No. 22-0185

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAYSON NICEWARNER, et al.,

Plaintiffs Below/Petitioners,

v.

No. 22-0185
(CIRCUIT COURT OF MONONGALIA COUNTY CIVIL ACTION NO. 19-C-167)

THE CITY OF MORGANTOWN,
a municipal corporation,

Defendant Below/Respondent,

BRIEF OF RESPONDENT, THE CITY OF MORGANTOWN

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I. STATEMENT OF THE CASE

Respondent, The City of Morgantown, ("Respondent," "Morgantown," or "City") offers the following statement of the case as necessary to address inaccuracies and/or omissions provided by Petitioners. *See* W. Va. R. App. Proc. 10(d).

A. INTRODUCTION

This is a case of statutory interpretation and the application of settled law. Petitioners, a set of Morgantown firefighters, initially made three claims against their employer, the City of Morgantown. Briefly, those claims centered on allegations that: (1) Morgantown negligently violated W. Va. Code § 8-15-10a (the "Holiday Statute") by failing to pay them one and one-half times their regular rate of pay for twenty-four hours for each legal holiday (J.A. 007, at Count I); (2) failing to pay that amount violated W. Va. Code § 21-5-3, the portion of the West Virginia Wage Payment and Collection Act ("WPCA") requiring employers to make prompt payment of wages due twice per month (J.A. 007, at Count II); and (3) the employees were entitled to a declaratory judgment finding that they were entitled to "one and one-half times [their] regular rate of pay" for each legal holiday (J.A. 008, at Count III). After cross-motions for summary judgment were exchanged and fully briefed, and after two separate hearings on the same, the lower court rightfully rejected the Petitioners' claims, and granted Morgantown summary judgment on Counts I and II of the Petitioners' Complaint. (J.A. 1252-54, 1277).

In its declaratory judgment order (the "Final Order") the Circuit Court correctly found that the Holiday Statute requires holiday benefits for "hours worked during" legal holidays or a separate benefit for days falling on a "regular scheduled day off," relying on the text of the Holiday Statute, the formal guidance of the Office of the Attorney General in 57 W. Va. Op. Atty. Gen. 171 (1977) (the "Attorney General Opinion"), and this Court's decision of *Pullano v. City of*

Bluefield in 1986. (J.A. 1250-77). Petitioners' theories would have required that the court ignore settled law and, instead, improperly legislate from the bench.

While Petitioners classify this case as one that "will impact firefighter wages across the state" (Pet'rs Br. 1), the potential impact(s) of Petitioners' legal theories would greatly impact tax payers and municipalities across West Virginia. Further, Petitioners' legal theories in regard to the WPCA would serve to broaden the Act to an untenable degree that would be felt by employers statewide.

B. ERRORS AND OMISSIONS

The Petitioners' opening brief and briefing to the Circuit Court ignore much of the legal precedent applicable to this case and instead attempt to rely upon irrelevant, inadmissible, and unpersuasive use of confidential settlement discussions. While the law is settled, and determinative, claims about settlement discussions have no place before this Court. Pursuant to Rule 408 of the West Virginia Rules of Evidence, evidence of offers to compromise a disputed claim is not admissible on behalf of any party to prove the validity or amount of a disputed claim, nor the liability of a party in a disputed claim. W. Va. R. Evid. 408(a)(1)-(2). Petitioners improperly attempt to include claims about settlement negotiations between the parties in this appeal. (Pet'rs Br. 2-3). Morgantown disagrees that Petitioners' representations of those settlement negotiations are accurate, but regardless of the accuracy, Petitioners' claims relating to attempted compromises must be disregarded in their entirety as prohibited uses under Rule 408. In a similar vein, none of the settlement agreements referenced by Petitioners are in evidence in this action (Pet'rs Br. 11) and none would impact the legal issues in this case.

Petitioners also recite that they filed a motion for summary judgment on May 7, 2021 (Pet'rs Br. 3 and 6, *citing* J.A. 209), but Petitioners' motion was filed June 7, 2021, after

Morgantown's motion for summary judgment and after the Circuit Court's deadline for filing dispositive motions. (J.A. 129).

II. SUMMARY OF ARGUMENT

Petitioners assign four errors on appeal, but the assignments related to laches and the statute of limitations are merely derivative of the assignment seeking application of the WPCA. Petitioners' substantive questions presented are (1) whether this Court should overrule *Pullano* and disregard the Attorney General Opinion and text of the Holiday Statute by holding that they are entitled to twenty-four hours of benefits on each legal holiday because each hour counts as either an hour worked or a part of their day off; and (2) whether this Court should overrule *Pullano* and several similar holdings finding that an employer's error in providing a benefit established outside the WPCA amounts to a failure to promptly pay wages when due and thus allows Petitioners to seek collection of attorneys' fees and liquidated damages.

Under binding precedent and formal guidance, firefighters who work during a holiday are entitled to equal time off for the hours worked, not for twenty-four hours. Firefighters who do not work that day are entitled to equal time off for time they would have worked. No firefighter is entitled to claim a legal holiday as both a workday and a day off, and neither a firefighter nor a municipality can change how much time off a firefighter receives by how they characterize a work shift.

Our state's municipalities have relied on this rule when compensating their employees. Changing the rule now as Petitioners ask would limit public services, raise taxes, and create new obligations on public funds never adopted by the legislature. Municipalities provide essential public services and are required to operate on a cash basis – spending available public funds on services each year within the revenues collected. Changing the benefits laws now would create a

new obligation without any available funding. Making that change and allowing it to apply retroactively would force municipalities to shift money allocated for other purposes this year to an unfunded benefit, diverting limited budget funds that are essential to keep streets paved, provide police protection, and operate public parks.

The law on these points is established, and the outcome in this case is dictated by *Pullano v. City of Bluefield*, which reached the same conclusion as the Attorney General Opinion and is consistent with the text of the Holiday Statute. The Holiday Statute grants benefits for hours worked during legal holidays, not the length of a shift. An employer who fails to give sufficient time off can correct the error by giving additional time off – nothing in the Holiday Statute directs that time off be paid instead. Because the Circuit Court properly applied the established law, Morgantown asks this Court to affirm the Final Order.

III. STATEMENT OF ORAL ARGUMENT AND DECISION

The facts of this case were well-presented in the proceeding below, as reflected in the Joint Appendix and as further discussed herein. In addition, well-established law governs the legal issues cited in this appeal. Because the law and the facts are clear, the decisional process would not be significantly aided by oral argument, and the same is therefore unnecessary in this case pursuant to West Virginia Rule of Appellate Procedure 18(a). Morgantown requests that the Court affirm the Circuit Court Order by Memorandum Decision.

IV. ARGUMENT

Petitioners argue that the Holiday Statute requires municipalities to compensate them for twenty-four hours for each legal holiday, regardless of how many hours they work. The Petitioners argue that they are either working during a legal holiday or they are on their regular scheduled day off, so that every hour entitles them to holiday benefits. Alternately, and inconsistently, Petitioners

claim that Morgantown must compensate them for twenty-four hours for each legal holiday because it treats their shifts as a calendar day.

The Attorney General Opinion – issued the year after the Holiday Statue was adopted – directs that firefighters working a 24-hour shift receive benefits for the hours worked during a legal holiday and not for the length of the 24-hour shift. This Court's decision in *Pullano* upheld that practice, and found that if Bluefield had not given firefighters sufficient time off in the past it could correct that error by providing additional time off. 176 W. Va. 198, 342 S.E.2d 164. Petitioners' claims are contrary to established law, and the Circuit Court properly denied them relying on the text of the Holiday Statute, the Attorney General Opinion, and *Pullano v. City of Bluefield*.

A. STANDARD OF REVIEW

A circuit court's entry of a declaratory judgment is reviewed *de novo*. *Goddard v. Hockman*, _____ S.E.2d _____, No. 20-0863 (W. Va. May 20, 2022), *available at* 2022 WL 1598026. The standard of review applicable to an appeal from a motion to alter or amend a judgment made pursuant to West Virginia Rule of Civil Procedure 59(e) is the same standard that would apply to the underlying judgment. *Id.*

B. THE HOLIDAY STATUTE REQUIRES BENEFITS FOR HOURS WORKED DURING A LEGAL HOLIDAY OR FOR A REGULAR SCHEDULED DAY OFF AND DOES NOT ALLOW BENEFITS FOR BOTH ON THE SAME LEGAL HOLIDAY.

First, it is unequivocal, and the lower court properly ruled, that the City has the statutory right to grant firefighters leave time for holidays rather than additional pay under the Holiday Statute. This point alone—which the Petitioners ultimately conceded at the summary judgment stage—is fatal to both Counts I and II of Petitioners' Complaint, as pled. The crux of Petitioners' Complaint is found in Count III—the count for declaratory judgment regarding the Petitioners'

rights and the Respondent's obligations under the Holiday Statute—namely, what is "equal time off" for "hours worked during" holidays under the Holiday Statute.

Petitioners claim that equal time off is twenty-four hours because that is the length of their shift, regardless of the hours they work during a legal holiday. (Pet'rs Br. 16). Petitioners' arguments fail because they do not address any of the three determinative rulings on this issue: (1) W. Va. Code § 8-15-10a (adopted 1976), requiring time off for "hours worked during" a legal holiday or alternatively for a holiday that falls on a regular scheduled day off; (2) the Attorney General Opinion (issued 1977) that firefighters who work 24-hour shifts receive holiday benefits for hours worked during the legal holiday and not for the entire length of a 24-hour shift; and (3) this Court's ruling in *Pullano v. City of Bluefield* (issued 1986), which upheld firefighters working 8 a.m. to 8 a.m. receiving holiday benefits for hours worked during the holiday, not the shift length.

The Legislature drafted the Holiday Statute in 1976 to apply to "hours worked during" a legal holiday and to provide a parallel benefit to those employees whose regular scheduled day off fell on the holiday. W. Va. Code § 8-15-10a. Cities and Counties asked the Attorney General's office for guidance the next year, and the Attorney General issued a formal opinion directing them that time off was owed for hours worked during the holiday and not for the full 24-hour shift. 57 W. Va. Op. Atty. Gen. 171 (1977). In 1986, this Court reached the same conclusion. *Pullano*, 176 W. Va. at 205, 342 S.E.2d at 172; (J.A. 1155, 1164-1218).

Petitioners do not mention the Attorney General Opinion. While a formal Attorney General opinion is not binding, "it is persuasive when it is issued rather contemporaneous with the adoption of the statute in question." *Walter v. Ritchie*, 156 W. Va. 98, 109, 191 S.E.2d 275, 282 (1972). The Attorney General Opinion directly answered the question presented here, and in *Pullano*. City and County officials asked:

> "1. Does new Code 8-15-10a contemplate only an 8-hour workday so that a fireman who normally works a 24-hour shift from 7:00 a.m. to 7:00 a.m. shall be allowed time off or eight hours of time and a half (equivalent of 12 hours) of pay when his regularly scheduled day off occurs on a holiday?"

51 W. Va. Op. Atty. Gen. 71, *available at* 1977 WL 36078, at *2. The Attorney General answered:

> We are, therefore, of the opinion 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. **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. at *3 (emphasis added).

The Attorney General Opinion here was issued the year after the Holiday Statute was enacted, and the Mercer County Circuit Court found it persuasive, relying on it when issuing the final order challenged in *Pullano*. (J.A. 792). This Court in *Pullano* reached the same result, finding benefits were granted for hours worked during a holiday and not the length of a 24-hour shift. 176 W. Va. 205, 342 S.E.2d 172.

While Petitioners acknowledge that *Pullano* is binding precedent, they attack its application on four grounds: alleging Morgantown treats a 24-hour shift as a calendar day and that it therefore must provide twenty-four hours of time off for a legal holiday; alleging that firefighters

working overtime on a holiday are entitled to double their regular rate of pay, which has no application to this case in which Morgantown has provided time off for holidays; alleging that Petitioners could vote to change their shift to begin at midnight pursuant to W. Va. Code § 8-15-10 and then be entitled to twenty-four hours of holiday benefits, which is inapplicable to this decision; and alleging that the City of Bluefield currently provides twenty-four hours of holiday benefits, which cannot alter this Court's precedent. Each claim is addressed in turn.

1. THE HOLIDAY STATUTE PRESCRIBES THE BENEFIT REQUIREMENT.

The amount of time off Petitioners receive for holidays is prescribed by the Holiday Statute, and no text in the legislation, the Attorney General Opinion, or the *Pullano* decision suggests otherwise. Petitioners' claim fails for that reason, but it also lacks factual support. Petitioners rely on Morgantown "counting" shifts worked by firefighters as a calendar day based on their allegation that other paid leave is accrued and used in calendar day increments. (Pet'rs Br. 1-2). That allegation is incorrect.

Petitioners argue without citation to any authority that "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[.]" (Pet'rs Br. 17). As a general matter, extra compensation beyond that required by law must be specifically authorized and cannot arise by implication.[1] On this principle, Petitioners cannot rely on claims about their treatment of shifts as calendar days to alter the specific, written treatment of leave accruals in hourly increments in

[1] 4 McQuillin Mun. Corp. § 12:214 (3d ed.) ("Extra compensation to the incumbent of an office or position in the municipal service cannot be based on a promise, contract, custom or usage, services pertaining to the duties of the office or employment, doubtful implication, implied contract or estoppel, or by indirect methods, although provided by statute, charter or ordinance."); *see also* J.A. 804.

Morgantown's personnel policies[2]. The *Pullano* decision follows this principle, determining holiday entitlements based on the statutory text rather than payroll practices of the employer.

Petitioners specifically rely on the following claim for their argument that a work shift is treated as a calendar day and that therefore each of them is entitled to twenty-four hours of benefits for each legal holiday under the Holiday Statute: "When a firefighter takes a sick day or a bereavement day, it is counted as one calendar day with the city, even though the shift spans 24-hours. (Id. at 49-52)." (Pet'rs Br. 1-2) (*sic*)[3]. Petitioners' citation appears to refer to a portion of the deposition testimony of former City Finance Director James Goff, in which Petitioners' counsel asks Mr. Goff if payroll records submitted by Petitioners report a shift when they take leave on a single calendar day, and Mr. Goff responds, "It—it appears they take one day off, 24 hours." (J.A. 1327). In the same deposition, Mr. Goff had already responded to Petitioners' counsel's request to describe a shift that "spans two calendar days" as being "really attributed to one calendar day in the paperwork" by saying: "It's 24 hours." (J.A. 1326-7). Mr. Goff also instructed Petitioners' counsel that holiday leave is accrued in hours, and directed them to Morgantown's Payroll Manager David Schultz for additional detail. (J.A. 1319). Mr. Schultz thoroughly described that leave is taken in hours, not days: "Like, May 7th was a bereavement day. **But it doesn't have to be 24 hours used at one time. They may leave halfway through their shift to go directly to a funeral. It's not like they have to take 8:00 a.m. to 8:00 a.m. the next day in its entirety.**" (J.A. 1406, 1412-15) (emphasis added).

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[2] Neither may Petitioners rely on personnel policies themselves to alter the obligations of the Holiday Statute, as more thoroughly discussed immediately below.

[3] The testimony was subject of an objection to the form of the question and is not properly considered as evidence, and in fact evidence of the "treatment" of a shift as a calendar day is irrelevant to an employer's obligation to provide benefits under W. Va. Code § 8-15-10a. Nonetheless, the entire deposition transcript clearly shows that Mr. Goff testified that Petitioners' leave time is accrued and used in hourly – not daily – increments, as described herein. (J.A. 1326-7).

Morgantown accrues paid leave in one-hour increments, and it requires they be used in increments of one hour or less. (J.A. 1415). Petitioners' own exhibits, filed in the briefing on summary judgment, show that firefighters took leave for portions of shifts and recorded leave in hour amounts. *Id.* Payroll records show several firefighters taking leave amounts less than 24 hours, (e.g. "Jones, 0800-2000," "Brandstetter, 0400-0800," "Rinehart, 1700-800") and recording leave amounts in increments as small as 0.5 hours. *Id.* The record before the Court establishes that Petitioners cannot support their claim that Morgantown treats a work shift as equal to a calendar day for purposes of calculating and using benefits. If the Court were to accept Petitioners' argument that Morgantown can alter its legal obligations under the Holiday Statute by establishing payroll practices, Petitioners still could not prevail on their claim to entitlement of twenty-four hours of benefits for each legal holiday. Morgantown's established practice clearly treats leave accrual and usage on an hourly, rather than daily, basis. To the extent the pay practices were relevant, they would support granting Petitioners twelve hours of benefits per holiday, given that that was the historical established amount assigned for each legal holiday from the total annual holiday leave accrued to each employee as of January 1. (J.A. 1408).

But that is not the precedent this Court has established. This Court has already disposed of this claim in its decision of *Pullano v. City of Bluefield*. The *Pullano* decision is consistent with the 1977 Attorney General Opinion and the text of the Holiday Statute as written in 1976, and it determines the outcome of this appeal.

2. PETITIONERS' ARGUMENTS ARE INCONSISTENT WITH *PULLANO.*

This case can be disposed of based on Section II of the Court's decision of *Pullano v. City of Bluefield*, which found in part: "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.**" *Pullano v. City of Bluefield*, 176 W. Va. 198, 205, 342 S.E.2d 164, 171 (1986).

In *Pullano v. City of Bluefield*, the Court was presented with various claims from police and fire employees of Bluefield, covering a time period during which Bluefield first used time off to compensate employees for holidays and then a period during which Bluefield switched to using premium pay. 176 W. Va. 198, 342 S.E.2d 164. Three questions predominated: (1) whether additional holidays had been declared by the Governor on certain days; (2) must benefits under the Holiday Statute be paid in addition to regular pay; and (3) "Did the City of Bluefield correctly calculate overtime pay for its firefighters?". *Id.* at 201, 167. The Court determined that (1) no additional legal holidays were declared; (2) benefits were not in addition to regular pay, but employees working overtime and receiving premium pay for the holiday should be paid double their regular pay rate; and (3) overtime rates must be calculated from an hourly wage calculated under one of two methods[4]. *Id.* at 203, 169-70 (declaration of holidays); 205-6, 171-2 (calculation of holiday benefits); 207-10, 173-7 (calculation of pay rates).

[4] It is this discussion, at Part III of the decision, that relates to Bluefield's practice, shown in the record before the *Pullano* Court, of paying its firefighters in increments of 14 hours and 10 hours with differential pay rates to account for overtime. (J.A. 779). Petitioners erroneously claim, without analysis, that those pay practices were the subject of the *Pullano* Court's holding that W. Va. Code § 8-15-10a requires benefits for hours worked during a legal holiday, not the length of a shift. (Pet'rs Br. 17) ("When what was being done in Bluefield when *Pullano* was being considered, it is clear the issue of how the 24-hour shift is treated (one calendar or two calendar days) affected the Appeals Court's decision.") (*sic*).

In Part II of the decision, entitled "Calculation of Holiday Pay for Municipal Police Officers and Firefighters," the Court determined three issues relevant to this appeal: (1) benefits for legal holidays worked and legal holidays falling on a day off are separate; (2) firefighters claimed they had not been given sufficient time off for holidays, and the circuit court order awarding them additional time off if the claim was proven was upheld; (3) granting benefits for hours worked during a holiday and alternately granting sixteen hours of benefits for a day off because it was the "maximum number of hours a firefighter could work in a shift on a legal holiday" complied with the Holiday Statute. *Pullano*, 176 W. Va. 204-6, 342 S.E.2d 170-2.

First, the Court recognized that work days and days off are distinct under the Holiday Statute.[5] In *Pullano*, the Court formulated the distinction between work days and days off this way: "Under both W. Va. Code, 8–14–2a, and W. Va. Code, 8–15–10a, if either a police officer or firefighter is required to work during a legal holiday or if it 'falls on ... [his] regular scheduled day off, he shall be allowed equal time off at such time as may be approved by [his superior] under whom he serves, or in the alternative, shall be paid at a rate not less than one and one-half times his regular rate of pay.' The question raised by the Petitioners is whether holiday pay must be paid in addition to the regular wages earned on that holiday." *Id.* at 176 W. Va. 204, 342 S.E.2d 170 (internal footnote omitted). The record before the Court, and its finding as to the sufficiency of time off granted by Bluefield, demonstrates that it considered these days separately. The Bluefield firefighters were working 24-hour shifts beginning at 8 a.m. one calendar day and ending at 8 a.m. the next. (J.A. 778). The firefighters were recording their time on timesheets as 24 hours in a single day. (J.A. 1155, 1164-1218). The Bluefield firefighters worked the same schedule, and

[5] The text of the Holiday Statute states: "...if any member of a paid fire department is required to work during a legal holiday ..., 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[.]" W. Va. Code § 8-15-10a.

completed the same timesheets, as Petitioners. Therefore, the *Pullano* decision applies with equal force to Petitioners here, and Petitioners are not entitled to holiday benefits for hours worked and for a regular scheduled day off on the same legal holiday.

Second, the Court found that municipalities using the "time off" option for holidays can correct an error by granting additional time off – the time off option is not turned into a premium pay obligation. The firefighters involved in the *Pullano* appeal claimed that during the time period when Bluefield gave time off for holidays, they did not receive enough time off under the Holiday Statute. *Pullano*, 176 W. Va. at 205, 342 S.E.2d at 171 ("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."). The Court considered the claim and affirmed the circuit court resolution, approving additional time off for any firefighter who could demonstrate that insufficient time off was given. *Id.* at 176 W. Va. 205, 342 S.E.2d 171-2.[6] This holding disposes of Petitioners' claim that they may use litigation to convert a time off benefit properly chosen by the employer into a premium pay benefit payable as damages.[7] The *Pullano* Court held that where firefighters claim on appeal they have not been given sufficient time off under the Holiday Statute, their employer may correct any deficiency proven with time off. *Id.* at 176 W. Va. 205, 342 S.E.2d 171-2. Morgantown was providing Petitioners with time off under the Holiday Statute. The Final Order appoints a special commissioner to calculate the time off owed to, and time off received by, each Petitioner and direct Morgantown to permit the use of the

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[6]The *Pullano* opinion describes the relief as follows: "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.*

[7] As discussed in Section IV.C., *infra*, the holding is also consistent with this Court's jurisprudence related to the application of the WPCA to separate benefit or damages statutes outside the WPCA.

proper amount of time off. (J.A. 1276). The facts and the remedy are the same as those in *Pullano* and must be upheld.

Third, the Court held that when firefighters work a 24-hour shift from 8 a.m. one calendar day to 8 a.m. the next day, they are not entitled to twenty-four hours of holiday benefits for each legal holiday. *Pullano*, 176 W. Va. 205, 342 S.E.2d 171-72. The Bluefield firefighters were working 24-hour shifts beginning at 8 a.m. one calendar day and ending at 8 a.m. the next. (J.A. 778). The firefighters were recording their time on timesheets as twenty-four hours in a single day. (J.A. J.A. 1155, 1164-1218). Bluefield granted holiday benefits to firefighters who worked on a legal holiday for the hours they worked. ("[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."). *Pullano*, 176 W. Va. 205, 342 S.E.2d 172. Bluefield granted holiday benefits to firefighters who did not work on a holiday for sixteen hours – the "maximum number of hours a firefighter could work in a shift on a legal holiday under the firefighters' work schedule." *Id.* ("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."). The Court held that paying holiday benefits for these work hours was legal pursuant to W. Va. Code § 8-15-10a. *Id.* at 176 W. Va. 205-6, 342 S.E.2d 172. This decision is specific to the facts of the case and binding on future claims under the same facts. Firefighters who worked a 24-hour shift, part of it on a legal holiday, received holiday benefits for the hours worked during the legal holiday. Firefighters who were on their regular scheduled day off received sixteen hours of benefits (the most they could have received under the 8 a.m. to 8 a.m. schedule for working the legal holiday from 8 a.m. to 11:59 p.m.).

The facts of this case are the same: Petitioners work 24-hour shifts from 8 a.m. one day to 8 a.m. the next.[8] The firefighters in *Pullano* did not receive twenty-four hours of benefits, as Petitioners seek in this case. The decision in *Pullano* controls the outcome of this claim, and the Final Order correctly applied it. (J.A. 1277). Petitioners are entitled to receive holiday benefits for the hours they work during legal holidays. They are also entitled to receive holiday benefits on legal holidays when they do not work, equal to the maximum amount of hours they could have worked that day based on their schedule.

3. PETITIONERS MISCHARACTERIZE THE FACTUAL RECORD RELIED UPON IN *PULLANO.*

The Petitioners are not entitled to receive holiday benefits for hours worked during a legal holiday and receive holiday benefits for the rest of the day on the same legal holiday as though it were their day off. Nor are Petitioners entitled to twenty-four hours of benefits because that is the length of their shift, or because they claim their shift is treated as though it were a calendar day. The decision in *Pullano* contains no language suggesting that the holiday benefit is derived from anything other than the statutory text.

In a footnote, the *Pullano* Court explains the reason that the 16-hour benefit for days off is specifically authorized for an 8 a.m. to 8 a.m. work schedule: "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." *Id.* at 176 W. Va. 205-6, 342 S.E.2d 172, FN 12. After Morgantown filed with the Circuit Court a portion of the record before the *Pullano* Court, Petitioners raised the argument that

[8] Petitioners and the Bluefield firefighters also both record their shifts as 24 hours on a block set aside for a calendar day on their timesheets (J.A. 1155, 1164-1218) but, as noted *supra*, that fact is not relevant to interpretation of the Holiday Statute.

Footnote 12 referred not to Bluefield's work schedule – as the decision text indicates – but to Bluefield's overtime rate practices. (J.A. 1155).

Petitioners now rely on the overtime practices of Bluefield as the support for their theory. (Pet'rs Br. 17). Bluefield's firefighters, on appeal, characterized the practice this way: "Each '24 hour shift' is actually paid as two days of ten (10) hours and fourteen (14) hours pay respectively **for the alleged purposes of compliance with W. Va. Code 21-5C-3 relating to maximum hours of work.**" (J.A. 779) (emphasis added)[9]. In the same description, two pages later, Bluefield's firefighters describe the separate method for determining holiday benefits: "Firemen are paid the holiday rate of 1 ½ only for those hours of the 24 hour shift which actually fall on the holiday." (J.A. 781).

In an entire paragraph without a citation to authority, Petitioners argue that "it makes sense" that a Bluefield firefighter would be entitled to time off for hours worked during a holiday (or 16 hours for a day off when that is the maximum hours that could be worked on a shift) because the circuit court "found the holiday paid time off be split into two days and calculated as two days." (Pet'rs Br. 19). The claim misstates the opinion.

These pay practices were at issue only with respect to whether Bluefield was properly calculating the regular rate and overtime rate of its employees. Part III, *Pullano v. City of Bluefield*, 176 W. Va. at 207-10, 342 S.E.2d at 173-7. The allocation of overtime hours by Bluefield had no bearing on the Court's holding that firefighters receive holiday benefits for hours worked during a legal holiday during a 24-hour shift and that sixteen hours of benefits is sufficient for a regular scheduled day off under an 8 a.m. to 8 a.m. shift schedule.

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[9] This description comes from the Petition filed by the plaintiff employees with the Supreme Court of Appeals of West Virginia. (J.A. 779).

Review of the findings in the circuit court order challenged in *Pullano* can be instructive to disentangle Petitioners' claims about overtime pay from the *Pullano* Court's separate findings regarding (1) the benefit entitlement under the Holiday Statue, and (2) the calculation of regular and overtime rates. The circuit court considered a declaratory judgment action seeking determination of two issues: (1) entitlement to benefits pursuant to W. Va. Code §§ 8-14-2a, 8-15-10a, and 2-2-1; and (2) the plaintiffs' rights to overtime pay and the basis for payment of straight time and overtime rates of pay under W. Va. Code §§ 21-5C-1 *et seq.* (J.A. 771). On the first question, the circuit court found that Bluefield must compensate firefighters with time off for hours worked during holidays:

> (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.

(J.A. 774). This ruling was upheld by the Supreme Court in *Pullano*. 176 W. Va. at 205, 342 S.E.2d at 171-72.

The circuit court separately found that Bluefield was not correctly calculating and paying overtime rates, but that firefighters were not entitled to a different calculation:

> (h) The City erred in calculating the regular and overtime rates due to firemen over the statutory maximum work week, however the firemen shall not be awarded any additional compensation for scheduled hours of work which make up the average fifty-six hour work week over the City's six-week work schedule because the firemen had knowledge of the regularly scheduled hours and rates of pay at the time of their appointment. Firemen shall only receive compensation for unscheduled or voluntary overtime in accordance with the proper pay formula.

(J.A. 775). These were the issues considered in Part III of the Supreme Court's *Pullano*decision. *Id.* at 176 W. Va. 207-10; 342 S.E.2d 174-77. The Supreme Court likewise upheld this finding

because the pay schedules provided a designated hourly rate and annual rate that allowed for proper calculation of overtime rates. *Id.* at 176 W. Va. 208, 342 S.E.2d 174-75.[10]

Although both findings were upheld, the discussion of the issues was separate. The *Pullano* Court considered the Holiday Statute benefit entitlement in Part II of the opinion, concluding that the statutory requirement was met in these conditions: "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.* at 176 W. Va. 205, 342 S.E.2d 172. The *Pullano* Court considered the overtime schedule at Part III of the opinion, making the conclusion cited above.

The only portion of the *Pullano* opinion in which the impact of overtime entitlements and holiday entitlements are considered together is in reference to a third, and separate, ruling by the circuit court. The circuit court found that both W. Va. Code § 8-14-2a and 8-15-10a "set[] minimal standards for [police or firefighters, respectively] holiday pay and do[] not require the City to pay [police or firefighters] a premium rate over and above pay required by W. Va. Code 21-5C-3, setting wage and hour standards." (J.A. 774). The Supreme Court in *Pullano* reversed, in part, on this finding, holding that the statutes should be read together and accordingly a police officer or firefighter who worked a legal holiday and was entitled to overtime pay under W. Va. Code § 21-

[10] The Court described its reasoning as follows: "When any of the listed hourly rates are multiplied by forty, representing the number of regular hours worked each week, and that product is added to one and one-half times the hourly rate multiplied by sixteen, representing the number of overtime hours worked each week, the total of these two figures annualized equals the designated annual salary. Because there is an amount set for the regular rate of pay that fully compensates each firefighter for his regular and overtime pay, the principle stated in Syllabus Point 3 of Local 313 is not applicable." *Id.*

5C-3 should receive double the regular pay rate for the hours worked when the city was providing holiday compensation with a premium pay rate. *Pullano*, 176 W. Va. 172-73, 342 S.E.2d 206-7.[11]

Petitioners couple the erroneous interpretation of the *Pullano* decision with erroneous arguments regarding a circuit court order involving the Holiday Statute. (Pet'rs Br. 18-19). While Petitioners admit that *Pullano* is the applicable precedent[12], Petitioners rely on an order of the Berkeley County Circuit Court in support of their interpretation of *Pullano*. (J.A. 1026). The cited order did not appear to consider that *Pullano* was based on 24-hour shifts, nor to address the Attorney General Opinion. In the order, prepared by Petitioners' counsel, the circuit court found that Martinsburg, which granted firefighters premium pay for holidays rather than time off, must pay firefighters premium pay for twenty-four hours for each holiday, regardless of the hours they worked. (Pet'rs Br. 18). In its denial of Martinsburg's Motion to Alter or Amend the order, the circuit court held that, "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." (J.A. 259). Martinsburg appealed the ruling, seeking reversal because it is inconsistent with the holding in *Pullano v. City of Bluefield*, but the appeal was dismissed as interlocutory, so no substantive ruling from this Court on W. Va. Code § 8-15-10a was issued in the case. (J.A. 701). While the factual development in *Pullano* may not have been in evidence in

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[11] While this holding is also organized within Part II of the Supreme Court's opinion, it is a separate discussion following the conclusion relating to benefit entitlements under the Holiday Statute.

[12] *See* J.A. 1026, where Petitioners argued at the summary judgment phase: "The 1987 (*sic*) *Pullano*Court found the City of Bluefield was right to pay its firefighters for either 16 hours of working a holiday or 8 hours for working a holiday. But there was never any factual development in Pullano that the City of Bluefield treated sick days, vacation days, assignment days, military time, bereavement days, or unscheduled overtime, as one day." This "hours worked" determination is necessary to determine the declaratory judgment question regarding obligations under the Holiday Statute. Even if it were not central to the holding, this correct statement of law in the *Pullano* opinion remains binding on future decisions. *W. Virginia Dept. of Transp., Div. of Highways v. Parkersburg Inn, Inc.*, 222 W. Va. 688, 694-5, 671 S.E.2d 693, 694-700 (2008). This is also the type of finding that formulates future policy decisions of public agencies, and on which they must be entitled to rely. *See Camreta v. Greene*, 563 U.S. 692, 704–06 (2011).

the Berkeley County Circuit Court, the record demonstrates that it was before the Supreme Court in *Pullano*. (J.A. 776-81).

Petitioners' argument is that, by writing in Footnote 12 of its opinion that municipalities have flexibility in granting holiday benefits because they "have different work schedules," the *Pullano* Court either allowed employees to create a claim to greater benefits because of how their employer characterized a work day or allowed employers to alter benefits by how they characterized a work day. *Pullano*, 176 W. Va. 206, 342 S.E.2d 172 FN12 ("In particular, the sixteen-hour figure utilized by the city was based on its work schedule. Other municipalities obviously have different work schedules."). Reviewing the record before the *Pullano*Court, however, it is impossible to construe "work schedule" to have anything other than its ordinary meaning: the hours worked during a day. The petition to the *Pullano* Court described the work schedule and benefits for firefighters this way:

> Since January 1, 1980, the City has paid firemen who work on a holiday one and one-half (1 ½) times their regular rate of pay for each hour worked on a holiday. Firemen who do not work on a holiday are paid one and one-half (1 ½) times the regular rate of pay for sixteen (16) hours, which is the number of regular hours calculated in a 24 hour shift.
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> If an individual member was still in the 'straight time' portion of any typical two weeks, he would receive 1 ½ times his regular rate for that time worked on a holiday. If a member was already being compensated for overtime when the holiday occurred, no additional compensation is paid. If the member is not scheduled to work when a holiday falls, he is paid sixteen (16) hours of pay at 1 ½ times his regular rate, which is the maximum premium rate he would receive if he began a work shift on 8:00 a.m. of a declared holiday.

(J.A. 781). The *Pullano* Court specifically described this as the relevant "work schedule" in the paragraph before Footnote 12 in its opinion. *Id.*[13] The Supreme Court was presented with a work

[13] The text of the discussion was this: 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

schedule spanning twenty-four hours from 8 a.m. one calendar day to 8 a.m. the next. (J.A. 781). The Supreme Court issued its decision on benefit entitlements under the Holiday Statute based on that work schedule, and the "hours worked during" the legal holiday, as *W. Va. Code* § 8-15-10a puts it. Petitioners argue that the employer's characterization of a 24-hour shift would have changed the outcome (or that it could have, despite the plain language of the Holiday Statute).

Yet, the *Pullano* Court had before it a schedule in which the employer both treated a shift as a 24-hour day and also – separately and solely for overtime compensation purposes – made payroll calculations based on 14-hour and 10-hour segments of that day. The discussion of benefit entitlements under the Holiday Statute, including the footnote forming the basis of Petitioners' argument here, did not reference either of those characterizations. The decision did not hold that Bluefield must pay firefighters working from midnight to 8 a.m. ten hours instead of eight hours because of how it "treated" their shift for payroll purposes. The firefighters were entitled to benefits for "hours worked during" the legal holiday, not for the length of their shift. *Id.*; *see* 57 Op. Atty. Gen 71 at *3. The "work schedule" dictated those hours worked during the legal holiday. A different work schedule with different start times would alter the hours worked during the legal holiday – and thus the amount of benefits under the Holiday Statute. Therefore, when the *Pullano* Court held that sixteen 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 work schedule Morgantown's firefighters are working. 176 W. Va. 198, 205, 342 S.E.2d 164, 172.

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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.*

Petitioners admit that they are seeking a different benefit than the *Pullano* Court allowed, claiming "every firefighter employed by the city is either working or scheduled off on each legal holiday. Accordingly, West Virginia law provides that, at a minimum, the City of Morgantown must compensate each of the plaintiffs with either twenty-four hours of paid time off or thirty-six hours of pay[.]" (Pet'rs Br. 16). However, the *Pullano* decision directly contradicts this theory, as does the Attorney General Opinion, and the text of the Holiday Statute itself.

4. TIME OFF IS NOT SUBJECT TO DOUBLE-TIME PAY REQUIREMENTS.

Petitioners conflate a discrete portion of the *Pullano* decision – finding that when municipalities pay premium time for holidays and an employee works overtime the employee should get the benefit of both required overtime pay and required holiday premium pay so the employee is paid double time – with the portion of the decision that controls this case: finding that holiday benefits are owed for time worked during holidays, or separately for time that would have been worked on days off; that sixteen hours is sufficient time off for regular scheduled days off under the same schedule Petitioners work; and that any deficiency in time off granted can be cured by providing additional time off.

This is a recurring issue, similar to Petitioners' erroneous reliance on the overtime practices of Bluefield (paying firefighters in a 14-hour increment and a 10-hour increment, each with separate amounts of overtime, in an attempt to comply with W. Va. Code § 21-5C-1 *et seq.*), discussed *supra*. *Pullano* holds that municipalities may choose to grant time off instead of premium pay. Neither the *Pullano* decision nor the text of the Holiday Statute contains any requirement to pay employees for time off at any rate above their regular rate. Syllabus Point 6, and the related discussion, in*Pullano* relative to double-time pay establish that an employee receiving premium pay for a holiday while also entitled to overtime premium pay under *W. Va.*

Code Chapter 21 Article 5C should receive the benefit of both premium pay provisions. *Id.* at 176 W. Va. 207-210, 342 S.E.2d 173-177. There is no corresponding addition to time off for holidays when that method is used, because an employee who works overtime on the holiday has already received the premium overtime pay benefit and the additional time off benefit.

5. PETITIONERS WOULD BE ENTITLED TO TWENTY-FOUR HOURS OF TIME OFF UNDER THE HOLIDAY STATUTE IF THEY WORKED FROM 12 A.M. TO 12 A.M.

Petitioners assert that they can vote to work 24-hour shifts beginning at 12 a.m. pursuant to W. Va. Code § 8-15-10, and that in that circumstance they would be entitled to twenty-four hours of benefits under the Holiday Statute. (Pet'rs Br. 19). If Petitioners were working a 24-hour shift that corresponded to a calendar day, they would be entitled to twenty-four hours of benefits under the Holiday Statute because they would work twenty-four hours during the legal holiday. Under the statutory text, the Attorney General Opinion, and this Court's decision in *Pullano*, that circumstance – working twenty-four hours during the calendar day that is a legal holiday – would entitle employees to twenty-four hours of benefits.

It is less clear why Petitioners believe this claim supports their position in this case. Petitioners believe they have the capacity to choose the time and length of their shift to entitle them to twenty-four hours of benefits, but they have not done so. The Holiday Statute provides benefits for "hours worked during" a legal holiday. Petitioners argue for different legislation, granting them time off for a shift length irrespective of the hours worked during a legal holiday. Granting that benefit is the province of the legislature rather than this Court. *See Hanover Resources, LLC v. LML Properties, LLC*, 241 W. Va. 767, 777, 828 S.E.2d 829, 839 (2019) (courts will not "legislate from the bench.").

The legislature is presumed to know the law and the pertinent judgments of the courts. Syl. Pt. 5, *Kessel v. Monongalia County General Hosp. Co.*, 220 W. Va. 602, 648 S.E.2d 366 (2007). Yet, since 1977 the legislature has not changed the law to alter the outcome of the Attorney General Opinion, or, later, this Court's decision in *Pullano v. City of Bluefield*. Petitioners' argument is for new legislation, not for a court's interpretation of the law – that is already settled.

6. PAY PRACTICES BY OTHER MUNICIPALITIES DO NOT CHANGE THE HOLIDAY STATUTE OR ITS REQUIREMENTS.

Without any legal argument to overturn *Pullano* or amend the Holiday Statute, Petitioners conclude by relying on pay practices or settlements of other entities in support of their attempt to reverse the Circuit Court's Final Order. Petitioners claim that Morgantown must grant holiday benefits in the same manner as they allege occurs in Bluefield or Martinsburg, rather than the benefits required by law. (Pet'rs Br. 20). Petitioners fail to address the impact of the Holiday Statute text providing time off for "hours worked during" a legal holiday, the Attorney General Opinion directing that time off is owed for the portion of a 24-hour shift worked during a legal holiday (and not for the full 24-hour shift), or the Court's confirmation of that direction in *Pullano*. Instead, they appear to attempt to bind Morgantown by settlements or pay practices of third parties.

This Court recognized in *Pullano* that the Holiday Statute offers municipalities flexibility to provide varying holiday benefits, dependent in part on their work schedules. *Pullano v. City of Bluefield*, 176 W. Va. at 206, 342 S.E.2d 172 FN12. And there is no doubt that employers may provide additional benefits beyond statutory minimums. Yet, parties to litigation have many reasons for reaching negotiated settlements, just as employers have many reasons for providing the various benefits offered to their employees. A settlement agreement is not binding on third parties. *Horkulic v. Galloway*, 222 W. Va. 450, 665 S.E.2d 284 (2008). Petitioners raise no argument that Morgantown participated in or agreed to any of the pay practices or settlement

agreements they recite in their Brief, so Petitioners' claims have no impact on the outcome of this case.

The Holiday Statute remains unchanged since 1976, the Attorney General's guidance remains unchanged since 1977, and this Court's precedent remains unchanged since 1986. The Circuit Court's Final Order faithfully follows each of these authoritative, or binding, sources, and it should be upheld.

C. THE CIRCUIT COURT CORRECTLY RULED THAT "PLAINTIFFS' 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."

Petitioners would have this Court believe that Morgantown wrongly withheld wages due and payable to its employees subjecting Morgantown to a proper WPCA claim. However, as the Circuit Court properly pointed out during the continued hearing on the parties' cross-motions for summary judgment held on September 16, 2021, and then memorialized in its February 9, 2022, Final Order, the case below is about time off afforded to the Petitioners for holidays under the Holiday Statute and how much time off to which the Petitioners are entitled thereunder. It is not a case about wage non-payment—whether it be premium pay under the Holiday Statute, the payment of holiday time off when used, or the payment of holiday time off when a firefighter separated from employment with Morgantown. Indeed, it was uncontested in the case below that Morgantown had always paid, in full, the holiday time off when it was due, calculable, and payable.

Nonetheless, as further discussed below, Petitioners continue to present an argument that falls short of establishing that their claim is subject to the WPCA and that there has been any violation of that Act. Petitioners seek only to establish that the holiday time off is a fringe benefit,

and therefore a wage (Pet'rs Br. 20-25), as if this alone renders the WPCA applicable to their claim that they were entitled to *more* time off under the Holiday Statute than what they received and for which they were paid.

1. TIME OFF FOR HOLIDAYS IS A "FRINGE BENEFIT" UNDER THE WPCA WHEN IT IS DUE, CALCULABLE, AND PAYABLE, AND, IN SUCH INSTANCES, MORGANTOWN HAS PAID ITS EMPLOYEES FOR THAT TIME OFF, TIMELY AND IN FULL.

Two sections of the WPCA are relevant for purposes of this discussion. West Virginia Code § 21-5-3 ("Section 3") requires that an employer "**settle with its employees at least twice every month** and with no more than 19 days between settlements, unless otherwise provided by special agreement, and **pay them the wages due, . . . for their work or services.**" W. Va. Code § 21-5-3 (emphasis added). "Wages" is defined under the Act as:

> 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. . . . 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.

W. Va. Code § 21-5-1(c) (emphasis added). Next, West Virginia Code § 21-5-4 ("Section 4") provides, in pertinent part, that:

> . . . (b) **Whenever a person, firm or corporation discharges an employee, or whenever an employee quits or resigns from employment, the person, firm or corporation shall pay the employee's wages due for work that the employee performed prior to the separation of employment on or before the next regular payday on which the wages would otherwise be due and payable**: *Provided,* That fringe benefits, as defined in section one of this article, that are provided an employee pursuant to an agreement between the employee and employer and that are due, but pursuant to the terms of the agreement, are to be paid at a future date or upon additional conditions which are ascertainable are not subject to this subsection and are not payable on or before the next regular payday, but shall be paid according to the terms of the agreement.

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

As expressly argued by Morgantown during the hearing on Petitioners' Motion to Alter or Amend the Court's Judgment Pursuant to W. Va. R. Civ. P. 59(e) ("Motion to Alter"), there was no evidence in the case below that Morgantown did not properly and timely pay out the holiday time off to the firefighters at the relevant times—either in the relevant pay period in which any such time off was used pursuant to Section 3 of the Act, or at separation pursuant to Section 4. (J.A. 1543-45.) 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, it followed that acknowledgment by pointing out on the record that, at all such times, the leave time has been properly, fully, and timely paid and that there has been no evidence to the contrary. (J.A. 1511: 1-5.) Petitioners did not contest this or point to any evidence to the contrary, and the Court incorporated this finding into its Final Order. (J.A. 1266.)

What is more, the evidence highlighted by Petitioners serves only to confirm that Morgantown at all times met its obligations under the Act. For example, in their Motion to Alter, Petitioners cited to testimony from the deposition of City of Morgantown Payroll Manager[14] Dave Schultz to support their assertions that:

> . . .the firefighters **receive money in their paycheck based upon an amount of time off provided to them by the City in accordance with the Holiday Pay [sic] statute**. The amount of money for the holiday pay [sic] time off is calculated based upon the work schedule of the firefighter and **when the firefighter takes the holiday pay [sic] time.** It is not paid until the holiday leave time is taken by the firefighter. Depending on when it is, it could even be paid as double time if the firefighter is already in an overtime condition.

(J.A. 1109.) (emphasis added.) Petitioners cited to similar testimony by Mr. Schultz in their Appeal Brief (Pet'rs Br. 22-23) and further state that:

> Here, the City **consistently calculated and paid holiday leave time to firefighters** at a rate consistent with each firefighter's straight hourly rate. (J.A. 1408, 1121). **It paid those funds in the paycheck** after the bank of holiday leave time was

[14] Petitioners incorrectly identified Mr. Schultz as the Finance Director.

established for the year and the relevant holiday corresponding with the bank of hours passed.

(Pet'rs Br. 24) (emphasis added). Thus, Petitioners continue to admit that Morgantown pays the time off **when they use it**.

Further, Petitioners plainly admit that accrued, unused holiday time off has been paid by Morgantown when firefighters separate from employment. They gave the example of Lieutenant Pickenpaugh, who, upon retirement, received a payout of his accrued, unused holiday leave time in the amount of $3,005.49 (i.e. the entire 150.5 hours of accrued, unused holiday time off in his bank, at $19.97 per hour). (J.A. 1111.) Accordingly, there is no cognizable violation of Sections 3 or 4 of the Act—and Petitioners plainly admitted the facts that prove as much in the case below.

2. FOLLOWING THEIR ARGUMENT THAT THE WPCA'S DEFINITION OF "FRINGE BENEFITS" IS SATISFIED, PETITIONERS MAKE AN UNTENABLE LEAP IN LOGIC THAT THE ACT AUTOMATICALLY APPLIES AND PETITIONERS ARE ENTITLED TO ITS REMEDIES.

Petitioners' argument falls short at Subsection IV.e. of their Appeal Brief, where they summarily conclude, "Because the WPCA applies to these firefighters, so do its remedies." (Pet'rs Br. 25.) The crux of the case below concerned the Petitioners' rights and Morgantown's obligations under the Holiday Statute—namely, what is "equal time off" for hours worked during holidays under the Holiday Statute. Therein lies the problem for Petitioners with regard to application of the WPCA to their case. Even accepting the assertion that time off under the Holiday Statute meets the definition of "fringe benefits" under the Act, the WPCA does not govern *entitlement* to such benefits—that is, how much time off should the firefighters be afforded under the Holiday Statute—but rather, governs only the proper and timely payment of those fringe benefits as they come due (here, when the accrued holiday time off either is used or upon separation from employment, as discussed above). *See Grim v. Eastern Electric, LLC*, 234 W. Va. 557, 571,

767 S.E.d2d 267, 281 (2014); *Barton v. Creasey Co. of Clarksburg,* 900 F.2d 249, *2 (4th Cir.1990) (unpublished), *cert. denied,* 498 U.S. 849, 111 S. Ct. 137, 112 L.Ed.2d 104 (1990); *see also Adkins v. Am. Mine Research, Inc.,* 234 W. Va. 328, 765 S.E.2d 217 (2014); *Meadows v. Wal–Mart Stores, Inc.,* 207 W. Va. 203, 530 S.E.2d 676 (1999). Petitioners do not demonstrate or discuss how or why the WPCA applies to a dispute about entitlement to holiday time off under the Holiday Statute. They simply conclude that it does since holiday time off arguably meets the definition of "fringe benefits" under the Act.

3. AUTHORITY FROM THIS COURT SHOULD PROHIBIT THE "BOOTSTRAPPING" OF A WPCA CLAIM TO PETITIONERS' HOLIDAY STATUTE CLAIM.

Where an agreed-upon wage or fringe benefit actually has been paid by the employer, but the employee claims the agreed-upon wage or fringe benefit is in violation of some other law, "bootstrapping" a WPCA claim to the primary claim is improper. This Court has made clear that the WPCA controls the manner in which employees in West Virginia are paid wages and it imposes on employers an obligation to pay employees' wages in a timely manner. *Grim*, 234 W. Va. at 571, 767 S.E.d2d at 281. The WPCA does not, however, create an entitlement or right to a certain wage or fringe benefit where the agreed-upon wages or fringe benefits are alleged to be in violation of some other law. *Id.*

In *Grim*, former workers on a public works project brought an action against their former employer to recover statutory wages and liquidated damages under the Prevailing Wage Act ("PWA") and the WPCA. *Id.* at 561, 271. The former workers were paid timely by the former employer under the terms of their employment agreements, but those wages were not prevailing wages under the PWA, W. Va. Code §§ 21-5A-1 *et seq*. *Id.* at 562, 272. The parties submitted cross-motions for summary judgment, and the circuit court granted the former employer's motion

in its entirety, including a ruling that the former employees had no cause of action under the WPCA. *Id.* at 563, 273. This Court affirmed the dismissal of the WPCA claim, providing the following reasoning for the same:

> The WPCA explicitly provides a private cause of action and statutory remedy when the employer breaches its obligation to pay earned wages. *Id.* **Notably, the WPCA "*does not establish a particular rate of pay,* instead, it controls the manner in which employees in West Virginia are paid wages and it imposes on employers an obligation to pay employees' wages in a timely manner."** *Gregory v. Forest River, Inc.,* 369 Fed. Appx. 464, 465 (4th Cir. 2010) (internal quotations and citations omitted) (unpublished decision) (emphasis added). **The *amount* of wages payable to an employee pursuant to the provisions of the WPCA is determined exclusively by the terms of the employment agreement.** *See* Syl. Pt. 5, *Adkins v. Am. Mine Research, Inc.,* 234 W. Va. 328, 765 S.E.2d 217 (2014) ("The determination as to whether 'wages,' as defined in West Virginia Code § 21–5–1(c) (2013 Repl. Vol.), are payable pursuant to the requirements of West Virginia Code § 21–5–1 *et seq.* (2013 Repl. Vol.) is governed by the terms of the employment agreement, whether written or in the form of a consistently applied unwritten policy."); *Meadows v. Wal–Mart Stores, Inc.,* 207 W. Va. 203, 530 S.E.2d 676 (1999) (finding employment agreement between parties governs in determining whether specific fringe benefits/wages are earned and thus due under WPCA); *Weldon v. Kraft, Inc.,* 896 F.2d 793, 801 (3d Cir. 1990) ("The contract between the parties governs in determining whether specific wages are earned.").
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> **In this case, petitioners attempt to bootstrap a WPCA claim to the statutory remedies provided by the PWA by obtusely contending they were not paid "wages due."** However, as made clear above, the WPCA merely provides a statutory mechanism to recover "compensation wrongly *withheld.*" Syl., *Mullins,* 171 W.Va. 92, 297 S.E.2d 866. **Petitioners 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; therefore, their remedy for this violation lies within the PWA. The WPCA creates no right to prevailing wages.** *See, e.g., Barton v. Creasey Co. of Clarksburg,* 900 F.2d 249, *2 (4th Cir.1990) (unpublished), *cert. denied,* 498 U.S. 849, 111 S.Ct. 137, 112 L.Ed.2d 104 (1990) (recognizing WPCA provides procedures and remedies to facilitate collection of wages but it does not "grant any entitlements to pay or wages[.]").
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> Therefore, we find that the circuit court properly dismissed petitioners' WPCA claims.

Id. at 571-72, 281-82 (italicized emphasis in original; bold emphasis added).

This is precisely the way that Petitioners sought in the case below to improperly bootstrap a WPCA cause of action to their Holiday Statute claim, by obtusely contending that they have not been paid their wages due, just like the plaintiffs did in *Grim*. The gravamen of Petitioners' action below was that they were not afforded *enough* time off under the Holiday Statute. However, by their view, because the time off ultimately can be and has been monetized when a firefighter either uses the time off or separates from employment, Morgantown automatically has not paid Petitioners their "wages due" (i.e., the additional time off in dispute under the Holiday Statute that Petitioners assert should have been accrued and available to them). Therefore, according to Petitioners' tenuous extrapolation, Morgantown is in violation of the Act. This Court's analysis and holding in *Grim* expressly confirms that this is not how the WPCA is intended to apply.

4. APPLICATION OF THE WPCA TO PETITIONERS' HOLIDAY STATUTE CLAIM WOULD OPEN THE FLOODGATES OF LITIGATION TO CLAIMS UNRELATED TO TIMELY WAGE PAYMENT.

To carry Petitioners' objectives to their untenable end, consider, hypothetically, a plaintiff making a claim for gender discrimination under the West Virginia Human Rights Act on a theory of failure to promote. The hypothetical plaintiff's claim involves allegations that, had she not been discriminated against, she would have received promotions and resulting increases in her wages. The plaintiff's employer properly and timely paid her *agreed upon* wages at each payday. However, by plaintiff's view, she would have been paid more at each such payday had she not been discriminated against. Now consider if this hypothetical plaintiff attempted to bootstrap a WPCA claim on the premise that, because her employer did not pay her enough wages at each and every payday due to its failure to promote her, that the employer had automatically violated the WPCA at each and every payday as a result. Allowing such claims would create "liability in an

indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 444 (1931) (Cardozo, C.J.)

The floodgates would open to WPCA claims appearing automatically in tandem with any and all other claims involving a dispute over an employment right or benefit that in some way or at some time could be monetized. This is why the mere satisfaction of the definition of "wages" under the WPCA is not enough to create a claim under the Act. The Act would have a much wider reach than either that which is expressly provided for in its statutory text or as interpreted in our case law. This is an untenable result and would be gravely unfair to employers in West Virginia, subjecting them to the WPCA's liquidated damages, interest, and attorneys' fees and costs provisions, and five-year statute of limitations, in situations where they complied with the Act.

5. THE CASES CITED BY PETITIONERS FURTHER UNDERSCORE THAT THE WPCA APPLIES TO THE NON-PAYMENT OF WAGES OR BENEFITS BY EMPLOYERS AND NOT TO DISPUTES ABOUT ENTITLEMENT TO THE WAGES OR BENEFITS.

Cases cited by Petitioners in the proceedings below, to support their proposition that holiday time off is a fringe benefit and therefore a wage, only underscore that the WPCA applies to claims regarding the actual non-payment or withholding of agreed upon wages and fringe benefits, and not the entitlement to them and in what amount under the applicable law or agreement governing the same. *See, e.g., Meadows*, 207 W.Va. 203, 530 S.E.2d 676 (dispute concerned various employers' non-payment of accrued, unused sick and vacation leave upon various employees' separations, not the entitlement to such leave in the first place, how it accrued, or in what amount; and, while the WPCA applied to the dispute, the Court found that "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)."); *Gress v. Petersburg Foods, LLC*, 215 W. Va. 32, 592

S.E.2d 811 (2003) (dispute concerned employer's non-payment of partial weeks of unused vacation time at separation; not the entitlement to such leave or in what amount).

Furthermore, Petitioners newly cite to *Kucera v. City of Wheeling*, 153 W. Va. 531, 170 S.E.2d 217 (1969), but they misstate its support for their position. Specifically, Petitioners state that:

> this Appeals Court **found that municipal firefighters are covered by the WPCA** when it stated at Syl. Pt. 2: "[a] municipal fireman, by reason of language of subsections (e) and (f) of Code, 1931, 21—5C—1, as amended, comes within the protection afforded by Code, 1931, 21—5C—3, as amended, and is entitled to time and a half for hours worked in excess of the hours specified therein."

(Pet'rs Br. 26.) (emphasis added.)

However, a closer look at *Kucera* reveals that, not only is there no such finding, but there is no discussion whatsoever of the WPCA—i.e. Article 5, Chapter 21 of the West Virginia Code. Rather, *Kucera* concerns an entirely different portion of the Code—Article 5C, Chapter 21—which is the West Virginia Minimum Wage and Maximum Hours Standards for Employers statute. The *Kucera* Court found, at Syllabus Point 3, that the City of Wheeling is not an agency of the state within the meaning of W. Va. Code § 21-5C-1(f) and its regularly employed fire fighters are not, therefore, excluded from the coverage afforded under the provisions of the state minimum wage and maximum hours law.[15] Petitioners have improperly extrapolated from this holding that the WPCA applies to their Holiday Statute claim. *Kucera* is legally and factually distinguishable and should have no bearing on the issues in this case.

6. THE HOLIDAY STATUTE IS ENFORCEABLE WITHOUT APPLICATION OF THE WPCA, AND IT PROVIDES A REMEDY TO PETITIONERS.

[15] As the Court subsequently held in *Adkins v. City of Huntington*, municipalities are exempt from the minimum wage and maximum hour provision of Chapter 21, Article 5C when 80% of their employees are covered by federal law relating to minimum wages and maximum hours. 191 W. Va. 317, 445 S.E.2d 500 (1994).

Even if this Court were to accept Petitioners' view of *Grim*—that its holding should apply only in situations where there would be a double recovery—then *Grim* nonetheless applies in this case. Petitioners incorrectly state that the Holiday Statute "is a single statute with no mechanism of enforcement. It must rely on the WPCA provisions for recovery if Holiday Pay [sic] is provided incompletely." (Pet'rs Br. 27.) This is incorrect because it ignores the equitable remedy available under the Holiday Statute. In *Pullano*, this Court held that Bluefield's practice of granting time off rather than additional pay for holidays complied with W. Va. Code § 8-15-10a. *Pullano,* 176 W. Va. at 205, 342 S.E.2d at 171. The *Pullano* Court further held that:

> 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. (emphasis added).

Petitioners further attempt to distinguish *Grim* when they state that "the Morgantown firefighters have not relied on two separate Acts that would provide them with a double recovery as the Eastern Electric employees did." (Pet'rs Br. 27.) However, the Morgantown firefighters are doing precisely what the Eastern Electric employees did. As demonstrated above, they are relying on two separate Acts, seeking either a double recovery or to cherry-pick their remedy. Either way, *Grim* makes clear that this is not permissible. *Grim*, 571-72, 281-82 ("Rather, the gravamen of petitioners' complaint is that the agreed-upon wages were in violation of the PWA; therefore, their remedy for this violation lies within the PWA.")

For all of the foregoing reasons, this Court should affirm the Circuit Court's sound ruling, as set forth in its Final Order, that "Plaintiffs' 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 summary judgment in its favor dismissing Count Two of the Plaintiffs' Complaint." (J.A. 1269.)

D. THE CIRCUIT COURT DID NOT ERR WHEN FINDING THAT LACHES PREVENTS PUBLIC EMPLOYEES FROM DELAYING THEIR CLAIMS FOR PAST BENEFITS AND ATTEMPTING TO DIVERT THEM FROM GENERAL FUNDS FOR THE CURRENT FISCAL YEAR.

Petitioners' present arguments continue to mischaracterize the Holiday Statute in an attempt to afford them a monetary award for their claims, suggesting that the current annual budget of the City of Morgantown should be diverted to pay several years of damages and compound interest on claims that Petitioners admit that they delayed filing. (Pet'rs Br. 30, *citing* J.A. 008 at ¶¶ 24-25). Likewise, Petitioners have continued to try to insert terms into § 8-15-10a in an attempt to recharacterize the equitable relief provided by the Holiday Statute as a monetary damage. (*Id.*, citing J.A. 007). However, Petitioners cannot deny that they brought their claims pursuant to § 8-15-10a. Based upon the Holiday Statute itself, Petitioners claims can, and must, be treated as the request for equitable relief that they are.

During its September 16, 2021, summary judgment hearing, the lower court directly addressed this issue. When counsel for the Petitioners attempted to argue that § 8-15-10a is the "holiday pay statute," the Court correctly identified the inaccuracy in this characterization:

THE COURT:	No. It doesn't say paid time off. It says allowed equal time off. Look at the statute, Mr. Miller.
COUNSEL:	Right. But that would mean paid time off.
THE COURT:	No, it doesn't. It means allowed equal time off. It means what it says. It doesn't say paid. It says equal time off or – depending on which way the City wants to do it – one and a half times his regular pay.

(J.A. 1495-96, at 31:18-32:2).

As the Circuit Court correctly identified, § 8-15-10a provides for an equitable remedy, and it correctly concluded that the doctrine of laches is applicable to the Petitioners' claims. This holding was consistent with *Pullano*, as well.

Furthermore, the Circuit Court rightfully found that Petitioners had been dilatory in bringing their claims, making laches an appropriate defense in this matter. As long recognized by our courts, "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).

In circumstances such as those presented in the case at hand, as well as in *Pullano*, retroactive damages are not chargeable against the public budget that is already obligated to other city services. Laches is particularly an important consideration when public funds are at issue. As this Court has previously held: "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).

Underscoring the strong public policy concerns at issue, this Court further explained 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).

If public employees were permitted to pursue a retroactive claim, their delay could improperly cause any expense – which would have been addressed in each past year's budget – to be addressed either through reduction in other services, or through increased taxes or fees to taxpayers in the current budget. For these reasons, the Final Order reasonably found 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." (J.A. 1276 at ¶ 81).

In addition to the Petitioners' failure to actively pursue their claims, however, the lower court also based its decisions on the strong public policy that underlies § 8-15-10a. Based on their prior briefings, oral arguments, and current arguments on appeal, the remedy Petitioners seek, for both current and former employees, is a monetary windfall at the taxpayers' expense. This goes against the strong public policy that underlies § 8-15-10a's provisions as has been emphasized by the Attorney General[16] and this Honorable Court.[17] Because the Holiday Statute unambiguously provides for the equitable relief of equal time off, Petitioners' claims for monetary damages were rightfully rejected. To find otherwise would require this Court to disregard the plain language of W. Va. Code § 8-15-10a.

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[16] "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." 57 W. Va. Op. Att'y Gen. 171, at *6

[17] "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." *Maynard v. Board of Educ. of Wayne County* 178 W. Va. 53, 62, 357 S.E.2d 246, 256 (1987).

E. LACHES PRECLUDES ANY MONETARY RECOVERY TO PETITIONERS AND THE LIMITATIONS PERIOD FOR ANY ACCRUAL OF BENEFITS IS TWO YEARS.

As demonstrated in the foregoing, Petitioners' claims are not subject to WPCA. Petitioners' insistence to the contrary is a clear attempt to twist the Act's applicability in an effort to seek an extended five-year statute of limitations, and to further attempt to seek unwarranted premium wages and damages payable by Morgantown and, by correlation, the taxpayers of the City. As detailed above, however, Petitioners' only actual dispute centers on whether the City has failed to properly calculate additional leave hours. While Petitioners repeatedly have attempted to implicate the WPCA, the undisputed facts and the nature of the claims themselves further demonstrate the fallacy in these assertions.

Should the Court find that Petitioners have not failed to mitigate their damages or that laches is not otherwise an applicable defense, Petitioners' only other cognizable claim is their allegation that the City has negligently failed to comply with § 8-15-10a (under an amended theory of liability regarding allotment of "equal time off," and not regarding failure to pay holiday pay). The Code itself is silent as to creating any statute of limitations. As such, the claims brought pursuant to the Code could only be subject to the two-year limitations period provided in W. Va. Code § 55-2-12 and its application to negligence claims. *See Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W. Va. 578, 583, 567 S.E.2d 294, 299 (2002). Similarly, W. Va. Code § 29-12A-6 further provides support for finding that a two-year limitation period is appropriate.[18]

[18] The Governmental Tort Claims and Insurance Reform Act provides, in relevant part: "As provided by the Code: "An action against a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, except as provided in subsection (b) of this section, shall be brought within two years after the cause of action arose or after the injury, death or loss was discovered or reasonably should have been discovered, whichever last occurs or within any applicable shorter period of time for bringing the action provided by this code. This section applies to actions brought against political subdivisions by all persons, governmental entities, and the state."

Respondent maintains that, based upon the holiday leave policy of Morgantown, as a matter of law, Petitioners' claims must be treated as the request for equitable relief that they are. Because they have been shown to be dilatory in bringing those claims, relief must be limited to the time of the filing of their Complaint forward. In the alternative, should the doctrine of laches not apply, any damages that Plaintiffs would be entitled to are limited to a two-year statute of limitations for the reasons stated herein and within the Final Order.

V. CONCLUSION

All Morgantown firefighters were paid for every hour they worked on every given holiday. In addition, each employee was historically granted a bank of leave time equivalent to 12 hours per legal holiday in a special bank of leave time each year to account for § 8-15-10a's requirements.

The questions presented within Petitioners' appeal have already been answered by the Attorney General and by this Court. In accordance with this well-settled law, Petitioners are not entitled to a premium rate of pay, and they are not entitled to be compensated for a minimum of twenty-four hours of compensatory time for holidays in which they did not work twenty-four hours. They are only entitled to time off for hours that they actually worked, or for their regular days off.

The Circuit Court's holdings are consistent with the settled-law upon which municipalities have relied for nearly four decades. The law on these points is established, and the outcome in this case is dictated by this Court's holding in *Pullano*, which reached the same conclusion as the Attorney General and is consistent with the text of the Holiday Statute.

In short, the W. Va. Code § 8-15-10a grants time off for hours that were worked, or would have been worked, during legal holidays. It does not grant those benefits for the length of a shift. Further, an employer who fails to give sufficient time off can correct the error by giving additional

time off – as nothing in the Holiday Statute directs that time off be paid instead. Because the Circuit Court properly applied this established law, Morgantown asks this Court to uphold the Final Order.

RESPECTFULLY SUBMITTED,

THE CITY OF MORGANTOWN,
BY COUNSEL

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CERTIFICATE OF SERVICE

I, Ryan P. Simonton, do hereby certify that on the 25th day of July, 2022, I served a true and correct copy of **BRIEF OF RESPONDENT, THE CITY OF MORGANTOWN** upon the parties and their counsel listed below via facsimile transmission as indicated:

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