

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 24-82

**WAYNE WHITE, MICHAEL WOOD,  
JOSHUA GARDNER, and others similarly  
situated, and the INTERNATIONAL ASSOCIATION  
of FIRE FIGHTERS LOCAL 91,**

Petitioners,

v.

**CITY OF PARKERSBURG,**

Respondent.

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*Appeal from the West Virginia Intermediate Court of Appeals*

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***AMICI CURIAE BRIEF FROM THE  
PROFESSIONAL FIRE FIGHTERS OF WEST VIRGINIA AND  
WEST VIRGINIA EMPLOYMENT LAWYERS ASSOCIATION  
IN SUPPORT OF PETITIONERS***

Teresa C. Toriseva (W.Va. I.D. No. 6947)  
**TORISEVA LAW**  
1446 National Road  
Wheeling, West Virginia 26003  
(304) 238-0066  
[ceo@torisevalaw.com](mailto:ceo@torisevalaw.com)

Lonnie C. Simmons (W.Va. I.D. No. 3406)  
**DIPIERO SIMMONS MCGINLEY &  
BASTRESS, PLLC**  
P.O. Box 1631  
Charleston, West Virginia 25326  
(304) 342-0133  
[lonnie.simmons@dbdlawfirm.com](mailto:lonnie.simmons@dbdlawfirm.com)

*Counsel for Amici Curiae Professional Fire Fighters of West Virginia and  
West Virginia Employment Lawyers Association*

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**I. Introduction and statement of interest of *amici curiae***

*To the Honorable Justices of the*

*West Virginia Supreme Court of Appeals:*

This ***AMICI CURIAE* BRIEF** and the accompanying **MOTION** are filed on behalf of the Professional Fire Fighters of West Virginia ("PFFWV") and the West Virginia Employment Lawyers Association ("WVELA").<sup>1</sup> The PFFWV is an organization chartered by and affiliated with the

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<sup>1</sup>Pursuant to Rule 30(b), counsel for the PFFWV and the WVELA timely notified by email counsel for Respondent City of Parkersburg of their intent to file an *amici* brief in favor of Petitioners. Furthermore, pursuant to Rule 30(e)(5), counsel for the PFFWV and the WVELA authored the *Amici* brief and have drafted this brief *pro bono* without receiving any compensation from any of the parties in this litigation.

International Association of Fire Fighters, AFL-CIO, CLC, since 1930. The PFFWV is comprised of Local Unions of fire fighters in the State of West Virginia. The PFFWV serves 21 Locals with approximately 1,000 active and retired members.

The WVELA is an affiliate of the National Employment Lawyers Association (“NELA”). Since its formation in 1985, the NELA has served as the only national bar association exclusively comprised of lawyers who represent employees in cases involving employment discrimination, illegal workplace harassment, wrongful termination, denial of employee pay and benefits and other employment related matters. Many of these causes of action provide for the payment of attorney fees to successful employee plaintiffs, through fee-shifting provisions. The NELA and its 68 state and local affiliates have more than 3,000 members. The WVELA is an active affiliate of the NELA. As such, like its parent association, the WVELA is comprised of lawyers throughout the state of West Virginia who devote their time and efforts to representing employees in workplace litigation.

The PFFWV and the WVELA advocate for the rights of firefighters and other employees under the various labor laws, including the Wage Payment and Collection Act (WPCA), which provides a powerful legal remedy for employees, who earn wages, but who are denied those earnings by their employers. The WPCA is designed to ensure employers meet the financial obligations owed to their employees. Without the civil remedy provided by the WPCA, including liquidated damages and attorneys’ fees, many employees may never be paid all of the wages they earned by their employers.

Because firefighters are required to work more than a forty-hour workweek and on holidays, the Legislature and their employers have enacted laws designed to compensate firefighters appropriately for their dedicated service and to provide incentives for these firefighters to continue

improving their skills. As a result, firefighters often are eligible to earn and receive additional wages, which then factors into the contributions made into their retirement system. For example, recently this Court addressed the issue of holiday pay owed to firefighters in *Nicewarner v. City of Morgantown*, 249 W.Va. 120, 894 S.E.2d 902 (2023), and recognized the WPCA’s five years statute of limitation was applicable. Because the present case involves the payment of longevity and EMT pay to firefighters and the efforts by Respondent City of Parkersburg to reduce these benefits, the PFFWV and the WVELA have a strong interest in advocating for Petitioners under the facts of this case.

## **II. Brief statement of the case**

The *amici* will rely on the detailed statement of facts provided by Petitioners. There is no dispute that this Court’s decision will need to address and apply two ordinances adopted by Respondent’s City Council. First, in 2008, Respondent’s City Council adopted an ordinance entitled “Longevity Plan,” which provides, “Fire civil service employees working a 48hour work-week will receive longevity of twenty-five (\$.25) cents per hour for each year of city service.” At the time this ordinance was adopted, firefighters regularly worked a 48-hour week. Thus, this ordinance clearly and unambiguously requires a firefighter who worked one year for Respondent after 2008 to receive an additional twenty-five cents per hour; two years added fifty cents per hour and so on. There is nothing in the plain language of this ordinance suggesting any other interpretation. In fact, from 2008 through 2017, Respondent correctly applied this ordinance as written.

Second, in 2008, Respondent’s City Council also enacted Article 125.01(c), which added \$.42 per hour to the pay of a fire civil service employee who maintained certification as an Emergency Medical Technician (“EMT”). Having firefighters who also are trained and certified

each year as EMT's enhances the quality of the services provided to the public by Respondent. Thus, this ordinance clearly and unambiguously requires a firefighter who maintains his or her EMT certification each year to have forty-two cents added to the firefighter's hourly wage. There is nothing in the plain language of this ordinance suggesting any other interpretation. In fact, from 2008 through 2017, Respondent actually and correctly applied this ordinance as written.

In 2011, Petitioners switched to working a 54-hour week and Respondent's City Council froze the longevity and EMT pay at that time. Thus, the maximum amount of longevity pay that would continue to be earned by a firefighter employed by Respondent from 2008 through 2012 is seventy-five cents an hour. The decision by Respondent's City Council in 2011 froze that already earned longevity pay. After 2011, that firefighter would not accrue any longevity pay in addition to the maximum of seventy-five cents an hour. Similarly, the EMT pay would continue to be paid to each firefighter whose EMT certification was renewed each year after 2011. The freezing of the longevity and EMT pay in 2011 simply meant that the additional pay already earned by each firefighter at that time would remain in place, but would not be increased each year.

This litigation was triggered when city officials other than Respondent's City Council decided to ignore the plain and unambiguous language in these two ordinances and instead created a reinterpretation resulting in reducing the pay received by Petitioners. This reinterpretation was made without Respondent's City Council amending any of the controlling language in the two 2008 ordinances.

For reasons that are not apparent from the language in these two ordinances, Respondent decided that because the workweek of firefighters was increased in 2011 from 48 hours to 54 hours, somehow that change required a reduction in the longevity and EMT pay. This reinterpretation ignores the undisputed fact that Petitioners did work 48-hour weeks during the time from 2008

through 2011, when the longevity pay was earned and then frozen.

The Circuit Court of Wood County agreed with the positions asserted by Petitioners and rejected Respondent's attempt to reduce the longevity and EMT pay to their eligible firefighters. However, on appeal, the circuit court's decision was reversed in a memorandum decision from the Intermediate Court of Appeals (ICA) in *City of Parkersburg v. White*, 2023 WL 9317831 (ICA No. 22-ICA-142, 12/27/2023). This decision was issued without the benefit of oral argument, which would have benefitted the ICA, which appears to have misunderstood the clear and unambiguous language in these ordinances.

The initial error committed by the ICA was its failure to read and apply the words of the Longevity Pay ordinance as written. As quoted above, this ordinance provides, "Fire civil service employees working a 48hour work-week will receive longevity of twenty-five (\$.25) cents per hour for each year of city service." This ordinance also provides, "Fire civil service employees working 54hour work-week will receive longevity of twenty-two (\$.2222) cents per hour for each year of city service." Between 2008 and 2011, it is not disputed that Petitioners worked 48-hour weeks and, therefore, these Petitioners earned the additional twenty-five cents per hour during that three-year time period.

However, the ICA accepted Respondent's argument that even though the firefighters regularly worked 48-hour weeks from 2008 through 2011, which mandates that each eligible firefighter receives an additional twenty-five cents an hour limited to those three years of service, once Petitioners began working a 54-hour week beginning in 2011 and thereafter, Respondent then had the right to go back and retroactively reduce Petitioners' longevity pay to twenty-two cents an hour. There is no legal or rational basis for making this reduction, which specifically contradicts the Longevity Pay ordinance.

If Petitioners had been working 54-hour weeks from 2008 through 2011, then this ordinance mandates that each eligible firefighter earned an additional twenty-two cents an hour for longevity pay. However, that is not what happened. This ordinance clearly mandates that each eligible firefighter who worked a 48-hour week from 2008 through 2011 is entitled to longevity pay of an additional twenty-five cents an hour. Once Respondent's City Council adopted an ordinance stopping the additional accumulation of longevity pay, the longevity pay then was frozen and locked into place thereafter adding twenty-five cents an hour for each eligible firefighter.

As to the EMT pay, once again Respondent seeks to go back and retroactively reduce Petitioners' EMT pay based upon the change to a 54-hour week. Although the ICA conceded the ordinance on its face makes no distinction between the EMT pay earned by a firefighter working a 48-hour or 54-hour week, nevertheless the ICA did not make a final decision on this argument, asserting that the case had to be remanded to permit the parties to make a record on whether or not Respondent had provided the WPCA's required notice to Petitioners of its intent to retroactively reduce the EMT pay based upon a 54-hour week.

The remand should not be necessary because the EMT ordinance speaks for itself. The EMT pay was frozen in 2011, so each eligible firefighter who was certified as an EMT each year earned an additional forty-two cents an hour. The EMT pay ordinance has no language asserting that the amount of the EMT pay must be reduced for firefighters working a 54-hour week. Because Petitioners worked a regular 48-hour week from 2008 through 2011, the amount of the EMT pay was frozen at forty-two cents an hour and was never increased or decreased thereafter.

### **III. Argument**

#### **A. The WPCA is designed to protect employees' wages and prevent wage theft**

The WPCA provides all employees with a legal mechanism designed to prevent wage theft.

In *Mullens v. Venable*, 171 W.Va. 92, 94, 297 S.E.2d 866, 869 (1982), where this Court held that corporate officers could be held personally liable for failing to comply with the WPCA, the Court discussed the fundamental public policy addressed by the WPCA:

In this case the Legislature has placed upon officers in the management of a corporation the duty to see that the Wage Payment and Collection Act is enforced. This duty is founded on a specific statutory requirement designed to further an important public policy. This public policy requires employers to pay the wages of working people who labor on their employer's behalf. **Wages have traditionally been afforded special protection under the law, in recognition of the fact that working people depend on wages to furnish the basic necessities of life to themselves and their families.** See *Farley v. Zapata Coal Corp.*, *supra*; *Atkins v. Grey Eagle Coal Co.*, 76 W.Va. 27, 84 S.E. 906 (1915). (Emphasis added).

When employees provide labor for their employers, the employees rely upon receiving all of the wages earned to support their families. When an employer fails to comply with the WPCA and pays an employee less than the wages already earned, the employer has engaged in wage theft. “Wage theft poses a serious and growing problem across industries for working individuals of the United States. Wage theft is widespread and is estimated to cost workers more than \$15,000,000,000 per year. In certain industries, compliance with Federal wage and hour laws is less than 50 percent.”<sup>2</sup> The problem is so severe that in 2023, the state of New York announced that “the Manhattan District Attorney’s Office that it had partnered with the New York State Department of Labor to create the Office’s first-ever ‘Worker Protection Unit’ to investigate and criminally prosecute wage theft

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<sup>2</sup><https://www.congress.gov/bill/116th-congress/senate-bill/2101/text>.

charges against companies and executives that ‘steal’ wages.’<sup>3</sup>

Increasingly, district attorneys (DAs), state attorneys general (AGs), and other criminal prosecutors<sup>1</sup> are bringing charges against employers for wage theft, misclassification and payroll fraud, workplace safety hazards, sexual assault, and human trafficking, among other crimes against workers. This development represents a shift, because historically, crimes against workers have not generally been prosecuted. More often, the criminal justice system has intervened to protect employers; for example, a worker stealing from an employer would likely face charges, while an employer committing wage theft likely would not. Yet state and local prosecutors have unique tools and an important role to play in protecting workers. Many are taking on this function as an enforcement priority, and more should get involved in this area.<sup>4</sup>

Any decision by this Court that continues to recognize and uphold the fundamental principle that employees must be paid all of the wages earned not only strengthens the policies behind the WPCA, but also carries out the clear mandate by the Legislature.

**B. The WPCA is liberally construed in favor of employees**

In interpreting and applying the WPCA, this Court applies the following standard, noted in *Shaffer v. Ft. Henry Surgical Associates, Inc.*, 215 W.Va. 453, 458, 599 S.E.2d 876, 881 (2004):

[I]t is well settled that “[t]he West Virginia Wage Payment and Collection Act is remedial legislation designed to protect working people and assist them in the collection of compensation wrongly withheld.” Syllabus, *Mullins v. Venable*, 171 W.Va. 92, 297 S.E.2d 866 (1982).’ Syl. Pt. 3, *Jones v. Tri-County Growers, Inc.*, 179 W.Va. 218, 366 S.E.2d 726 (1988).” Syl. Pt. 3, *Lipscomb v. Tucker*

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<sup>3</sup><https://www.jdsupra.com/legalnews/recent-state-law-makes-it-a-crime-to-7420555/>.

<sup>4</sup><https://www.epi.org/publication/fighting-workplace-abuses-criminal-prosecutions-of-wage-theft-and-other-employer-crimes-against-workers/>.

*County Com'n*, 206 W.Va. 627, 527 S.E.2d 171 (1999). Therefore, “[s]tatutes, such as the [Wage Payment and Collection Act], that are designed for remedial purposes are generally construed liberally to benefit the intended recipients.” *Conrad v. Charles Town Races, Inc.*, 206 W.Va. 45, 51, 521 S.E.2d 537, 543 (1998)(citations omitted).

“Wages” are defined in W.Va.Code § 21-5-1(c), as including “then accrued fringe benefits capable of calculation and payable directly to an employee.” “Fringe benefits” are defined in W.Va.Code § 21-5-1(l), as including “***any benefit provided an employee or group of employees by an employer***, or which is required by law[.]” (Emphasis added).

The protections afforded by the WPCA are very specific and all encompassing. In W.Va.Code §21-5-1(m), “employer” is defined as “any person, firm or corporation employing any employee.” This Court in *Ingram v. City of Princeton*, 208 W.Va. 352, 540 S.E.2d 569 (2000), held the WPCA does apply to governmental employees. In fact, this Court noted to rule otherwise would create unconstitutional equal protection concerns. 208 W.Va. at 356, 540 S.E.2d at 573.

**C. This Court’s rules of statutory construction must be applied to these ordinances**

In Syllabus Points 2 and 3 of *City of Martinsburg v. Dunbar*, 246 W.Va. 223, 868 S.E.2d 437 (2022), this Court noted the same rules of statutory construction also apply to ordinances. In any case where this Court is required to review, interpret, analyze, and explain the meaning and application of a statute or ordinance, the analysis is governed by the following general rules set out in Syllabus Points 1 through 4 of *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999):

1. "Judicial interpretation of a statute is warranted only if the statute is ambiguous[.]" Syllabus Point 1, in part, *Ohio County Com'n v. Manchin*, 171 W.Va. 552, 301 S.E.2d 183 (1983).

2. In the interpretation of a statute, the legislative intention is the controlling factor; and the intention of the legislature is ascertained from the provisions of the statute by the application of sound and well established canons of construction.

3. A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.

4. "Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use." Syllabus Point 4, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959).

Finally, in Syllabus Points 8 and 10 of *In re: R.S.*, 244 W.Va. 564, 855 S.E.2d 355 (2021), this Court cited two additional rules that are relevant in this case:

8. "It is always presumed that the legislature [or here city council] will not enact a meaningless or useless statute." Syl. Pt. 4, *State ex rel. Hardesty v. Aracoma*, 147 W. Va. 645, 129 S.E.2d 921 (1963).

10. "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. Pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938).

The fundamental error committed by the ICA is not following and carrying out the clear and unambiguous language in the two ordinances at issue. Neither the Longevity Pay nor the EMT ordinances provides any language suggesting that Respondent had the right to recalculate and reduce longevity and EMT pay based upon the change in 2011 from a 48-hour workweek to a 54-hour workweek. Fundamentally, it makes no sense to go back and recalculate the frozen longevity and EMT pay at the 54-hour week rate when Petitioners, in fact, Petitioners regularly worked 48-hour weeks from 2008 through 2011. Furthermore, Respondent's City Council did not include any language in these ordinances suggesting this type of reduction in these benefits was justified.

Respondent had correctly interpreted and applied these two pay ordinances from 2008 through 2017. Its attempt to change its interpretation of these ordinances is contrary to the plain language used by Respondent’s City Council, the liberal construction required under the WPCA, and the applicable rules of statutory construction. *Amici* respectfully submit that Petitioners, under these ordinances and the WPCA, earned their full longevity and EMT pay and that the memorandum decision by the ICA is in error. This Court should continue to afford special protection to Petitioners “in recognition of the fact that working people depend on wages to furnish the basic necessities of life to themselves and their families.” To be consistent with the Legislature’s mandated policy to protect wages earned, the *amici* respectfully submit that the ICA’s decision must be reversed and an order entered recognizing that these Petitioners earned and are owed the full longevity and EMT pay mandated by the two ordinances in question.<sup>5</sup>

#### **IV. Conclusion**

For the foregoing reasons, the PFFWV and WVELA respectfully asks this Court to reverse the memorandum decision issued by the ICA and to enter an order requiring Respondent to pay Petitioners all of the longevity and EMT pay they earned consistent with the way Respondent paid those earned wages from 2008 through 2017. No matter how this Court resolves these issues, the PFFWV and the WVELA appreciate the opportunity to share their concerns with the Court regarding the issues raised in this case.

**PROFESSIONAL FIRE FIGHTERS OF  
WEST VIRGINIA AND WEST VIRGINIA  
EMPLOYMENT LAWYERS  
ASSOCIATION, *Amici Curiae*,**

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<sup>5</sup>*Amici* agrees with the legal analysis provided by Petitioners and accepted by the Circuit Court of Wood County addressing the standing of International Association of Fire Fighters Local 91. The application of these facts to the standing test set out in Syllabus Point 4 of *The Affiliated Construction Trades Foundation v. West Virginia Department of Transportation*, 227 W.Va. 653, 713 S.E.2d 809 (2011), supports standing for Local 91 in this case.

–By Counsel–

/s/ Teresa C. Toriseva  
Teresa C. Toriseva (W.Va. I.D. No. 6947)  
**TORISEVA LAW**  
1446 National Road  
Wheeling, West Virginia 26003  
(304) 238-0066  
[ceo@torisevalaw.com](mailto:ceo@torisevalaw.com)

/s/ Lonnie C. Simmons  
Lonnie C. Simmons (W.Va. I.D. No. 3406)  
**DIPIERO SIMMONS MCGINLEY &  
BASTRESS, PLLC**  
P.O. Box 1631  
Charleston, West Virginia 25326  
(304) 342-0133  
[lonnie.simmons@dbdlawfirm.com](mailto:lonnie.simmons@dbdlawfirm.com)

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**Certificate of Service**

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing *AMICI CURIAE BRIEF FROM THE PROFESSIONAL FIRE FIGHTERS OF WEST VIRGINIA AND WEST VIRGINIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS* was served electronically on counsel of record on the 28<sup>th</sup> day of May, 2024, through the File & Serve Xpress system to all counsel of record.

/s/ Lonnie C. Simmons

\_\_\_\_\_  
Lonnie C. Simmons (W.Va. I.D. No. 3406)