Code* § 8-15-10a, Morgantown had no obligation to pay premium pay to Plaintiffs pursuant to *W. Va. Code* § 8-15-10a.

27. Accordingly, Morgantown did not “negligently fail[] to pay plaintiffs the proper amount of holiday pay due them pursuant to *W. Va. Code* § 8-15-10a,” and Morgantown is granted judgment in its favor dismissing Count One of the Plaintiffs’ Complaint.

Plaintiffs’ Count Two: Claims Made Pursuant to W. Va. Code § 21-5-1 *et. seq.* [THE West Virginia Wage Payment and Collection Act] and Demand for Interest and Attorneys’ Fees

28. In Count Two of the Complaint, Plaintiffs allege that Morgantown violated the West Virginia Wage Payment and Collection Act, specifically alleging that “[b]y failing to properly and promptly pay the aforesaid holiday pay to the plaintiffs, the City of Morgantown has violated *W. Va. Code* § 21-5-3, by not paying plaintiffs ‘wages due’ them.” Complaint ¶¶ 17-21.

29. In support of Count Two, Plaintiffs rely on the same claim made in Count One that Morgantown is obligated to pay premium pay for legal holidays under *W. Va. Code* § 8-15-10a. For the reasons previously stated, Morgantown is entitled to grant time off for legal holidays rather than premium pay under *W. Va. Code* § 8-15-10a. Morgantown has never been obligated by *W. Va. Code* § 8-15-10a to grant premium pay for legal holidays.

30. Plaintiffs contend that the obligation to grant time off or premium pay under *W. Va. Code* § 8-15-10a is “wages” pursuant to *W. Va. Code* § 21-5-1(c). Plaintiffs’ Motion for Summary Judgment, p. 7.

31. West Virginia Code section 21-5-1(c) defines “wages” as follows: “(c) 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 § 21-5-4, § 21-5-5, § 21-5-8a, § 21-5-10, and § 21-5-12 of this code, 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 or her employees which does not contradict the provisions of this article.” *Id.*

32. Plaintiffs support their claim by arguing, “Specifically, when a firefighter works a holiday, that firefighter is to be paid time-and-a-half in exchange for the time he gives on-shift.” Plaintiffs’ Motion for Summary Judgment, p. 7.

33. Alternately, Plaintiffs concede that the time off or premium pay granted pursuant to *W. Va. Code* § 8-15-10a may not be a wage because it is not given in exchange for “labor or services rendered to the employer,” but allege that instead “... the Holiday Pay compensation is absolutely a fringe benefit under the law. Because it is either pay in the form of time-and-a-half pay, or a fringe benefit as paid time off, the West Virginia Wage Payment and Collection Act absolutely applies.” *Id.*

34. The statute governing this action, *W. Va. Code* § 8-15-10a, contains no reference to the West Virginia Wage Payment and Collection Act (“WPCA”), nor does it require the payment of wages.

35. In *Pullano v. City of Bluefield*, the Supreme Court of Appeals of West Virginia held that a city that grants insufficient time off pursuant to *W. Va. Code* § 8-15-10a can correct the deficiency by granting additional time off rather than paying monetary damages. 176 W. Va. 198, 205, 342 S.E.2d 164, 171-2.

36. The “WPCA itself ‘does not create a right to compensation. Rather, it provides a statutory remedy when the employer breaches a contractual obligation to pay earned wages. The contract between the parties governs in determining whether specific wages are earned.’” *Adkins*

v. Am. Mine Rsch., Inc., 234 W. Va. 328, 332, 765 S.E.2d 217, 221 (2014) (quoting *Weldon v. Kraft, Inc.*, 896 F.2d 793, 801 (3d Cir.1990)).

37. Similarly, it has also long been established that “[p]ursuant to *W. Va. Code* § 21-5-1(c) (1987), whether fringe benefits have then accrued, are capable of calculation and payable directly to an employee so as to be included in the term ‘wages’ are determined by the terms of employment and not by the provisions of *W. Va. Code* § 21-5-1(c).” Syl. Pt. 5, in part, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999).

38. It is undisputed in this lawsuit that holiday leave afforded under the Holiday Statute is not “capable of calculation and payable” at any time other than when it is used by an employee—at his or her discretion and per Morgantown’s rules for use of said leave—and that is when it historically, consistently, and properly has been paid by Morgantown.

39. In *Conrad v. Charles Town Races, Inc.*, 206 W. Va. 45, 521 S.E.2d 537 (1998), the West Virginia Supreme Court of Appeals addressed whether back pay damages paid pursuant to the Worker Adjustment and Retraining Notification (“WARN”) Act constituted “wages” as defined by the WPCA, finding as follows:

WARN Act payments are not compensation for services rendered but are damages designed to compensate employees for an employer’s failure to provide the required sixty days’ notice prior to closure. **The WPCA, on the other hand, only applies to “wages,” that is, “compensation for labor or services rendered.”** Therefore, **we find that back pay damages paid pursuant to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1988), do not constitute wages as defined by the West Virginia Wage Payment and Collection Act, W. Va. Code § 21-5-4(b), (c) and (d) (1975) do not apply to payments made pursuant to the Worker Adjustment and Retraining Notification Act.**

Conrad, 206 W. Va. at 50, 521 S.E.2d at 542 (emphasis added).

40. The Court analyzed the nature of the WARN Act payments in order to reach its finding, and in that vein relied heavily on the reasoning of the Commonwealth Court of

Pennsylvania, in *Georgia-Pacific v. Unemployment Comp. Bd.*, 157 Pa. Cmwlth. 651, 630 A.2d 948 (1993), which had decided whether WARN Act payments were considered remuneration within the meaning of that state's unemployment compensation law. The *Conrad* Court found the following reasoning of the Commonwealth Court of Pennsylvania persuasive:

The WARN payment is not intended as a means of replacing lost wages; rather, it is "to provide an incentive and a mechanism for employers to satisfy their obligations to their employees in the event they fail to provide 60 days advance notice of [plant closure] to their employees." . . . WARN payments then are damages owed employees for suffering an expected employment loss where they had a rightful expectation of continued employment with that employer.

Id. at 49, 541 (quoting *Georgia-Pacific*, 157 Pa. Cmwlth. at 667, 630 A.2d 956-957 (footnote omitted)) (internal citation omitted).

41. In *Wolfe v. Adkins*, 229 W. Va. 31, 725 S.E.2d 200 (2011), the Court held that former employees were not entitled to payment of their accumulated sick leave upon termination:

Where there is no provision in a written employment agreement, personnel handbook, personnel policy materials or employer documents granting employees payment for unused, accumulated sick leave upon termination from employment, the unused, accumulated sick leave, upon termination from employment, is not a vested, nonforfeitable fringe benefit under the West Virginia Wage Payment and Collection Act and is not payable to the employees.

Syl. Pt. 1, *Wolfe*, 229 W. Va. at 32, 725 S.E.2d at 201 (emphasis added).

42. Similarly, in *Gress v. Petersburg Foods, LLC*, 215 W. Va. 32, 592 S.E.2d 811 (2003), the Court held that the evidence was sufficient that the former employer had consistently applied an unwritten vacation policy of not paying employees for partial weeks of unused vacation at the time of discharge, as required to preclude a former employee's vacation pay claim under the WPCA. *Gress*, 215 W. Va. 32, 592 S.E.2d 811. The *Gress* Court reasoned that there was no dispute that the former employee was aware that the former employer had a practice of only allowing workers to take vacations in five-day increments after each full year of employment, and

that the employee offered no evidence to contradict the assertion that the employer had a consistent policy of not paying employees for partial weeks of unused vacation at the time of discharge. *Id.* at 37, 816.

43. The *Gress* Court then relied on the holding in *Ingram v. City of Princeton*, 208 W. Va. 352, 540 S.E.2d 569 (2000), that “a consistently applied *unwritten* employment policy regarding the payment of fringe benefits could support an employer’s defense against a WPCA suit when the unwritten policy was known by employees.” *Id.* at 36-37, 815-816 (citing *Ingram*, 208 W. Va. 352, 540 S.E.2d 569).

44. Plaintiffs’ sole basis for their claim to holiday pay or benefits is *W. Va. Code* § 8-15-10a. Plaintiffs do not allege any agreement, contract, document, and/or other arrangement, express or implied, that entitles them to their claim for holiday pay. See Morgantown’s Motion for Summary Judgment, p. 26, and Exhibit 4 (Plaintiffs’ discovery responses).

45. The viability of Count Two, as pled, relies entirely upon the notion that Plaintiffs are entitled to holiday pay. However, *W. Va. Code* § 8-15-10a does not require holiday pay, and instead permits municipalities to choose between affording additional leave or pay for holidays.

46. The real issue in dispute is not “wages”—either as that term is commonly understood or as it is specifically defined under the WPCA. Instead, the only statute that applies here is *W. Va. Code* § 8-15-10a, which presents a unique set of requirements for municipalities like Morgantown.

47. Neither *W. Va. Code* § 8-15-10a nor Morgantown’s longstanding practice of granting time off for holidays rather than premium pay entitle Plaintiffs to payment for wages under the WPCA.

48. Ultimately, the claims in Count Two are governed by the portion of the holding in *Pullano v. City of Bluefield* as to the remedy for any firefighter who did not receive sufficient time off for legal holidays: “Originally, the city gave its firefighters equal time off for legal holidays, as provided in W. Va. Code, 8–15–10a, rather than additional compensation. Although on appeal the firefighters contend the circuit court erred in its ruling on the question of whether the firefighters had been given adequate time off, we conclude the circuit court ruled correctly. Essentially, the circuit court ruled that if any firefighter could establish as a matter of fact that he had not been granted sufficient time off during the time period in question, then that firefighter would be entitled to additional time off. We believe the circuit court’s resolution of this issue was appropriate since it did accord relief if specific facts could be shown to warrant it.” 176 W. Va. 198, 205, 342 S.E.2d 164, 171-2.

49. For the foregoing reasons and all of the reasons stated in Morgantown’s memoranda, Plaintiff’s claims are not subject to the WPCA, Morgantown did not fail to pay wages due, including fringe benefits, under the WPCA, and Morgantown is granted judgment in its favor dismissing Count Two of the Plaintiffs’ Complaint.

Plaintiffs’ Count Three: Declaratory Judgment Action Pursuant to W. Va. Code §§ 55-13-1 et seq. and Motion for Appointment of Special Commissioner to Calculate Individual Damages

50. In Count Three of their Complaint, Plaintiffs allege that they are employees of Morgantown and that the parties have a dispute as to the meaning of *W. Va. Code* § 8-15-10a that is subject to resolution by the Court pursuant to *W. Va. Code* § 55-13-1 et seq. Complaint, ¶¶ 22-24.

51. The parties agree that each is subject to *W. Va. Code* § 8-15-10a, and the disputed question of law is whether, as Plaintiffs contend, Plaintiffs are entitled to 24 hours of time off for each legal holiday, or whether, as Morgantown contends, Plaintiffs are entitled to time off for each

legal holiday equal to the hours worked during the holiday or, when a holiday falls on a Plaintiff's regular scheduled day off, for the hours that he or she would have worked.

52. The Court concludes that West Virginia law is clearly established on the following point: Firefighters working 24-hour shifts beginning and ending at 8:00 a.m. are entitled to holiday time off under *W. Va. Code* § 8-15-10a only for the hours worked on a legal holiday. If the legal holiday falls on a firefighter's regular scheduled day off, the firefighter is entitled to time off for the hours he or she would have worked that day. *Pullano v. City of Bluefield*, 176 W. Va. 198, 205, 342 S.E.2d 164, 171-2; *see also* 57 W. Va. Op. Atty. Gen. 171 (W. Va. A.G.), 1977 WL 36078.

53. Plaintiffs rely on two Circuit Court orders in support of their claim that they are entitled to 24 hours of time off for each holiday, regardless of the time worked. Plaintiffs' Motion for Summary Judgment, Exhibits 10 and 11. These orders are a 2015 Ohio County Circuit Court order involving the claim of police officers working 8-hour shifts that a collective bargaining agreement did not supersede *W. Va. Code* § 8-15-10a and the 2021 order of the Berkeley County Circuit Court determining that Martinsburg firefighters working 24-hour shifts from 8:00 a.m. one calendar day to 8:00 a.m. the next calendar day are entitled to premium pay for 24 hours for each legal holiday. *Id.*

54. The Berkeley County Circuit Court ordered, "In *Pullano* there was no factual development of Bluefield firefighters working a twenty-four hour shift. Nowhere in *Pullano* was a twenty-four hour shift discussed or mentioned." Plaintiffs' Motion for Summary Judgment, Exhibit 10, p. 2.

55. The record that was before the Supreme Court in *Pullano v. City of Bluefield* showed that Bluefield firefighters were working 24-hour shifts beginning and ending at 8:00 a.m.

56. The Court recognizes that neither the orders of other Circuit Courts nor the formal opinion of the Attorney General are binding precedent dictating this Court's order. However, the Court finds the reasoning of the Attorney General in its 1977 opinion persuasive as to the intended effect of *W. Va. Code* § 8-15-10a when it was adopted.

57. As the Attorney General opined, *W. Va. Code* § 8-15-10a requires time off when a firefighter is "required to work during" a legal holiday, or when the holiday falls on the firefighter's regular scheduled day off. *W. Va. Code* § 8-15-10a; 57 W. Va. Op. Atty. Gen. 171 (August 19, 1977), available at 1977 WL 36078.

58. The Attorney General clearly explained how that requirement applies to firefighters working 24-hour shifts, when only part of the shift requires work during the legal holiday: "As an example, if the legal holiday falls on a Sunday, the following Monday will be taken as the legal holiday (Code 2-2-1) and firemen working on a regularly scheduled duty shift commencing at 6:00 p.m. on Monday and ending at 6:00 p.m. on Tuesday will be entitled to 6 hours of credited time off, or, in lieu thereof, to not less than one and one-half their regular rate of pay for 6 hours, whereas those firemen whose shift had ended at 6:00 p.m. on that Monday (the day taken as the holiday) would be credited with 18 hours of time off, or, in lieu thereof, to not less than one and one-half times their regular rate of pay for 18 hours." *Id.*

59. The Court believes that the opinion of the Attorney General was confirmed by the Supreme Court in its decision of *Pullano v. City of Bluefield*.

60. In *Pullano*, the portion of the Mercer County Circuit Court ruling upheld by the Supreme Court included the following:

(d) For holiday hours worked between April 30, 1978 and December 31, 1979 the City shall grant its firefighters equal time off or pay as will entirely compensate them for all time spent at work during holidays as identified above under *W. Va. Code* 8-15-10a.

Morgantown's Supplement to Motion for Summary Judgment, Ex. 1, p. 6.

61. Therefore, when the *Pullano* Court held that 16 hours' time off is sufficient under *W. Va. Code* § 8-15-10a because it was "the maximum number of hours a firefighter could work in a shift on a legal holiday[.]" it was ruling on the same shift schedules Morgantown's firefighters are working. 176 W. Va. 198, 205, 342 S.E.2d 164, 172.

62. Plaintiffs contend that the instant matter is distinguishable from the decision in *Pullano v. City of Bluefield* because Plaintiffs' 24-hour shift is "considered one calendar day for all purposes[.]" "Plaintiffs' Response to Defendant's Supplement to Motion for Summary Judgment," p. 2. Plaintiffs rely on Footnote 12 of the opinion in *Pullano* as support for their claim. *Id.* at p. 3.

63. Footnote 12 of *Pullano v. City of Bluefield* states, "We emphasize that the method adopted by the city is acceptable under W. Va. Code, 8-15-10a, but is not necessarily the method required of all municipalities under this statute. In particular, the sixteen-hour figure utilized by the city was based on its work schedule. Other municipalities obviously have different work schedules." 176 W. Va. 198, 206, 342 S.E.2d 164, 172.

64. The work schedule at issue in *Pullano v. City of Bluefield* was a 24-hour shift beginning at 8:00 a.m. on one calendar day and concluding at 8:00 a.m. on the next calendar day, as shown by the record before the Supreme Court and the above-referenced payroll records of the Bluefield firefighters. The hours worked by the firefighters in *Pullano v. City of Bluefield* is undisputed.

65. The Court concludes that a city's or plaintiff's treatment of a 24-hour shift as a calendar day is immaterial to the decision in this case. Morgantown's obligation pursuant to W. Va. Code § 8-15-10a is to grant time off to firefighters for the hours they are required to work

during a legal holiday, or, for holidays that fall on their regular scheduled day off, the hours they would have worked.

66. Both the Attorney General and the Supreme Court have considered the application of *W. Va. Code* § 8-15-10a to firefighters working 24-hour shifts that span two calendar days, and both concluded that the city is required to grant time off only for the hours worked during the legal holiday, not for the entire length of the shift. *Pullano v. City of Bluefield*, 176 W. Va. 198, 205-6, 342 S.E.2d 164, 171-2; 57 W. Va. Op. Atty. Gen. 171 (August 19, 1977), available at 1977 WL 36078.

67. The decision of the Supreme Court in *Pullano v. City of Bluefield* is binding precedent holding that W. Va. Code § 8-15-10a requires cities with paid fire departments to compensate their firefighters with time off for legal holidays equal to the time actually worked during the legal holidays. For days that a firefighter does not work and is on his or her regular scheduled day off, *Pullano v. City of Bluefield* holds that a city can comply with *W. Va. Code* § 8-15-10a by providing time off equal to the maximum number of hours a firefighter would work on his or her regular shift. *Pullano v. City of Bluefield*, 176 W. Va. 198, 205-6, 342 S.E.2d 164, 171-2.

68. This Court concludes and declares that, pursuant to *W. Va. Code* § 8-15-10a, Morgantown is obligated to provide each Plaintiff with time off for legal holidays equal to the time actually worked during that legal holiday, regardless of the length of Plaintiff's shift. During Plaintiffs' regular shifts, the time off granted will equate to eight (8) hours for a firefighter working from 12:00 a.m. to 8:00 a.m. during a legal holiday and sixteen (16) hours for a firefighter working from 8:00 a.m. to 11:59 p.m. during a legal holiday. For days that a Plaintiff does not work and is on his or her regular scheduled day off, Morgantown can comply with *W. Va. Code* § 8-15-10a by

providing time off equal to the maximum number of hours a firefighter would work on his or her regular shift, which is sixteen (16) hours.

Claim Period; Statute of Limitations; and Laches

69. Plaintiffs assert that the statute of limitations applicable to the claims for damages brought in this lawsuit is five years pursuant to W. Va. Code § 55-2-6 because they allege Plaintiffs' claims fall within the provisions of the West Virginia Wage Payment and Collection Act (WPCA), W. Va. Code § 21-5-1 *et seq.*

70. As noted in this Order, Plaintiffs' claims are properly characterized as claims for additional time off pursuant to *W. Va. Code* § 8-15-10a, and the WPCA does not apply to the claims in this case.

71. Accordingly, the Court concludes that the general two-year statute of limitations provided in W. Va. Code § 55-2-12 applies with respect to Plaintiffs' claims.

72. Therefore, the Court orders, consistent with W. Va. Code § 55-2-12 and *Pullano v. City of Bluefield*, that any Plaintiff who can establish that he did not receive sufficient time off from Morgantown under the declaratory judgment issued in this Order for the period beginning two years prior to the date of the filing of the Complaint and ending with the date of entry of this Order shall be entitled to receive additional time off from Morgantown in the amount due.

73. The Court further finds and concludes that Plaintiffs, with knowledge of their claims in this matter, delayed and exercised a lack of diligence in pursuing their claims, which involve a public entity and the expenditure of public funds.

74. Morgantown asserted the defense of laches as its first affirmative defense in this matter. Morgantown's "Answer."

75. “Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right.” Syl. Pt. 2, *Bank of Marlinton v. McLaughlin*, 123 W. Va. 608, 17 S.E.2d 213 (1941); *see also Harrison et al. v. Miller, Exec.*, 124 W.Va. 550, 21 S.E.2d 674 (1942).

76. Further, “Laches is an equitable remedy which places the burden on the person asserting it to prove both lack of diligence by the party causing the delay and prejudice to the party asserting it.” *See National Home Equity Mortg. Assn v. Face*, 64 F.Supp.2d 584 (E.D.Va.1999), *aff’d*, 239 F.3d 633 (4th Cir.2001), *cert. denied*, 534 U.S. 823, 122 S.Ct. 58, 151 L.Ed.2d 26 (2001).

77. Laches generally bars actions like the present lawsuit where plaintiffs have delayed challenging a matter involving the public interest and potentially expenditure of public funds. “A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of expenditure of public funds. Failure to do so constitutes laches.” *Maynard v. Board of Educ. of Wayne County*, 178 W. Va. 53, 61, 357 S.E.2d 246, 255 (1987) (*citing Somers Construction Co. v. Board of Education*, 198 F.Supp. 732, 737 (D.N.J.1961)).

78. “Generally, courts have been reluctant to award retroactive monetary relief to public employees who have filed actions after a lengthy delay, where to afford such relief would cause substantial prejudice to the public’s fiscal affairs.” *Id.*

79. The public policy supporting applications of the laches doctrine to these issues is based upon the problems created for taxpayers when plaintiffs are permitted to delay their claims against the government:

Municipal financing is predicated on a pay-as-you-go principle. [citations omitted] The governing body must prepare a budget ‘on a cash basis.’ [statutory citation omitted] This entails a listing of proposed expenditures. By understating its expenses, the Board of Education was innocently reducing the amount of funds to be raised by taxation. This situation was aggravated because the underestimating occurred for ten years. To rectify the error would necessitate including in the

current budget the full aggregate amount claimed. This could have the dual effect of causing some other service to be diminished ... and of imposing the complete tax burden on the existing taxpayer [s] for costs that should have been distributed over a ten-year period.

Id. at 62, 255-6 (quoting *Lavin v. Board of Education*, 90 N.J. 145, 447 A.2d 516 (1982)).

80. Plaintiffs' individual discovery responses each indicated longstanding knowledge of their claims, stating, "[A]t least as early as December 16, 1985, the Union sent correspondence to the city asking to be paid correctly for holiday pay, The City refused. The Union asked again on January 5, 1990. A Budget Request was made regarding correcting holiday pay for the 1997-1998 City Budget. Written requests were again made on January 19, 2000 and January 28, 2002." See Morgantown's Motion for Summary Judgment, p. 30. Plaintiffs have offered no reason for the lack of diligence and delay in pursuing this civil action.

81. As in *Maynard v. Wayne County*, where a delay of five years from the last fiscal year at issue was barred by laches due to plaintiffs' delay and the budget impacts, Plaintiffs' claims to retroactive monetary relief are barred here. 178 W. Va. 53, 62, 357 S.E.2d 246, 256. ("It would also be inequitable to charge the current group of public administrators with the administrative responsibility for rectifying the large, lump-sum financial burden created many years ago.").

82. Accordingly, the Court orders that Plaintiffs' claims for retroactive monetary relief, including any claims for money damages by a Plaintiff who has separated from employment with Morgantown and cannot recover time off, are barred by the equitable doctrine of laches.

Appointment of Special Commissioner

83. The Court orders that if Plaintiffs elect to have a special commissioner consider the evidence as to each Plaintiff's entitlement to additional time off pursuant to W. Va. Code § 8-15-10a consistent with this Order, the parties shall jointly select a special commissioner to hear such evidence and notify the Court of such selection within 30 days of the entry of this Order.

WHEREFORE, for the foregoing reasons, the Court hereby ORDERS

that Plaintiffs' Motion to Alter or Amend the Court's Judgment Pursuant to W.Va. R.C.P. Rule 59(e) is denied; that Plaintiffs' Motion for Summary Judgment is denied; and that Morgantown is granted summary judgment in its favor on Counts One and Two of Plaintiffs' Complaint, dismissing the same, with prejudice, from the docket of this Court. With respect to Count Three of Plaintiffs' Complaint, the Court enters judgment declaring the following:

- (1) The City of Morgantown has the statutory right to grant employees leave time in compliance with *W. Va. Code* § 8-15-10a rather than additional pay;
- (2) Firefighters are entitled to equal time off for only that time they actually work on a given holiday or the time they would have actually worked on a holiday;
- (3) Plaintiffs' claims are not subject to *W. Va. Code* § 21-5-1, *et. seq.*; and
- (4) Any additional time off awarded to Plaintiffs is limited to a two-year statute of limitations as stated in this Order.

This Order is a final judgment as to the claims of the parties in this matter. The objections of the Plaintiffs to this Order are noted and preserved for the record. The Circuit Clerk is directed to provide a certified copy of this Order to all counsel of record.

Enter this 9th day of February 2022

By:

Hon. Phillip D. Gaujot, Chief Judge

STATE OF WEST VIRGINIA SS:

I, Clerk of the Circuit Court
of Monongalia County,
do hereby certify that the
above copy of the original
and entered by said Court.

Jean Friend
Clerk

ENTERED:

Feb 9, 2022

DOCKET LINE

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Jean Friend, Clerk