

FILE COPY



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0185

JAYSON NICEWARNER, et al.,

Plaintiffs Below/Petitioners,

**DO NOT REMOVE
FROM FILE**

v.

**THE CITY OF MORGANTOWN,
A municipal corporation,**

Defendant Below/Respondent,

PETITIONERS' REPLY BRIEF

Counsel for Petitioners

Teresa C. Toriseva, Esq. #6947
Joshua D. Miller, Esq. #12439
Michael A. Kuhn, Esq. #13898
TORISEVA LAW
1446 National Road
Wheeling, WV 26003
304-238-0066
304-238-0149
justice@torisevalaw.com

Table of Contents

ARGUMENT	1
I. THE DECISION BY THIS SUPREME COURT WILL AFFECT ALL PROFESSIONAL FIREFIGHTERS IN WEST VIRGINIA	1
II. WEST VIRGINIA CODE § 8-15-10a IS LEGISLATION TO ENHANCE FIREFIGHTER PAY.....	3
a. “Compensation” is in the title.....	3
b. The benefit required by W. Va. Code § 8-15-10a provides compensation whether the firefighter works or not.....	4
III. THE BENEFIT PROVIDED UNDER W. VA. CODE § 8-15-10a, THE HOLIDAY PAY STATUTE, IS A WAGE UNDER THE WAGE PAYMENT AND COLLECTION ACT.	5
a. The Wage Payment Collection Act applies because the City of Morgantown is an employer and the Morgantown professional firefighters are employees.	5
b. The definition of “wage” under the Wage Payment and Collection Act.....	5
c. “Fringe benefits” are also “wages” under the Wage Payment and Collection Act.	6
d. The case law and hypotheticals cited by the employer-city on this issue do not give guidance regarding how Holiday Pay for firefighters should be treated.	8
e. The employer-city has failed to pay its employee-firefighters half the fringe benefit required by the Holiday Pay Statute.....	10
f. While the employee-firefighters have agreed the employer-city can choose to provide paid time rather than premium pay to comply with the Holiday Pay Statute, <i>Pullano</i> disagrees in at least one situation.	14
IV. BECAUSE THE WAGE PAYMENT COLLECTION ACT COVERS THIS FRINGE BENEFIT, ITS ALSO PROVIDES THE REMEDY	14
a. The employee-firefighters are due the unpaid fringe benefits plus interest.	14
b. Any separated employee-firefighter that was owed unpaid fringe benefits at the time of separation is owed double the original amount owed.	15
c. The right to these wages cannot be waived.....	16
d. Finally, the WPCA indicates the employee should not pay the cost and expenses to recover his/her withheld wages.	17
V. LACHES DOES NOT APPLY HERE.	17
VI. CONCLUSION.....	19

Cases

<i>Condry v. Pope</i> , 152 W.Va. 714, 166 S.E.2d 167 (1969).....	17
<i>Grim v. E. Elec., Inc.</i> , 234 W. Va. 557, S.E.2d 267 (2014).....	8
<i>Jones v. Tri-County Growers, Inc.</i> , 366, S.E.2d 726 W.Va. 218 (1988).....	7
<i>Lucas v. Moore</i> , 172 W.Va. 101, 303 S.E.2d 739 (1983).....	17
<i>Maynard v. Bd. of Educ. of Wayne Cty.</i> , 178 W. Va. 53, 357 S.E.2d 246 (1987).....	17
<i>Mullins v. Venable</i> , 297 S.E.2d 866, 171 W.Va. 92 (1982).....	14
<i>Pullano v. City of Bluefield</i> , 176 W. Va. 198, 342 S.E.2d 164 (1986).....	3, 13
<i>Sansom v. Sansom</i> , 148 W. Va. 603, 137 S.E.2d 1 (1964).....	17
<i>Waldron v. Harvey</i> , 54 W.Va. 608, 46 S.E. 603 (1904).....	17
<i>Western v. Buffalo Mining Co.</i> , 162 W.Va. 543, 251 S.E.2d 501 (1979).....	16

Statutes

W. Va. Code § 21-5-1 (c).....	5
W. Va. Code § 21-5-3(a).....	4
W. Va. Code § 21-5-1(l)	6
W.Va. Code § 21-5-1	6
W.Va.Code, 21-5C-3(a).....	13
W.Va. Code § 21-5-6.....	14
W. Va. Code § 21-5-10	15
W. Va. Code § 21-5-12	15
W. Va. Code § 21-5-4.....	15
W. Va. Code § 8-15-10a	1,3,4,6,8,9,12,13,15
W.Va. Code §55-2-6.....	16,17

W.Va. Code 21-5-3	17
-------------------------	----

Rules

West Virginia Rules of Civil Procedure 81 (1960).....	17
---	----

ARGUMENT

I. THE DECISION BY THIS SUPREME COURT WILL AFFECT ALL PROFESSIONAL FIREFIGHTERS IN WEST VIRGINIA.

The Respondent argues oral argument is unnecessary in this matter. Resp.'s Br. at 4. The Respondent posits "well-established law governs the legal issues cited in this appeal". Id. But the law in this matter is not well-established. If it were, each and every municipality around West Virginia would not have been attempting to comply with the Holiday Pay Statute, W. Va. Code § 8-15-10a, in a different way. Moreover, if the law was "well-established", when statewide municipalities corrected the method of Holiday Pay, whether litigation was necessary or not, the corrections across the State would have been uniform. The corrections were not. Consider the following:

When litigation necessary:

- Martinsburg: The successful resolution¹ included a lump sum back pay award of \$1.75 million and a forward fix providing firefighters 24-hours of paid time off whether the firefighter works or not. If staffing issues create a need to pay the firefighters instead of providing them 24 hours paid time off, the amount will be 36 hours of pay.
- Weirton: The successful resolution included a lump sum back pay award and a forward fix to ensure the firefighters were paid according to the statute to include new language in their Collective Bargaining Agreement.
- Huntington: This case settled during the pendency of this Appeal. It includes a backpay award of \$415,000.00. The number of hours for the forward fix varies but is an

¹ This settlement document and the following ones are not in the Joint Appendix but are the subject of a motion to supplement the record being filed by the Petitioners.

improvement from what was being paid. “[T]he firefighters who have no duty hours on the relevant holiday will be provided an additional 12 hours of paid time off over and above what they receive now under the current CBA [making it now 24 hours]. Going forward from the settlement date, and also from the date of complaint filing until said date (for named Plaintiffs only), the firefighter who ends his shift at 7:00am on the holiday will receive an additional 5 hours of paid time off over and above what they receive now under the current CBA. The firefighters who start their shift at 7:00am on the holiday will be paid according to the CBA.” Most importantly, this agreement includes the following: “Once the Supreme Court issues its decision in *Nicewarner v. City of Morgantown*, the parties agree that the City will provide firefighters time off for holidays in accordance with the Supreme Court of Appeals’ decision.” See Huntington Mediation Term Sheet.

- Parkersburg: This matter is still pending with a bench trial set for November 3, 2022.

When litigation unnecessary:

- Charleston: The successful resolution included a lump sum back pay award of \$1.7 million and a forward fix “to assure that all shift-duty firefighters, regardless of whether they work on a holiday or not, are one and one half times their regular rate of pay for the 24 hours of each holiday...” The Charleston firefighters work schedule is identical to that of Morgantown, 8:00 a.m. to 8:00 a.m.
- Bluefield: The city now is and has been paying its firefighters 36 hours of premium pay (1 ½ times their 24-hour shift even though the shift begins at 8:00am) since 2018. (J.A. 1037). Bluefield is the defendant in *Pullano*.
- Since the initial Holiday Pay litigation filed by the Weirton firefighters in 2015, Wheeling, Saint Albans, Fairmont, and Clarksburg have all increased the amount of Holiday Pay paid

to professional firefighters without litigation.. Petitioners counsel here does not know the specifics of those “forward fixes” as it was not involved in the matters.

The law regarding the Holiday Pay Statute is not “well-established”; if it was, its application would be uniform throughout the State. *Pullano v. City of Bluefield*, 176 W. Va. 198, 342 S.E.2d 164 (1986) is the only case that meaningfully addresses the West Virginia Holiday Pay Statute. *Pullano* does not provide enough guidance to statewide municipalities to consistently apply the statute thereby ensuring that West Virginia professional firefighters are paid their full amount of wages and fringe benefits as directed by that statute. The decision by this Appeals Court will have an affect across the State and could reduce firefighter pay for all West Virginia professional firefighters, including the firefighters that have recently resolved their claims. Because there is also an identical statute enhancing Holiday Pay for professional municipal police officers², this Court’s ruling here could affect thousands of working first responders across West Virginia. Oral argument is warranted and critically important.

II. WEST VIRGINIA CODE § 8-15-10a IS LEGISLATION TO ENHANCE FIREFIGHTER PAY.

a. “Compensation” is in the title.

The title of W. Va. Code § 8-15-10a is “Firemen who are required to work during holidays; how compensated”. Emphasis added. Black’s Law Dictionary defines “compensate” as “1. Pay”. *Black’s Law Dictionary*, (10th ed. 2014). Further, Black’s Law Dictionary defines “pay” as “3. To give (someone) money for the job he or she does, to compensate a person for his or her occupation”. *Id.* Professional firefighting is the Petitioners’ occupation. (J.A. 002, 003). It is undisputed by the Respondent the Petitioners are all current professional firefighters or separated

² § 8-14-2a. Policemen who are required to work during holidays; how compensated.

professional firefighters who are or were paid money in exchange for their work as professional firefighters for the citizens of the city of Morgantown. “Compensated” means “paid”. The firefighters are to be paid holiday pay under W. Va. Code § 8-15-10a.

b. The benefit required by W. Va. Code § 8-15-10a provides compensation whether the firefighter works or not.

W. Va. Code § 8-15-10a states “[f]rom 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...”. Emphasis added. This means that whether a professional firefighter (the employee) works the holiday or is off on the holiday, the city (as the employer) shall compensate them with either an equal amount of paid time off or pay at the time-and-a-half-rate of that firefighter. Whether the firefighter is working or off, the firefighter is provided with enhanced compensation through additional money in their paycheck as required by W. Va. Code § 8-15-10a, the Holiday Pay Statute³. No matter the method the city-employer uses to comply W. Va. Code § 8-15-10a, the result is an enhanced wage paid to professional firefighters in West Virginia.

³ The Respondent consistently refers to W. Va. Code § 8-15-10a as the “Holiday Statute”, purposely leaving out the word “Pay”. The “Holiday Statute” would accurately describe the statute that denotes the defined state holidays, W. Va. Code § 2-2-1, not one that provides additional compensation to professional firefighters in West Virginia.

III. THE BENEFIT PROVIDED UNDER W. VA. CODE § 8-15-10a, THE HOLIDAY PAY STATUTE, IS A WAGE UNDER THE WAGE PAYMENT AND COLLECTION ACT.

a. The Wage Payment Collection Act applies because the City of Morgantown is an employer and the Morgantown professional firefighters are employees.

W. Va. Code § 21-5-3(a) states “[e]very person, firm, or corporation doing business in this state, ... shall settle with its employees at least twice every month in a manner of the person, firm, or corporation's choosing, as set forth in subsection (b) of this section, and with no more than 19 days between settlements, unless otherwise provided by special agreement, and pay them the wages due, less authorized deductions and authorized wage assignments, for their work or services.” Morgantown is a corporation doing business in this state. Morgantown professional firefighters are employees being paid by the City of Morgantown for their work as firefighters.

b. The definition of “wage” under the Wage Payment and Collection Act.

W. Va. Code § 21-5-1 (c) states:

“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.” Here, it is undisputed the Morgantown professional firefighters are paid an hourly rate when they are working. City of Morgantown Finance Director James Goff agrees:

Q. And do you consider the firefighters to be paid an hourly rate versus a salary?

A. Yes, I do.

(J.A. 1325, p. 41, Line 13:15).

It is undisputed the Morgantown firefighter hourly pay is a “wage” under the Wage Payment and Collection Act. When a dispute arises regarding their hourly wage, the Wage Payment and Collection Act applies.

c. **“Fringe benefits” are also “wages” under the Wage Payment and Collection Act.**

W. Va. Code § 21-5-1 (c) also states:

“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” Emphasis Added. The paid time off provided to Morgantown firefighters is calculable and payable to the firefighter. Then-City Manager Paul Brake confirmed this:

Q. Okay. And then **how is that holiday time reduced to money for the firefighter?**

A. So it's compensatory time, so in lieu of working, that they would -- on their time sheet, they would claim those -- those particular hours. And so by taking time off, that they would say that, "I'm going to claim, you know, this -- combining the 12 to make 24 and not work on this particular day. **Then they receive payment but not actually work on that -- that particular day.**”

(J.A. 1289, Page 43, Line 22 to Page 44, Line 8). Emphasis added.

In the definitions section of the Wage Payment and Collection Act, W.Va. Code § 21-5-1, at (l), “fringe benefit” is defined. The Code states “[t]he term ‘fringe benefits’ means **any benefit provided an employee** or group of employees **by an employer, or which is required by law, and includes** regular vacation, graduated vacation, floating vacation, **holidays**, sick leave, personal leave, production incentive bonuses, sickness and accident benefits, and benefits relating to medical and pension coverage.” W. Va. Code § 21-5-1(l). Emphasis added. This means that a benefit other than the hourly pay paid by the employer to the employee can be considered a “wage”

even though it may not be the regular unit of pay for hourly work. Here, the unit of pay for the regular work is hourly. On regular workdays, each firefighter works a 24-hour shift and each firefighter is paid for every hour of that 24-hour shift.

The “fringe benefit” Morgantown firefighters receive is the paid time off for holidays provided by the City of Morgantown in accordance with the Holiday Pay Statute, W. Va. Code § 8-15-10a. No matter which method allowed by the Holiday Pay Statute the city-employer chooses to provide, the result is an enhanced wage paid to professional firefighters in West Virginia. Therefore, the firefighter Holiday Pay compensation is a wage under the Wage Payment and Collection Act.

Interestingly, the Respondent agrees in its brief at Page 27:

“While Morgantown acknowledged on summary judgment that, **when the holiday time off is used, it may then be a fringe benefit capable of calculation and due to the employee....**” (Resp.’s Br. 27). Emphasis added.

The employee-firefighters agree the Holiday Pay that has actually been paid (the hourly rate x **12 hours** x 13 holidays x the number of years) was a fringe benefit and was paid timely. The employer-city ignores the remaining 12 hours the employer-city withheld. These withheld wages fall under the WPCA.

The Respondent also cites to the Pickenpaugh example the Petitioners explained at J.A. 1111 as proof that the employer-city paid all the Holiday Pay required. Pickenpaugh was an employee-firefighter who retired in 2021 without using all of the Holiday paid time off that was in his bank. This holiday paid time off was provided to him at 12 hours per holiday prior to February 2020 and then at 24 hours per holiday after February 2020⁴. The Pickenpaugh example

⁴ February 2020 is when the employer-city passed an ordinance increasing the Holiday Pay from 12 hours to 24 hours. J.A. 196.

was used to illustrate the holiday paid time off is calculable and payable whether it was used during employment or cashed out upon retirement. It was not suggested that because Pickenpaugh was able to cash out his unused holiday paid time upon retirement in 2021 that the Petitioners agree the Respondent provided the correct amount of holiday paid time off in the years prior to the complaint filing.

It seems the employer-city believes that if a fringe benefit exists but is unpaid, the WPCA does not apply. But the whole point of the WPCA is recover unpaid wages and/or fringe benefits. Syl. Pt. 3, *Jones v. Tri-County Growers, Inc.*, 366 S.E.2d 726, 179 W.Va. 218 (1988). The 12 hours of Holiday Pay the Respondent failed to provide is a fringe benefit calculable and payable to the employee-firefighters. The employee-firefighters are asking this Supreme Court to agree.

d. The case law and hypotheticals cited by the employer-city on this issue do not give guidance regarding how Holiday Pay for firefighters should be treated.

The Respondent here cites to *Grim v. E. Elec., Inc.*, 234 W. Va. 557, 767 S.E.2d 267 (2014) and suggests the employee-firefighters are coupling the Holiday Pay *Statute* to the Wage Payment Collection *Act* incorrectly because this Supreme Court found the *Grim* employees did when they coupled the Prevailing Wage *Act* (PWA) with the Wage Payment and Collection *Act*. But the PWA was an entire act that contained provisions for enforcement. It contained misdemeanor criminal provisions, employee enforcement provisions, damages provisions, and provisions for attorneys' fees and costs. Here, the Holiday Pay statute is just that, a stand-alone statute, not an entire act. At page 30 of the Respondent's Brief, *Grim* is quoted (and emphasized) as follows: "[p]etitioners herein do not contend that their contractual wages were wrongly 'withheld' or that their agreed upon wages were not paid timely. Rather the gravamen of petitioners' complaint is that the agreed upon wages were in violation of the PWA..." (Resp.'s Br. At 30). Because of this, the *Grim* Court found the PWA, not the WPCA should apply. But here, the employee-firefighters are absolutely

claiming their wages (in the form of fringe benefits) were wrongly withheld. The Holiday Pay Statute provides nothing in its text authorizing a method to recover unpaid wages. The WPCA must apply.

Further, the Respondent incorrectly states at page 34 of its brief “[a]s demonstrated above, they [the Petitioners] are relying on **two separate Acts**, seeking either a double recovery or to cherry-pick their remedy.” Resp’s Br. At 34. Emphasis added. The Holiday Pay statute is not an act. The WPCA is an “act”. W. Va. Code § 8-15-10a has no enforcement provision in its language. The only way to enforce the provision of enhanced pay for firefighters stated in the Holiday Pay Statute is to use the provisions in the WPCA. The employees in *Grim* had an entire act to enforce their prevailing wage claim; allowing them both the PWA and the WPCA was not necessary to afford the *Grim* employees recovery. Because *Grim* dealt with the misapplication of two separate and distinct acts and not the application of a statute that relies on an act for enforcement, *Grim* does not apply.

The same goes for the hypothetical the Respondent poses using the West Virginia Human Rights Act (HRA). The Respondent attempts to co-opt these employee firefighters as bad actors much like the Respondent’s female hypothetical plaintiff.⁵ She is apparently attempting a double recovery using the HRA and the WPCA. First, as stated in the title, the HRA is an entire act. The HRA currently is made up of 20 separate sections including a “Declaration of Policy” (§5-11-2), a “Definitions” section (§5-11-3), a section on “Power and Objectives” (§5-11-4), a section providing for “investigations, hearings, and orders” (§ 5-11-10), and an “Exclusiveness of Remedy” section (§5-11-13). Conversely, W. Va. Code § 8-15-10a has none of these sections or provisions and is one statute under West Virginia Code Chapter 8 titled “Municipal Corporations”.

⁵ It is curious the Respondent chose, out of all the possibilities of examples, their hypothetical double-dipper to be a woman.

As a stand-alone statute it lacks a declaration of policy, its own set of definitions, has no provision for investigations, hearings or orders, and provides no remedy on its own. It must have some other act to provide it a remedy. The West Virginia Wage Payment Collection Act is the remedy and is the only remedy.

Lastly, the Respondent attacks the Petitioners as mis-stating *Kucera*. *Kucera* was a firefighter overtime case from 1969. This Court found the City of Wheeling firefighters overtime claims were controlled by the overtime provisions of West Virginia labor law. The Wage Payment and Collection Act as it known now was not developed until after 1975⁶. Indicating the *Kucera* firefighters fell under the WPCA is not a misstatement. For the same reasons the Court found the then-current state of codified labor law (W.Va. Code 1931, 21-5C-1 and 3) applied to overtime calculations for municipal firefighters, the Court would find the WPCA applied as well, had it existed at the time.

e. The employer-city has failed to pay its employee-firefighters half the fringe benefit required by the Holiday Pay Statute.

It is undisputed a regular firefighter shift is 24-hours. Each firefighter is paid for every hour of that 24-hour shift. The fire department is staffed 24 hours per day, 365 days per year. (J. A. 1431, Line 22). Each firefighter is either working a shift or not working (off).

The Morgantown firefighter 24-hour shift has always been treated as one calendar day. The firefighter shift starts at 8:00 a.m. and been considered one day for purposes of payroll, sick days, bereavement days, and vacation days, to name a few. (J.A. 1033, Lines 15-19). When a firefighter takes a sick day, vacation day, assignment day, military time, bereavement day, or a holiday, it is actually logged into the city produced payroll sheets as one calendar day, not two. (J.A. 1327).

⁶ Elizabeth D. Harter, Paying the Price of Judicial Activism under the Wage Payment and Collection Act, 96 W. Va. L. Rev. (1994).

Additionally, when the 24-hour shift starting at 8:00 a.m. is worked for unscheduled overtime, it is also logged and counted as one calendar day. (J.A. 1123). The City of Morgantown's own payroll manager Dave Schultz testified in his deposition that when a firefighter took a 24-hour shift off for bereavement, it was counted as one calendar day. (J.A. 1414). Because the 24-hour shift in Morgantown has always been considered one day for these purposes, it should also be considered one day for purposes of calculating Holiday Pay. This means the firefighters should be compensated with paid time off based on the entire 24-hour shift. But for the decades prior to the filing of the lawsuit the city-employer provided 12 hours of paid time for each firefighter for each recognized holiday. See the deposition of Paul Brake, the City Manager at the time:

Q. No, okay. All right. So back to my original question a minute ago. So it's -- you take -- when I say "you," I mean the City.

A. I know what you mean.

Q. The number of holidays for the year times 12 hours?

A. Correct

(J.A. 1289, Page 41, Line 9-15)

And the deposition of James Goff, Finance Director:

Q. Alright. Do you know how the firefighters are currently paid for holidays?

A. Yes.

Q. Can you tell me what -- what that is?

A. They're giving -- given a bank of hours basically at the beginning of the year for typically 13 holidays per year at 12 hours each.

(J.A. 1319, Page 18, Line 24 to Page 19, Line 6)

And the deposition of David Schultz, Payroll Manager,

Q: Okay. Tell me about that. Tell me what they were receiving prior to January 2020.

A: They were receiving 12 hours per holidays and the schedule was the Civil Service schedule that the State of West Virginia puts out. **So basically it would be half of what they currently are receiving.**

(J.A. 1403, Line 17-23). Emphasis added. Mr. Schultz continued:

Q: Do you know how they were paid holiday pay prior to January 1, 2020?

A. Yes.

Q. Can you describe it for me, please?

A. With kind of a --- we sort of went over it. It's 12 hours per holiday, according to the Civil Service holiday schedule, given in one lump sum on the first day of every year.

(J.A. 1408, Line 1-8).

And finally, it was verified by Counsel for the City of Morgantown during a hearing before the trial court:

THE COURT: Now, I know that for some time now the City has provided its firefighters what you call a holiday bank of time; is that right?

MR. SIMONTON: That's correct, Your Honor.

THE COURT: And that's 12 hours?

MR. SIMONTON: Yes, Your Honor.

(J.A. 1473).

The firefighter shift is 24 hours. The city-employer was compensating the firefighters 12 hours per holiday, or half of what was owed in paid time off. This is illustrated above in Paul Brake's

deposition where he indicated “I’m going to claim, you know, this -- combining the 12 to make 24 and not work on this particular day.” A firefighter was required to use two 12 hour days’ worth of holiday paid time off to take an entire work shift off.

After the lawsuit was filed, the City increased the holiday paid time off from 12 hours to 24; the city acknowledged it was not paying firefighters correctly by doubling the amount of holiday paid time off from 12 hours to 24 hours per shift for all firefighters, whether the firefighter works the holiday or not. (J.A. 483). It is important to note that Respondent misquotes the Holiday Pay Statute in its brief. At page 6, the Respondent quotes W. Va. Code § 8-15-10a to say “...requiring time off for ‘hours worked during’ a legal holiday...”. Resp.’s Br. at 6. W. Va. Code § 8-15-10a does not state these words. The Holiday Pay Statute states the words “equal time off”. “Equal time off” is 24 hours, not 12.

The Respondent points to individual firefighters taking leave amounts less than 24 hours as support the employer-city does not treat the 24-hour shift as one calendar day. Resp.’s Br. at 10. It is unclear how a firefighter taking ½ hour leave, 2 hours leave, or even 4 hours leave could be considered 2 calendar days. Paid time off taken that is less than 24 hours is of no moment here. The important point is that when an entire firefighter shift (24 hours) is taken off for reasons other than providing the Holiday Pay fringe benefit, the shift (24 hours) is and has been treated as one calendar day, not two. Holiday paid time off should also be calculated based on the 24-hour shift as one calendar day, not two.

For the decades prior to the filing of the lawsuit, the employer-city was paying half of the fringe benefit owed to its employee-firefighters. This is a difference of 12 hours each holiday every year for 13 holidays per year. This occurred every year for decades. There are normally 13 holidays per year. (J.A. 1288, Page 38, Line 5). The employee-firefighters agree the employer-city paid half

of the holiday paid time off, but that leaves half unpaid/withheld. That half unpaid is also controlled by the WPCA. Assume a firefighter earns \$12.50 per hour. That calculates as follows: (\$12.50 x 12 hours x 13 holidays per year) or \$1,950.00 per year in unpaid fringe benefits to the firefighter. Obviously, as the hourly rate increases, so does the withheld fringe benefit amount.

- f. While the employee-firefighters have agreed the employer-city can choose to provide paid time rather than premium pay to comply with the Holiday Pay Statute, *Pullano* disagrees in at least one situation.**

“Where a firefighter works overtime under W.Va. Code, 21–5C–3(a), and such overtime work is performed on a legal holiday under W.Va. Code, 8–15–10a, he is entitled to two times his regular rate of pay for the overtime hours worked.” Syl. Pt.6, *Pullano v. City of Bluefield*, 176 W. Va. 198, 342 S.E.2d 164 (1986). *Pullano* speaks of premium pay here, not paid time off. This means that in the situation of a firefighter working a holiday while already making time-and-a-half, that firefighter is to be paid double-time. *Pullano* has removed the option to for the city-employer to choose premium pay or paid time off; the employer-city must pay premium pay in this situation. This fringe benefit provided through the Holiday Pay Statute falls under the WPCA.

IV. BECAUSE THE WAGE PAYMENT COLLECTION ACT COVERS THIS FRINGE BENEFIT, IT ALSO PROVIDES THE REMEDY.

- a. The employee-firefighters are due the unpaid fringe benefits plus interest.**

The West Virginia Wage Payment and Collection Act is remedial legislation designed to protect working people, assist them in collection of compensation wrongly withheld and restricts right to assign wages. Syl. Pt. 3, *Jones; Mullins v. Venable*, 297 S.E.2d 866, 171 W.Va. 92 (1982). To assist working people in the collection of compensation wrongly withheld, the WPCA provides the following section:

W.Va. Code § 21-5-6 states:

“if any [employer] shall refuse for the period of 5 days to settle with and pay any of its employees at the intervals of time as provided in 21-5-3 of this article, **or to provide fringe benefits after the same are due** ... and suit be brought for the amount overdue and unpaid, judgment for the amount of such claim proven to be due and unpaid, with legal interest thereon until paid, shall be rendered in favor of the plaintiff.” Emphasis added.

The employer-city has withheld 12 hours of fringe benefits in paid time off for each holiday every year. The fringe benefit was due, at the latest, at the end of each year⁷. The employee-firefighters have filed suit to recover these withheld fringe benefits. Judgment in the amount of each firefighter’s claim shall be rendered in “the amount of such claim proven to be due and unpaid, with legal interest thereon until paid”. (See Plaintiffs’ Expert Report, J.A. 1005). This means the 12 hours of withheld fringe benefits for each holiday to each firefighter for each year plus interest on those funds shall be paid.

b. Any separated employee-firefighter that was owed unpaid fringe benefits at the time of separation is owed double the original amount owed.

W. Va. Code § 21-5-4 Cash orders; employees separated from payroll before paydays; employer provided property at (e)states:

“If a person, firm, or corporation fails to pay an employee wages as required under this section, the person, firm, or corporation, in addition to the amount which was unpaid when due, is liable to the employee for two times that unpaid amount as liquidated damages.”

⁷ It is arguable that while the bank of 12 hours was provided at the beginning of every year, the 12 hours not provided was due when each relevant individual holiday came and went during the year. To simplify, the employee-firefighters agree the unpaid 12 hours for each of the 13 holidays was due for each year at the end of that year.

Any employee-firefighter that no longer works for the employer-city who has not been paid all the fringe benefits required under the Holiday Pay statute (the hourly rate x unpaid 24 hours x 13 holidays x the number of years), that employee-firefighter shall be paid twice the amount he/she should have been paid at the time of the separation.

The Gaujot Order means any separated firefighter who should have been granted additional paid time off for Holiday Pay has no way to recover the withheld pay. The Gaujot Order states employer-city is only required under *Pullano* to provide additional paid time off to firefighters who can show they were entitled to more. (J.A. 1262 at Paragraph 20). This provides no remedy for separated firefighters because an employee cannot take paid time off from an employer that no longer employs him/her. Moreover, the Gaujot Order goes too far when it rules this withheld wage is not controlled by the WPCA. The Order produces an extreme result where no firefighter, either working or separated, has any remedy for the withheld wages mandated to be paid by the Holiday Pay Statute.

c. The right to these wages cannot be waived.

W. Va. Code § 21-5-10 states:

“Except as provided in section thirteen, no provision of this article may in any way be contravened or set aside by private agreement, and the acceptance by an employee of a partial payment of wages shall not constitute a release as to the balance of his claim and any release required as a condition of such payment shall be null and void.”

It is important to note here there is no agreement between the parties for the employer-city to pay this fringe benefit to the employee-firefighters. This includes the 12 hours of holiday paid time off the city paid. There is no known written contract of employment for any employee-firefighter with the employer-city. The duty for the employer-city to pay this fringe benefit is only

created by W. Va. Code § 8-15-10a. The employer-city's duty to pay the withheld wage cannot be waived.

d. Finally, the WPCA indicates the employee should not pay the cost and expenses to recover his/her withheld wages.

W. Va. Code § 21-5-12 states:

“The court in any action brought under this article may, in the event that any judgment is awarded to the plaintiff or plaintiffs, assess costs of the action, including reasonable attorney fees against the defendant.”

Here, the employee-firefighters have had their wages withheld for many years. The firefighters were forced to file a lawsuit to recover those withheld wages. Because they have, they are entitled to recover attorneys' fees and costs for bringing the suit. The Holiday Pay Statute does not provide for this; the *Pullano* case does not provide for this. Only the WPCA provides this remedy to these firefighters, a remedy the West Virginia Legislature intended working people to benefit from. It is clear from the *Jones* decision, this Supreme Court also intends for working people to benefit from the provisions of the WPCA when it says the act “...is remedial legislation designed to protect working people, assist them in collection of compensation wrongly withheld and restricts right to assign wages”. *Jones* at Syl. Pt. 3. The WPCA was considered in *Pullano*, but apparently for only the calculation of overtime and double time pay on holidays, not for costs and attorneys' fees issues. It is difficult to tell as the ultimate outcome of *Pullano* as it was remanded for further proceedings.

V. LACHES DOES NOT APPLY HERE.

If the Respondent can convince this Appeals Court the WPCA does not apply, then it can argue a two-year limitation applies. If the WPCA applies, its five-year limitation would apply. This Court of Appeals, has previously held that claims that fall under the W. Va. Wage Payment and

Collection Act are claims based on (at least) implied contract and are therefore governed by the 5-year statute of limitations found in W.Va. Code § 55-2-6. If a written contract exists, the statute of limitations would be 10 years. See Syl. Pt. 2 of *Jones; Western v. Buffalo Mining Co.*, 162 W.Va. 543, 251 S.E.2d 501 (1979) and *Lucas v. Moore*, 172 W.Va. 101, 303 S.E.2d 739 (1983) (holding a suit by employees for recovery of money allegedly obtained under a wage assignment that violates W.Va. Code § 21-5-3 is one based on contract and the five year statute of limitations provided for in W.Va. Code § 55-2-6 is applicable), *Sansom v. Sansom*, 148 W. Va. 603, 137 S.E.2d 1 (1964) (holding the statute of limitations of five years is applicable in the case at bar, because it is based on an implied contract).

Laches applies to suits in equity. Suits in equity demand an equitable (non-monetary) remedy. Statutes of limitations apply to suits at law. Suits at law demand a remedy at law, usually, money. “One of the substantive distinctions between statutes of limitations and laches is that ‘[l]aches applies to equitable demands, where the statute of limitation does not.’ Syl. pt. 2 (in part), *Condry v. Pope*, 152 W.Va. 714, 166 S.E.2d 167 (1969). The reverse is also true, that is, statutes of limitations, not laches, apply to demands at law: ‘The mere delay in asserting a right [at law], short of the limitation fixed by statute, does not bar the right in equity.’ *Id.* Stated another way, ‘[i]f a legal right gets into equity [that is, into a proceeding in which equitable relief, primarily, is sought], the statute [of limitations] governs [the determination of whether the legal right is time-barred].’ *Condry v. Pope*, 152 W.Va. 714, 722, 166 S.E.2d 167, 172 (1969), quoting *Waldron v. Harvey*, 54 W.Va. 608, 617, 46 S.E. 603, 607 (1904). Again, ‘[i]f the action was formerly cognizable at law, statute of limitations is the appropriate defense; if formerly cognizable in equity, laches applies.’ M. Lugar and L. Silverstein, *West Virginia Rules of Civil*

Procedure 81 (1960).” *Maynard v. Bd. of Educ. of Wayne Cty.*, 178 W. Va. 53, 60, 357 S.E.2d 246, 254 (1987).

This is a suit at law. There are two statutes that control the claims here. In addition to the WPCA, this Court can look to the Holiday Pay Statute to establish the claims for Holiday Pay are brought under a statute. If brought under a statute, the concept of laches does not apply and neither does the 2-year statute of limitations. Because statutes apply, laches does not.

VI. CONCLUSION

The City of Morgantown has been withholding wages from its professional firefighters for decades. The firefighters filed a lawsuit to recover those withheld wages. All that is required for the West Virginia Wage Payment and Collection Act to apply is a withheld wage and a lawsuit to recover it. Both are present here.

Judge Gaujot stated on the record: “Firefighters do a tough job and deserve to be paid.” But ultimately, the Judge did not follow through with this sentiment; Judge Gaujot’s Order finds the withheld wage is not a wage and firefighters can only recover more paid time off for any time off they may have been denied. It is an extreme ruling that results in no recovery for the employee-firefighters. This is not what the West Virginia Legislature intended when it passed a law providing enhanced pay for firefighters coupled with an entire act designed to assist employees in recovery of that enhanced pay when it is withheld. The Petitioners here appreciate the acknowledgment they do a tough job and deserve to be paid and hope this Supreme Court agrees. The Petitioners’ here pray this Court of Appeals agrees they should be paid based on the entirety of the 24 hours shift, and further prays this Court enters an order reversing the ruling of the Circuit Court.

**JAYSON NICEWARNER, et al.,
BY COUNSEL**

A handwritten signature in blue ink, appearing to be 'T. Toriseva', is written over a horizontal line.

Teresa C. Toriseva, Esq. #6947

Joshua D. Miller, Esq. #12439

Michael A. Kuhn, Esq. #13898

TORISEVA LAW

1446 National Road

Wheeling, WV 26003

304-238-0066

304-238-0149

justice@torisevalaw.com

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the Petitioners' Reply Brief was served to the individual listed below via regular mail on this 15th day of August, 2022:

**Erin J. Webb, Esq.
Ryan Simonton, Esq.
Matthew D. Elshiaty, Esq.
KAY CASTO & CHANEY PLLC
150 Clay Street, Ste 100
Morgantown, WV 26501**



Teresa C. Toriseva, Esq. #6947
Joshua D. Miller, Esq. #12439
Michael A. Kuhn, Esq. #13898
TORISEVA LAW
1446 National Road
Wheeling, WV 26003
304-238-0066
304-238-0149
justice@torisevalaw.com