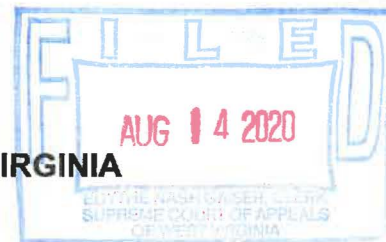


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET No. 20-0295**



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

**Plaintiffs Below / Petitioners,**

**v.**

**Appeal from a Final Order of the  
Circuit Court of Kanawha County  
(18-C-549)**

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

**Defendants Below / Respondents.**

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**PETITIONERS' REPLY BRIEF**

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Come now the Petitioners, Lisa Wilkinson, Heather Morris, Kathryn A. Bradley, Pamela Stumpf, and Lula V. Dickerson, through counsel, J. Michael Ranson and Cynthia M. Ranson of Ranson Law Offices, PLLC, G. Patrick Jacobs of Jacobs Law Office, Teresa C. Toriseva and Joshua D. Miller of Toriseva Law and Robert McCoid of McCoid Law Offices, PLLC, pursuant to the May 28, 2020 Order of this Court permitting a Reply Brief to be filed pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure of the West Virginia Supreme Court of Appeals, and for their Reply Brief the Petitioners state as follows:

### **ASSIGNMENTS OF ERROR**

1. The Circuit Court erred in not permitting discovery on the amount of arrearage now owed to State Employees resulting after the changeover in the payment of employees from Bi-Monthly to Bi-Weekly paychecks.
2. The Circuit Court erred in finding that the Petitioners were only in arrears for ten (10) days pay when that finding opposed the facts most favorable to the Petitioners and when the Petitioners are actually fifteen (15) days in arrears.
3. The Circuit Court erred in ruling that the Respondents could not violate Article III § 10 of the West Virginia Constitution because the Circuit Court did not allow discovery on payment to elected officials.
4. The Circuit Court erred regarding the remaining claims of the Petitioners because the Court incorrectly applied a ten (10) day arrearage when the arrearage is fifteen (15) days.

### **SUPPLEMENTAL RESTATEMENT OF THE CASE FOR THE PURPOSES OF THE REPLY BRIEF**

In 2015, the State of West Virginia began to convert the pay cycle of state employees from bi-monthly to bi-weekly.<sup>1</sup> This occurred over a three-year period from 2015 to 2017. Each year was called a “Wave”. The Petitioners' pay cycle was converted

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<sup>1</sup> The Petitioners do not know what person, group or committee approved the change in the payroll system. They simply know that the new payroll system was implemented by the various Respondents.

in 2017 in what is known as Wave 3. The Petitioners' claims are based on what occurred in 2017 during Wave 3.<sup>2</sup> In the beginning of 2017, all of the State employees affected by Wave 3 were already being paid in arrears as set forth in **West Virginia Code § 6-7-1**. As a result of the plain language of the statute, **the State Employees could not be placed in additional arrearage**. In addition, **West Virginia Code § 6-7-1** does not permit elected officials to be paid in arrears. Despite these limitations, as it relates to adding additional arrearage, the State of West Virginia added an extra week of arrearage to non-elected State Employees and a week of arrearage to elected officials in violation of **West Virginia Code § 6-7-1**. As a result of the conversion, State Employees are now 15 days in arrears, or more than one pay cycle, and elected officials are on average 5 days in arrears.

The Petitioners sought class certification to correct the payroll for all employees who are being paid in violation of West Virginia law. The Petitioners are not contesting the arrearage permitted by **West Virginia Code § 6-7-1** which was in place prior to 2017. What the Petitioners are contesting is the fact that the 2017 payroll change added an additional arrearage to all State Employees and that is not permitted by law.

The original arrearage that was unchanged when **West Virginia Code § 6-7-1** was amended in 2014 is not a part of the Petitioners' claim. The Petitioners were in arrears prior to 2017 and were still paid their entire yearly salary on a yearly basis. An arrearage only affects an employee's pay in the year in which the arrearage is applied. In that year and only that year, the employee is shorted the arrearage amount. Once the arrearage year passes an employee would receive his or her full annual salary on any 12-month cycle.

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<sup>2</sup> The Respondents have taken the position that all of the Waves are the same.

The Petitioners are not contesting the fact that they are paid bi-weekly so long as they are paid properly pursuant to West Virginia law.

### **SUMMARY OF THE ARGUMENT**

In the present case, the Respondents moved for Summary Judgement based upon the pleadings and the Circuit Court granted the motion. When the Circuit Court reviews a matter for Summary Judgment the Court is required to view the facts as presented which are favorable to the non-moving party, here the Petitioners. If the Court finds while accepting the facts most favorable and as presented by the Petitioners that Summary Judgement is appropriate, then the Court may grant summary judgment to the Respondent.

In the instant matter, Judge Evans did not view the evidence in the light most favorable to the Petitioners, but instead made findings most favorable to the Respondents even though those findings were either in dispute or unsupported and despite the fact that no discovery has been conducted.

The Respondents now admit that if the Petitioners are currently owed for 15 days of pay as opposed to 10 days of pay that the Petitioners are due 5 days of pay. The Respondents' entire defense rests upon the notion that once the Petitioners' pay schedule was changed, the arrearage due to the Petitioners had not increased and that the Petitioners were only 10 days (one pay period) in arrears as permitted by **West Virginia Code § 6-7-1**.

At the Summary Judgement phase on the pleadings, the Petitioners presented the following:

- a. Payroll records that confirmed that the Petitioners' arrearage had increased

from 10.8 days to 15 days after the conversion;

- b. Affidavits presented by the Respondents that confirmed that the Petitioners' arrearage had increased from 10.8 days to 15 days after the conversion;
- c. The **uncontested** affidavit of Daniel L. Selby, CPA, MBA, CVA, CFF that the Petitioners were owed for 15 days (5 days over the amount allowed by law);
- d. Evidence that Elected Officials were paid an unlawful bonus payment in violation of **West Virginia Code § 12-3-13**
- e. Evidence that Elected Officials were paid twice for the same workdays;
- f. Evidence that employees pay was shorted on May 30, 2017, when they were only paid for 8.5 days of work when they were due payment for 10.8 days;
- g. Evidence that employees pay was shorted on June 9, 2017 when they were only paid for 10 days of work when they were due a payment for 10.8 days;
- h. Evidence that Elected Officials had illegally been placed in arrearage.

Judge Evans did not view the evidence in a light most favorable to the Petitioners and instead adopted the unsupported argument of the Respondents that they only owed the Petitioners for 10 days in arrearage without any finding by the Circuit Court to support the conclusion. The Circuit Court also found that a change in the payroll system required that all elected officials be paid in the calendar year that the work was performed. While this ruling is correct, the Petitioners presented evidence that the elected officials were not paid for all of the work that they performed in 2017 until 2018, all in violation of **West Virginia Code § 6-7-1**.

In the Respondents' brief, they aver that elected officials are paid for a year's work in December while non-elected employees are paid in January.<sup>3</sup> This statement is correct but only if the payroll follows West Virginia law. The elected officials would be paid on the last day of December and the non-elected employees would be paid their yearly salary on

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<sup>3</sup> See, Respondents' Response Brief, page 28

the first paycheck in January.

In the present case, once the payroll was altered in 2017, all State Employees were paid in arrears and in January. The elected officials were paid with the first paycheck in January and the non-elected employees were paid with the second paycheck in January. This caused the elected officials to be paid 5 days in arrears and the non-elected employees to be paid 15 days in arrears. This action was taken because the State of West Virginia could not extend an additional week of arrearage to the State Employees without placing the elected officials in arrearage as well.

This Court should remand this matter back to Judge Evans to develop a record as to the actual amount of days that are in fact due before simply eliminating 5 days of its employees and other State Employees pay as well as permitting elected officials to be paid in arrears.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Respondents have requested that this Court reject oral argument and simply rubber-stamp an Order signed by Judge Evans that approved a change in payroll that eliminates 5 days of pay for State Employees and places elected officials in arrears. The Petitioners request full argument so that these issues can be fully presented before this Court enters an opinion affecting thousands of State Employees both non-elected and elected.

### **STANDARD OF REVIEW**

This Court has held that “a circuit court’s entry of summary judgment is reviewed *de novo*.” Saunders v. Tri-State Block Corp., 207 W.Va. 616, 619, 535 S.E.2d 215, 218 (W.Va.,2000) per curiam (citing Syl. Pt. 1, Davis v. Foley, 193 W.Va. 595, 457 S.E.2d 532 (1995); Syl. Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994)).



The Court has further stated in Syllabus Point 3 of Aetna Cas. & Sur. Company v. Fed. Ins. Co. of N.Y., 148 W.Va. 160, 133 S.E.2d 770 (1963) that “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Id. Further, this Court held in syllabus point two of Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995), that

[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record 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.

194 W.Va. 52, 59-60, 459 S.E.2d 329, 336 - 337 (W.Va.1995)(citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). This Court further held that even though a reviewing court must consider “underlying facts and all inferences” in the light most favorable to the nonmoving party, “the nonmoving party must nonetheless offer some ‘concrete evidence from which a reasonable ... [finder of fact] could return a verdict in ... [its] favor’ or other ‘significant probative evidence tending to support the complaint.’” Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986), quoting First Nat’l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 290 (1968)).

## **ARGUMENT**

### **I. The Circuit Court erred in not permitting discovery on the amount of arrearage now owed to State Employees resulting after the changeover in the payment of employees from Bi-Monthly to Bi-Weekly paychecks.**

Petitioners acknowledge that this argument heading in their original petition should have been written in a more concise manner. The Petitioners claim is that the Circuit Court did not follow well established West Virginia when it failed to adopt the evidence

most favorable to the Petitioners. The uncontested evidence as presented by the Petitioners is that they are currently owed for 15 days of pay.<sup>4</sup> The 2017 Payroll records, as produced via the affidavit of Sue Racer-Troy, support the Petitioners' claims that they were shorted on their salary in 2017 as well as the payroll records of an elected official, and the affidavit of Daniel L. Selby, CPA, MBA, CVA, CFF.<sup>5</sup> In fact, during oral arguments before the Circuit Court, it did not appear as if the Respondents opposed the fact that they owed 15 days of pay. The Respondents' main argument was that they were simply paying the 15 days in arrearage and therefore the Petitioners were being paid. In the hearing before the Circuit Court on December 4, 2019, the Respondents did not make any argument that they only owed the Petitioners for 10 days.<sup>6</sup>

The Circuit Court, in its final Order, found that the State only owed the Petitioners for 10 days without citing any evidence to support this finding.<sup>7</sup> The Circuit Court simply eliminated five days of pay and then granted summary judgment. This factual finding was in opposition to the Petitioners' evidence that they were owed for 15 days. Pursuant to well established Summary Judgment standards in West Virginia, the Circuit Court should have viewed the evidence in the light most favorable to the Petitioners and should have made a finding that the Petitioners were owed for 15 days. If the Circuit Court then wanted to find that based upon that fact that Summary Judgment was appropriate, the Circuit Court would have at least applied the correct standard. This would have also protected the Petitioners' right to receive their full payment of 15 days in the future. The

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<sup>4</sup> Petitioners want to be clear that 10 days of pay is the arrearage permitted by **West Virginia Code § 6-7-1**. The Petitioners are seeking the 5 days of pay above the 10 days.

<sup>5</sup> **The Respondents admit that the Petitioners were underpaid in 2017.** They claim that the law does not require them to make payments on time. This is simply incorrect. **West Virginia Code § 6-7-1** is clear and concise that employees must be paid at least twice a month and that the pay can only be one payment in arrears. The State of West Virginia cannot make payments at its discretion.

<sup>6</sup> See, **J.A. 645-724**, Oral Argument Hearing Transcript.

<sup>7</sup> See, **J.A. 725-756**, Evans Order granting summary judgment.

Petitioners did not need discovery to present evidence that they were owed for 15 days of work. The Circuit Court's failure to adopt the facts most favorable to the Petitioners was in error.

The Petitioners also did not need discovery to present evidence that the elected officials were paid in arrears and in violation of **West Virginia Code § 6-7-1**. Placing elected officials in arrearage affected the payments to the non-elected employees.

If the Circuit Court was going to make a finding absent any evidence that the Petitioners were now only owed for 10 days, then the Circuit Court should have permitted full development of the record. At a minimum, the Circuit Court could have tangentially supported its factual findings that were the purported basis for the ruling.

**II. The Circuit Court erred in finding that the Petitioners were only in arrears for ten days pay when that finding opposed the facts most favorable to the Petitioners and the fact that the Petitioners are fifteen (15) days in arrears.**

**A. The Petitioners Have Never Contested the Right of the State of West Virginia to Withhold One Pay Cycle in Arrears.**

The Respondents continue to assert this claim – it is simply not correct. The Petitioners have never contested being one pay cycle in arrears. The Petitioners were being paid one pay cycle in arrears prior to 2017 without complaint. Since the Petitioners were already in arrearage prior to 2017 they cannot be placed in any additional arrearage or pay shortage. It is the pay shortage in 2017 which is in dispute. **This case has nothing to do with the arrearage prior to 2017.**

**B. Petitioners should be paid their salary in a timely fashion.**

**i. Legal Requirements**

The payment of wages to the Petitioners and all State Employees including Elected Officials is not left to the imagination of the State of West Virginia. The payment of

employees is governed by statute.

The basic statute controlling payment of employees is **West Virginia Code § 6-7-1**.

This statute provides the following;

- a. Employee shall be paid at least twice a month;
- b. All employees, except elected officials shall be paid one cycle in arrears;
- c. Nothing in this statute is to diminish or increase salary;

This is not the only limitation as **West Virginia Code § 12-3-13** clearly states that an employee cannot be paid in advance.

Moreover, pursuant to **West Virginia Code § 6-7-2** the salary of elected members of the Executive Branch must be paid in the calendar year that the salary is due. The judicial branch salary is controlled by **West Virginia Code § 51-2-13** for Judges and **West Virginia Code § 51-1-10a** for Justices. Both use the words per year and annual salary.

It has been argued by the Respondents and accepted in the Evans' Order that elected officials must be paid for days they work in the calendar year in which the work was performed.<sup>8</sup> The Petitioners agree with this legal conclusion.

Employee salaries are set by civil service and letters of appointment that set forth the level of the "annual" salary. In order to avoid any confusion, **West Virginia Code § 2-2-4** defines a month as a calendar month and year as a calendar year.

**West Virginia Code § 6-7-1** does not require the State of West Virginia to pay the employees bi-weekly. It only requires that all employees be paid at least twice a month. Once **West Virginia Code § 6-7-1** was amended in 2014, the State of West Virginia

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<sup>8</sup> See **J.A. 752**, Evans Order granting summary judgment and Respondents' Response Brief pages 25, 26, 27

decided to switch over the payroll from Bi-monthly to Bi-weekly. Bi-weekly is more difficult to implement because the end of the year will not always fall on the last day of December. This is required to comply with the law as it relates to elected officials and which affects non-elected state employees. In the 2014 amendment, the West Virginia Legislature did not permit elected officials to be paid in arrears.

## ii. Placing Elected and Non-Elected Employees in Arrears

When the State of West Virginia decided to no longer pay employees on a bi-monthly basis and instead to pay on a bi-weekly basis, there were limitations in place.<sup>9</sup> It is not disputed by the respondents. All non-elected employees by 2014 were already in arrears. However, elected Officials could not be placed in arrears.<sup>10</sup> In implementing this bi-monthly payment plan, the State of West Virginia could not legally add additional arrearage to any employee without being in violation of **West Virginia Code § 6-7-1**. Whether the drafters of the new pay plan decided to intentionally violate the law or whether the violation was the function of oversight or neglect, the net effect resulted in the loss of one week's pay from employees.

In 2017, if the employees had been paid bi-monthly until June 30 and then bi-weekly thereafter all employees would have been paid in exact accordance with the wage law cited above.

1	<b>Elected Off</b>			<b>Employee</b>			
2		<b>\$126,000.00</b>			<b>\$58,528.00</b>		
3	<b>Date</b>	<b>Amount</b>	<b>Elected</b>			<b>Non-Elected</b>	
4	16-Jan-17	\$5,250.00	1-Jan-17	16-Jan-17	\$2,438.67	16-Dec-16	31-Dec-16
5	31-Jan-17	\$5,250.00	17-Jan-17	31-Jan-17	\$2,438.67	1-Jan-17	16-Jan-17
6	14-Feb-17	\$5,250.00	1-Feb-17	14-Feb-17	\$2,438.67	17-Jan-17	31-Jan-17
7	28-Feb-17	\$5,250.00	15-Feb-17	28-Feb-17	\$2,438.67	1-Feb-17	14-Feb-17

<sup>9</sup> The State of West Virginia is a generic term used for the unknown group or person that changed the payroll.

<sup>10</sup> Per **West Virginia Code § 6-7-1** and **West Virginia Code § 6-7-2**, elected officials are not to be paid in arrears, but are paid current.

8	16-Mar-17	\$5,250.00	1-Mar-17	16-Mar-17	\$2,438.67	15-Feb-17	28-Feb-17
9	31-Mar-17	\$5,250.00	17-Mar-17	31-Mar-17	\$2,438.67	1-Mar-17	16-Mar-17
10	15-Apr-17	\$5,250.00	1-Apr-17	15-Apr-17	\$2,438.67	17-Mar-17	31-Mar-17
11	30-Apr-17	\$5,250.00	16-Apr-17	30-Apr-17	\$2,438.67	1-Apr-17	15-Apr-17
12	16-May-17	\$5,250.00	1-May-17	16-May-17	\$2,438.67	16-Apr-17	30-Apr-17
13	31-May-17	\$5,250.00	17-May-17	31-May-17	\$2,438.67	1-May-17	16-May-17
14	15-Jun-17	\$5,250.00	1-Jun-17	15-Jun-17	\$2,438.67	17-May-17	31-May-17
15	30-Jun-17	\$5,250.00	16-Jun-17	30-Jun-17	\$2,438.67	1-Jun-17	15-Jun-17
16	14-Jul-17	\$4,846.15	1-Jul-17	14-Jul-17	\$2,438.67	16-Jun-17	30-Jun-17
17	28-Jul-17	\$4,846.15	15-Jul-17	28-Jul-17	\$2,251.08	1-Jul-17	14-Jul-17
18	11-Aug-17	\$4,846.15	29-Jul-17	11-Aug-17	\$2,251.08	15-Jul-17	28-Jul-17
19	25-Aug-17	\$4,846.15	12-Aug-17	25-Aug-17	\$2,251.08	29-Jul-17	11-Aug-17
20	8-Sep-17	\$4,846.15	26-Aug-17	8-Sep-17	\$2,251.08	12-Aug-17	25-Aug-17
21	22-Sep-17	\$4,846.15	9-Sep-17	22-Sep-17	\$2,251.08	26-Aug-17	8-Sep-17
22	6-Oct-17	\$4,846.15	23-Sep-17	6-Oct-17	\$2,251.08	9-Sep-17	22-Sep-17
23	20-Oct-17	\$4,846.15	7-Oct-17	20-Oct-17	\$2,251.08	23-Sep-17	6-Oct-17
24	3-Nov-17	\$4,846.15	21-Oct-17	3-Nov-17	\$2,251.08	7-Oct-17	20-Oct-17
25	17-Nov-17	\$4,846.15	4-Nov-17	17-Nov-17	\$2,251.08	21-Oct-17	3-Nov-17
26	1-Dec-17	\$4,846.15	18-Nov-17	1-Dec-17	\$2,251.08	4-Nov-17	17-Nov-17
27	15-Dec-17	\$4,846.15	2-Dec-17	15-Dec-17	\$2,251.08	18-Nov-17	1-Dec-17
28	29-Dec-17	\$4,846.15	16-Dec-17	29-Dec-17	\$2,251.08	2-Dec-17	15-Dec-17
29		\$126,000.00			\$58,715.59		
30	12-Jan-18				\$2,251.08	16-Dec-17	29-Dec-17

If this easy conversion had been used, the elected officials would have been paid all they were legally owed by December 29 which is a Friday and the last working day in 2017. The employees would receive their full calendar wages for 2017 or their arrearage wage on January 12, 2018, the first paycheck in 2018 instead of two paychecks in the future.<sup>11</sup>

Instead, a decision was made to manipulate the payroll so as to retain one week's pay from State Employees for the fiscal year 2016-2017 and to place elected officials in arrears. This was done by illegally failing to pay employees amounts due and owing. This action indisputably increased the Petitioners' arrearage to 15 days which was in excess of

<sup>11</sup> In a proper conversion, employees' arrearage goes from 10.8 days to .8 days so they should receive an increase of .8 days.

one pay cycle (i.e. 10 days). The problem is that since a 15-day arrearage violates **West Virginia Code § 6-7-1**, the only way to cover-up the taking of wages is to place the elected officials 5 days in arrears. Then, both groups were pushed forward by 5 days.

Since as long as anyone can track, elected officials and non-elected employees have been paid on the same pay cycles. Over the years the non-elected employees were paid one pay cycle in arrears compared to the elected officials. These pay cycles were not followed when employees were paid on May 31 and June 9, 2017.

Pay Date	Elected		Employee		\$52,704.00	\$126,000.00
	Pay Period	Non arrears	Pay Period	Arrears	Paycheck	Paycheck
16-Jan	1-Jan	16-Jan	16-Dec	31-Dec	\$2,196.00	\$5,250.00
31-Jan	17-Jan	31-Jan	1-Jan	16-Jan	\$2,196.00	\$5,250.00
14-Feb	1-Feb	15-Feb	17-Jan	31-Jan	\$2,196.00	\$5,250.00
28-Feb	16-Feb	28-Feb	1-Feb	15-Feb	\$2,196.00	\$5,250.00
16-Mar	1-Mar	15-Mar	16-Feb	28-Feb	\$2,196.00	\$5,250.00
31-Mar	16-Mar	31-Mar	1-Mar	15-Mar	\$2,196.00	\$5,250.00
15-Apr	1-Apr	15-Apr	16-Mar	31-Mar	\$2,196.00	\$5,250.00
30-Apr	16-Apr	30-Apr	1-Apr	15-Apr	\$2,196.00	\$5,250.00
15-May	1-May	15-May	16-Apr	30-Apr	\$2,196.00	\$5,250.00
31-May	16-May	31-May	1-May	12-May	\$1,790.58	\$5,250.00
9-Jun	27-May	9-Jun	13-May	26-May	\$2,027.08	\$4,846.15
23-Jun	10-Jun	23-Jun	27-May	9-Jun	\$2,027.08	\$4,846.15

The above chart demonstrates what was done on May 31 and June 9 to place all non-elected employees in arrears greater than one pay cycle and to manipulate the payroll to take 5 days of wages from State Employees. It also demonstrates what was done on June 9 to place all elected officials in arrears. On May 15, all non-elected employees were paid for their bi-weekly check for work performed April 16-30 while elected officials were paid for work performed May 1 to May 15. On May 31, elected officials were paid for work performed May 16 to May 31. Conversely, on **May 31**, non-elected employees who were entitled to be paid for work performed May 1- May 15 were



suddenly underpaid. In the above example, the non-elected employee was due \$2,196.00 but was only paid \$1,790.58. This violates any wage and hour law and places the employee in an additional arrearage as wages due have not been paid. On June 9, the elected officials are changed to bi-weekly. The non-elected employees are lagging one pay period behind and are still entitled to their last bi-monthly paycheck for the time period of May 16-31. Instead, they are paid a bi-weekly paycheck which places them further in arrears.

In order to cover up the non-elected employees' arrearage, on June 9 the elected officials are put in arrearage in violation of **West Virginia Code § 6-7-1**. This is how it was accomplished. On May 31, the elected officials were paid for working dates May 16 to May 31. On June 9 the elected officials are paid for dates May 27 to June 9. At first glance, this looks as if the elected officials are being paid twice for work performed on May 27, 28, 29, 30, and 31 which, while illegal, is financially advantageous. What in effect is occurring is the elected officials' payroll records require them to work the same days twice. This pushes back the payroll back by 5 days and creates the arrearage for elected officials.

The list of payments to elected officials ended with the elected employee receiving their last paycheck for work performed in 2018 on December 22, 2017 covering the time period December 9, 2017 to December 22, 2017.

As reflected in the affidavit of Ms. Racer-Troy, the Chief Financial officer for the Supreme Court of Appeals, the next period of payment was on January 5, 2018 and was payment for work performed December 23, 2017 to January 5, 2018.<sup>12</sup> This was the same date that a bi-weekly check was paid to elected officials to pay them for one week

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<sup>12</sup> See **J.A. 349-362**, Affidavit of Sue Racer-Troy

of work in December 2017 and the first week of work in 2018. This means unequivocally that the elected officials were not paid for the work that they performed in December of 2017 until January 5, 2018.

The actual pay for elected officials in 2017 is as follows;

<b>Elected Official</b>					
					<b>\$126,000.00</b>
2017	Monday, January 16, 2017	1-Jan	16-Jan	\$5,250.00	
2017	Tuesday, January 31, 2017	17-Jan	31-Jan	\$5,250.00	
2017	Tuesday, February 14, 2017	1-Feb	15-Feb	\$5,250.00	
2017	Tuesday, February 28, 2017	16-Feb	28-Feb	\$5,250.00	
2017	Thursday, March 16, 2017	1-Mar	15-Mar	\$5,250.00	
2017	Friday, March 31, 2017	16-Mar	31-Mar	\$5,250.00	
2017	Saturday, April 15, 2017	1-Apr	15-Apr	\$5,250.00	
2017	Sunday, April 30, 2017	16-Apr	30-Apr	\$5,250.00	
2017	Monday, May 15, 2017	1-May	12-May	\$5,250.00	
2017	Tuesday, May 30, 2017	13-May	26-May	\$5,250.00	
2017	Friday, June 9, 2017	27-May	9-Jun	\$3,392.31	<b>7 workdays</b>
2017	Friday, June 23, 2017	10-Jun	23-Jun	\$4,846.15	
2017	Friday, July 7, 2017	24-Jun	7-Jul	\$4,846.15	
2017	Friday, July 21, 2017	8-Jul	21-Jul	\$4,846.15	
2017	Friday, August 4, 2017	22-Jul	4-Aug	\$4,846.15	
2017	Friday, August 18, 2017	5-Aug	18-Aug	\$4,846.15	
2017	Friday, September 1, 2017	19-Aug	1-Sep	\$4,846.15	
2017	Friday, September 15, 2017	2-Sep	15-Sep	\$4,846.15	
2017	Friday, September 29, 2017	16-Sep	29-Sep	\$4,846.15	
2017	Friday, October 13, 2017	30-Sep	13-Oct	\$4,846.15	
2017	Friday, October 27, 2017	14-Oct	27-Oct	\$4,846.15	
2017	Friday, November 10, 2017	28-Oct	10-Nov	\$4,846.15	
2017	Friday, November 24, 2017	11-Nov	24-Nov	\$4,846.15	
2017	Friday, December 8, 2017	25-Nov	8-Dec	\$4,846.15	
2017	Friday, December 22, 2017	9-Dec	22-Dec	\$4,846.15	
				<b>\$123,738.46</b>	
2018	Friday, January 5, 2018	23-Dec	5-Jan	\$2,261.54	<b>5 workdays</b>
				<b>\$126,000.00</b>	

As found by Judge Evans, argued by the Respondents and agreed to by the Petitioners, elected officials, pursuant to **West Virginia Code § 6-7-1**, must be paid for all work performed in the calendar year 2017 in the year 2017 or by December 31, 2017.

The Elected officials were paid for every day that they worked in 2017.<sup>13</sup> This last payment is an illegal arrearage payment made on January 5, 2018 for the last week of work in December 2017.

The non-elected employees were then not paid their final pay for 2017 until 10 days after the elected officials were illegally paid on January 5, 2018. While this would appear to be a 10-day arrearage since the elected officials are illegally 5 days in arrears, this makes the non-elected employees actually 15 days in arrears.<sup>14</sup>

In essence what occurred is that elected officials were paid an illegal bonus check on March 30, 2017 in violation of **West Virginia Code § 12-3-13**. They were then double paid for the workdays between May 27 and May 31. This was not a gap payment as elected officials were paid for every day that they worked in 2017. This money was paid to cover-up the fact that said elected officials were going to be placed 5 days in arrears. Arrearage is generally discovered when one gets a final IRS form W-2 and discovers that their pay for the year is short. This is how the Petitioners discovered their underpayment. If the illegal payments had not been made, then elected officials would have soon learned that they had not been paid their yearly salary by the end of 2017 and would have demanded payment just like the Petitioners. They would not accept being paid one week in arrears by being paid on January 5, 2017.

If the payment system to elected officials had been corrected this would have corrected all of the issues raised by the Petitioners. Once the initial arrearage is created, every subsequent year an employee receives a full contractual salary amount even

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<sup>13</sup> The same statement used by the Respondents about the non-elected employees. Just because an employee is eventually paid does not make up for illegally paid wages.

<sup>14</sup> If the elected officials had been paid around December 31, 2017 as required by law then the next bi-weekly payment to complete the non-elected employee annual salary would have been around January 14, 2017 or a true 10 days in arrears as allowed by law.

though the money to pay the salary is from different years. It is clear that elected officials did not know that they were being paid in arrears. They believed that a gap payment was being made to “cover” the conversion for 2017. Based on current knowledge, this must be corrected via this Court or by having this matter returned to Judge Evans for full development.<sup>15</sup>

**iii. Elected Officials have remained in Arrears Since 2017 which Continues to Extend the Arrearage for Non-Elected Employees**

While Ms. Racer-Troy’s affidavit ends with a payment on January 9, 2018, it is quite easy to continue the pay schedule. All employees are paid every other Friday or every two weeks. The days paid are the 10 workdays or 14 calendar days that fall prior to the two-week payment.

Following this logic, in 2018 the last payment for elected officials should have been December 21, 2018 for the time period December 8 to December 21, 2018. The elected officials were then not paid for work performed between December 22, 2018 through December 31, 2018 until January 4, 2019, which is in violation of state law. Since this payment was not made until January 2019, one might ask how the elected officials W-2 was correct for 2018? It was correct because the State of West Virginia or an agency such as the Supreme Court took the last week of 2017 that the elected officials worked which was paid in January 2018 and applied that to make up for the work that was not paid for the last week of work in 2018.

Simply put, the elected officials will now be paid in January for final work performed in the prior year and will continue to be paid in arrears. Since the elected officials are 5 days in arrears and the non-elected employees are paid 10 days after the elected officials

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<sup>15</sup> While elected officials were illegally paid in 2017 as described herein, the State of West Virginia or every agency herein failed to properly pay the elected officials for all days worked in 2017 in 2017. This should be a wash.

are paid then the non-elected employees will be a total of 15 days in arrears. This illegal arrearage will continue absent Court intervention.<sup>16</sup>

**C. The Conversion did not result in an Additional Arrearage.**

Apparently hewing to the belief that if something is repeated often enough it will become true, the Respondents continue to aver that the conversion did not result in an additional arrearage but provide zero proof to support the averment. Nor can they show actual payment to back up the claim. In order to determine if a person is being paid in arrears, one must determine the amount owed at the end of the calendar year that will be paid out of salary from the next year. As of 2016, or before the changeover, payroll of all the Petitioners were 10.83 days in arrears as shown below. The elected officials were 0 days in arrears because arrearage is not permitted for elected officials by law. As of December 2018, the Petitioners' arrearage had been increased to an amount equal to 15 days of work which requires two pay periods to pay. The elected officials had gone from zero lag to approximately a 5-day lag. The elected officials lag should be paid on or around January 4, 2019 and the non-elected employees should be paid around January 18, 2019. All of the employees are being "paid" but they are being paid in violation of **West Virginia Code § 6-7-1** as elected officials cannot be paid in arrears to the calendar year and non-elected employees cannot be more than 10 days in arrears.

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<sup>16</sup> The petitioners sought class certification. If this had been granted, then all employees would have been represented including elected and non-elected employees. In effect, all of the Supreme Court and any appointed judge to hear this matter is a potential Petitioner. Judge Evans seemed to believe that the petitioners were "picking" on the elected officials which consist mostly of Judges and Justices. As a result, he did not want to hear any argument regarding elected officials and declared it irrelevant (See **J.A. 692**, Oral Argument Hearing excerpt). What Judge Evans failed to understand is that the pay of elected officials and non-elected employees are joined. Whatever payroll system is used by the State of West Virginia, elected officials must be paid on the last day of the calendar year. If this clear interpretation of the statute is followed, then the State is prevented from extending the pay of employees beyond the first paycheck in the following year.

Last	Date	Lag	Days	Date	Lag	Lag Increase	Days
Bradley	31-Dec-16	\$2,439.50	10.83	31-Dec-18	\$3,377.77	\$938.27	15.00
Dickerson	31-Dec-16	\$1,660.50	10.83	31-Dec-18	\$2,299.15	\$638.65	15.00
Morris	31-Dec-16	\$1,588.00	10.83	31-Dec-18	\$2,198.77	\$610.77	15.00
Stumpf	31-Dec-16	\$2,196.00	10.83	31-Dec-18	\$3,040.62	\$844.62	15.00
Justices	31-Dec-16	\$0.00	0	31-Dec-18	\$2,615.38	\$2,615.38	5.00
Judge	31-Dec-16	\$0.00	0	31-Dec-18	\$2,423.08	\$2,423.08	5.00
Governor	31-Dec-16	\$0.00	0	31-Dec-18	\$2,884.62	\$2,884.62	5.00
AG	31-Dec-16	\$0.00	0	31-Dec-18	\$1,826.92	\$1,826.92	5.00
Treasurer	31-Dec-16	\$0.00	0	31-Dec-18	\$1,826.92	\$1,826.92	5.00
Auditor	31-Dec-16	\$0.00	0	31-Dec-18	\$1,826.92	\$1,826.92	5.00
Sec. State	31-Dec-16	\$0.00	0	31-Dec-18	\$1,826.92	\$1,826.92	5.00

The Respondents started out owing the Petitioners for 10.8 days of pay pursuant to withholding one bi-weekly paycheck. The Petitioners were then shorted a week's pay in 2017 increasing the amount owed. It is non-sensical for the Respondents to now claim they are only 10 days in arrears to non-elected employees. Similarly, the Respondents started out paying the elected officials for all of their work in a calendar year by December 31 of the year the work was performed. Now the elected officials receive their final pay in January of the following year in violation of State Law.<sup>17</sup>

Even if this Court does not agree that the 5 additional days is now due and owing, the Court should at least find that the total amount of 15 days must be paid upon termination. The Court should not allow state workers to simply lose 5 days of pay. To do otherwise would be immoral and unjust.

### **III. The Respondents' Claim that the Elected Officials Pay Schedule is Supported by a Rational Basis.**

In order to have an equal protection claim, the elected officials would have to receive special treatment to protect their wages that was not afforded to non-elected

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<sup>17</sup> This is based on the current information known to the Petitioners and assumes that the elected officials are being paid on the current payroll rotation. The issue of fact about the amount of days that petitioners are in arrears is a critical fact that is in controversy and should be fully developed.

employees. What is currently known is that elected officials were given extra pay in 2017 and non-elected employees were not given this payment. The Payment to elected officials was not a gap payment as they were paid for every day worked.

Full development of the record or agreement of the parties is required to determine the full treatment of the class of elected officials and non-elected employees. Pursuant to **West Virginia Code § 6-7-1** elected officials cannot be paid one pay cycle in arrears. It is admitted by the Respondents that if they take from the elected officials salary from a prior year to pay for the shortage created in the current year that this would be an arrearage payment which would violate **West Virginia Code § 6-7-1**.

The same holds true for the Petitioners as well. Pursuant to **West Virginia Code § 6-7-1**, each State Employee can only be one pay cycle in arrears. As of the beginning of 2017, all of the Petitioners were one pay cycle in arrears as admitted by the Respondents. Since **West Virginia Code § 6-7-1** only permits employees to be one pay cycle in arrears, it is a violation of statute to increase the arrearage by not paying the Petitioners full wages in 2017.

By statute, as of the beginning of 2017, neither the elected officials nor the state employees could have arrearage added to their pay. If the Respondents were going to put in a tortured conversion from bi-monthly to bi-weekly, then both groups would be entitled to a gap payment so as to not violate **West Virginia Code § 6-7-1**.

The Respondents argue that both elected and non-elected employees were paid every dollar due. While this is correct, the payment of those monies was made in violation of **West Virginia Code § 6-7-1**. Elected officials received their pay during the first week of January for work performed in December of the previous year. In the future those payments could be delayed as long as January 14 based upon the current payroll



rotation. Non-elected employees receive their pay beyond one pay cycle. This will continue as long as elected officials are paid in arrears.

The Petitioners have never received their full pay. This is an immutable fact. The Respondents' position has been that the Petitioners were paid in January 2018. This use of 2018 monies is in excess of the arrearage that was already in place at the beginning of year 2017. If one takes money from January 2018 to pay for a shortage created in 2017, the 2018 payment is now short by that same amount.

Using an analogy — the Respondents only paid \$80.00 for a lawn service that was supposed to cost \$100.00. When the lawn was cut the second time the Respondents did not pay \$120.00 to cover the cost of the shortage they only paid \$100.00 and told the lawn care worker to take \$20.00 of the \$100.00 to cover the debt that was owed. This would then make the second lawn mowing \$20.00 short. This would continue until the \$20.00 debt is paid, if at all.

The foregoing example describes what is occurring to every employee of the Supreme Court or any employee of the Respondents. A shortage in pay was created in 2017 above the one cycle in arrears that was already affecting employees' pay. This shortage has never been paid. All the Respondents are doing for bookkeeping purposes is taking money from the next year's pay and crediting it to pay the shortage from the prior year so that each employee's pay is consistently short each year by the shortage created in 2017.

What the Respondents admit to in their brief is that they created a second arrearage in violation of **West Virginia Code § 6-7-1**. This second arrearage did not go away by assigning a payment in 2018 to cover the 2017 shortfall as that would simply create a shortfall for 2018.

**IV. The Circuit Court erred regarding the remaining claims of the Petitioners because the Court incorrectly applied a ten (10) day arrearage when the arrearage is fifteen (15) days.**

The Respondents do not respond to this assignment of error because they cannot produce any argument that the Petitioners are only 10 days in arrears. The Petitioners were already 10.83 days in arrearage at the start of 2017. They were admittedly shorted additional pay during the conversion in 2017 from bi-monthly to bi-weekly which increased the arrearage to 15 days. This 15-day arrearage requires the bi-weekly paychecks at the beginning of 2018 to pay off the 15 days. This cannot be disputed.<sup>18</sup> The problem for the Respondents is that **West Virginia Code § 6-7-1** only allows Petitioners to be paid one pay cycle in arrears which is 10 days. Once the conversion process was completed the Respondents were in violation of **West Virginia Code § 6-7-1**.

The establishment of the amount of days owed the Petitioners is more critical than the time of payment. Presently no evidence exists as to how the pay conversion system was put in place.<sup>19</sup> As a result, there is nothing in writing approving the 15-day arrearage plan to make sure of payment in the future. It would appear that what may have confused Judge Evans was that he based his ruling on the fact that the Petitioners were 10 days in arrears from the elected officials 5 days of arrearage. While this appears like 10 days of arrearage, it is actually 15 days.<sup>20</sup>

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<sup>18</sup> See **J.A. 544-546**, uncontested Affidavit of Daniel L. Selby, CPA, MBA, CVA, CFF

<sup>19</sup> The State of West Virginia could have paid bi-monthly until June 30 and then switched to bi-weekly and everyone would have been paid their full salary.

<sup>20</sup> The Petitioners frustration is based upon the fact that the party that put the 2017 payroll into existence is unknown. It is understood that the Respondents simply adopted the plan as submitted. The persons responsible did an outstanding job of attempting to coverup the taking of the Petitioners salary and the extension of the arrearage including putting the elected officials in arrears. Since discovery was not permitted prior to Judge Evans ruling the Petitioners have to digest the facts with only a small amount of information. The fact that the elected officials were being placed in arrearage was not clearly understood until the payroll

Regardless of whether the wage payment withheld in 2017 is due now or at the time of termination, the fact is that the wages must be paid is critical. Judge Evans ruling, without support and in opposition to the facts presented by the Petitioners, must be reversed at this time or all of the employees lose the week of wages that were withheld.

#### **V. Immunity and the Bi-Weekly Payment**

This issue is raised by the Respondents, but it is not before the Court. Regardless, the Petitioners are not contesting the right of the Respondents to implement a bi-weekly payroll. The Petitioners are simply seeking their full pay under the pay system implemented.

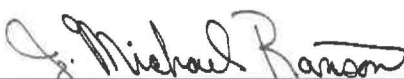
#### **CONCLUSION**

The Petitioners request this Honorable Court to set aside the Order of Judge Evans and remand this matter to the Circuit Court.

#### **RELIEF SOUGHT**

The Petitioners requests this Honorable Court remand this case to the Circuit Court directing permissible discovery to occur along with a full development of evidence including testimony, if required, so that the Court will have a full factual development upon which a proper determination of the facts can be performed in conjunction with the applicable law.

Signed:

  
**J. Michael Ranson, Esquire (WVSB #3017)**  
**Counsel of Record for Petitioners'**

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information was reviewed for the umpteenth time after the filing of the brief of the Respondent. While the information was there it was not understood. As a result, this argument was not presented to Judge Evans although the information was available to the Court. A full development of the case and full payroll payments would have disclosed this information.

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of August 2020, true and accurate copies of the foregoing ***Petitioners' Reply Brief*** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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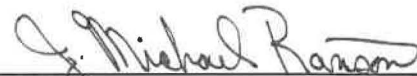
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