

**WEST VIRGINIA  
SUPREME COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA**

**Wayne White, Michael Wood, Joshua Gandee,  
and others similarly situated, and the  
International Association of Fire Fighters Local 91,**

**Plaintiffs Below, Petitioners,**

**v.**

**City of Parkersburg,**

**Defendant Below, Respondent.**

**CASE NO. 24-82  
Civil Action No. 18-C-259  
(Wood County)**

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**PETITIONERS' BRIEF**

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## **I. Assignments of Error**

1. The City's 2017 reduction of its firefighters' longevity increment and EMT pay was in violation of its written pay policies, nine years of the City's pay practices and the West Virginia Wage Payment Collection Act and the Intermediate Court's Reversal of that determination by the Circuit Court was error.
2. There was no overpayment of longevity or EMT certification pay by the City and the Intermediate Court's Reversal of that determination by the Circuit Court was error.
3. The City's belated attempt to reframe its defense to its firefighters' efforts to restore City's 2017 cuts to their hourly rate of pay was correctly rejected by the Circuit Court in its final order of August 31, 2022 and the Intermediate Court's Reversal of that determination by the Circuit Court was error.
4. The International Association of Fire Fighters Local 91 has representative standing under the test enunciated in *Affiliated Construction Trades Foundation v. W. Va. DOT*, 227 W.Va. 651, 713 S.E.2d 809 (2011) and the Intermediate Court's Reversal of that determination by the Circuit Court was error.

## **II. Statement of the Case**

At issue in this proceeding are two classes of increased hourly pay applicable to Firefighters for the City of Parkersburg from 2008 until 2011, including longevity pay as well as additional pay based upon their status as licensed EMTs, all benefits due to those firefighters working a forty-eight-hour work week. Petitioners, all full-time Parkersburg firefighters, filed suit in this matter after the City of Parkersburg recalculated longevity and EMT pay for this time period and lowered the hourly pay for these employees in 2017. While the record is voluminous and the arguments asserted by the City are convoluted, the facts in this case are undisputed. The City of Parkersburg's 2017 "reinterpretation" of the longevity pay and EMT pay ordinances ignored the plain language of the 2008 ordinances and resulted in illegal prospective reductions to Respondents' hourly pay after the City recalculated hourly rates contrary to the pay ordinances at

issue. In doing so, the City of Parkersburg violated the ordinances in question, acted contrary to years of prior practice, and violated the West Virginia Wage Payment Collection Act.

### **III. Summary of the Argument**

The City of Parkersburg's 2017 "reinterpretation" of the longevity pay and EMT pay ordinances resulted in illegal reductions to Respondents' hourly pay contrary to the plain language of those ordinances and contrary to nine years of pay practices which had been consistent with the ordinances. In doing so, the City violated the ordinances in question, acted contrary to nine years of prior practice, and violated the West Virginia Wage Payment Collection Act. The ICA's decision usurps the role of the Circuit Court at times while at others reading entire statutory provisions out of existence. Both the City and the ICA must be corrected in this matter.

### **IV. Statement Regarding Oral Argument and Decision**

Petitioners posit that oral argument is necessary in this case. This particular case has come before this Court on two prior occasions (on writs of mandamus) and continues to pose several thorny legal questions, now involving multiple misinterpretations of blackletter law by the ICA which beg for correction by this Court.

### **V. Standard of Review**

At the time this brief was filed, this Court had not yet issued a decision addressing what standard of review will be applied by this Court to appeals from ICA decisions. Petitioners respectfully submit that the standard of review this Court applies to an appeal of a summary judgment order issued by a circuit court should be applied to this appeal of the ICA's decision reversing the Circuit Court's decision to grant summary judgment to Petitioners herein. Adopting

that standard, the entry of summary judgment would be reviewed de novo; summary judgment should be granted only when it is clear there is no genuine issue of fact to be tried. The ICA's function is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial; and summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Syllabus Points 1, 2, 3, and 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

## **VI. Facts and Procedural History**

At issue in this proceeding are two classes of increased hourly pay applicable to Firefighters for the City of Parkersburg from 2008 until 2011, including longevity pay as well as additional pay based upon their status as licensed EMTs, all benefits due to those firefighters working a forty-eight hour work-week. Petitioners, all full-time Parkersburg firefighters, filed suit in this matter after the City of Parkersburg recalculated longevity and EMT pay for this time period and lowered the hourly pay for these employees in 2017. While the record is voluminous, the facts in this case are undisputed.

In 2008, Parkersburg City Council adopted two ordinances increasing the hourly rate of pay of certain “fire civil service employees.” One ordinance (entitled “Longevity Plan”) added \$.25 per hour for each year of service to the pay of fire civil service employees who worked a 48-hour work week. The second ordinance [Article 125.01(c)] added \$.42 per hour to the pay of fire civil service employees who maintained certification as Emergency Medical Technicians (EMTs).<sup>1</sup> Petitioners White, Wood and Gandee were fire civil service employees who worked a 48-hour

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<sup>1</sup> These two pay policies were attached as Exhibits A and B respectively to *Plaintiffs’ Motion for Summary Judgment* and can be found in the *Joint Appendix* at 423 and 424 .

work- week in 2008 when these two policies were adopted. *Amended Complaint ¶ 1, Answer to Amended Complaint ¶ 1, Joint Appendix* at 23, 125. Longevity pay was frozen – that is no new increments for additional longevity were added – in 2011, at the same time Petitioners’ work schedules were altered from 48 hour weeks to 54 hour weeks by the City.

From 2008 through 2017 the City adhered to the two policies as written, providing Petitioners an additional \$.25 per hour worked for each year of service (longevity pay) and \$.42 per hour to employees who maintained certification as an EMT. In 2017, the City began to “reinterpret” the two pay ordinances and reduced both longevity (reduced to .2222) and EMT pay (reduced to .37) for city fire employees. The City asserts both hourly increments were reduced to reflect what it believed was the intent behind these two ordinance and admits that following the adoption of both pay policies by the Parkersburg City Council in 2008, Petitioners were paid consistently pursuant to those policies for nine years. Then – with no change to either written policy –the City recalculated longevity and EMT pay and reduced both.

The City asserts that this “reinterpretation” and the resulting pay reduction reflects the intent of the “Longevity Plan” ordinance to provide longevity pay totaling six hundred twenty-four (\$624) dollars per year for each year of city service, not an additional \$.25 per hour for each year of city service which it had been paying. Based upon this 2017 reinterpretation, the City assessed the Petitioners’ work schedules and divided their scheduled hours for each year by \$624, and then added that amount to each Petitioner’s hourly rate. This resulted in a reduced hourly rate of pay for all Petitioners. The amount of the hourly reduction depended upon the number of years of each employee’s city service: the higher the years of service, the greater the reduction in longevity pay each Petitioner suffered due to the City’s 2017 reinterpretation.

The EMT pay was treated similarly. As with longevity pay, in 2017 the City reinterpreted its EMT pay policy to “annualize” the EMT hourly increment based upon the City’s determination that the intent of the ordinance was to provide Petitioners and other EMT-certified firefighters with a total increase in pay of \$1,040 annually, as opposed to the hourly amount stated in the ordinance creating the EMT pay. Dividing the \$1,040 annual amount the City decided was due under the policy into the Petitioners’ 54-hour per week schedule resulted in a reduction of their EMT pay from the \$.42 per hour provide in the ordinance to a newly imposed rate of \$.37 per hour. The City admits that the EMT pay ordinance does not mention the \$.37 per hour rate to began paying the Petitioners in 2017.<sup>2</sup> The City also admits that all Petitioners have been negatively affected by its 2017 reinterpretation of the two ordinances at issue in this civil action. Amended Complaint ¶¶5-7, Answer to Amended Complaint ¶¶ 5-7, *Joint Appendix* at 91-92; 125-126.<sup>3</sup> The hourly pay reductions were as follows, in the order in which the salary records were produced by the City: <sup>4</sup>

| BATES NO.    | NAME           | DATE      | AMOUNT CUT |
|--------------|----------------|-----------|------------|
| City 00001-2 | Kevin Ackerman | 5/22/2017 | -0.30¢/hr. |
| City 0003-4  | Douglas Ashley | 5/22/2017 | -0.29¢/hr. |

<sup>2</sup> When the longevity and EMT pay was adopted in 2008, Appellees and other members of the Fire Department worked 48-hour work-week schedules. In 2011, their work schedules were changed by the City from 48 hour to 54-hour work weeks. Although 54-hour per week, EMT certified employees are not explicitly mentioned in Article 125.01(c), from 2008 through 2017, the City nevertheless paid Appellees the additional \$.42 per hour as set forth in the ordinance if EMT certification was maintained by the employee. The City however, did use 54 hours to calculate the EMT pay rather than using 48 hours, the number of hours the additional pay was accumulated under, thus further reducing these additions to the hourly rate.

<sup>3</sup> Salary records produced by the City for all affected firefighters were produced as identified above, and attached as Exhibit B to Plaintiff's Memorandum Regarding Enforcement of the Court's Amended Order Of October 22, 2021, *Joint Appendix* at 478-481, City 0001-65. *Joint Appendix* at 649-650. Each firefighters’ wage loss is the reduction of the hourly rate taken by the City in 2017 (as set forth above) multiplied by the number of hours each has worked from his 2017 reduction in pay to date. Each affected firefighter is also entitled to legal interest on the back wage due from the reduction in pay to date.

<sup>4</sup> Although the City contends it did not reduce White’s longevity pay, Respondent admits White is affected by both decisions at issue in this civil action. Amended Complaint ¶ 6, Answer to Amended Complaint ¶ 6, *Joint Appendix* at 91, 123.

|              |                    |           |            |
|--------------|--------------------|-----------|------------|
| City 0005-6  | Justin Belva       | 5/22/2017 | -0.33¢/hr. |
| City 0007-8  | Brandon Brown      | 5/22/2017 | -0.29¢/hr. |
| City 0009-10 | Jeff Burdette      | 5/22/2017 | -0.37¢/hr. |
| City 0011    | Jody Costa         | 5/22/2017 | -0.27¢/hr. |
| City 0012-14 | Brian Drake        | 5/22/2017 | -0.33¢/hr. |
| City 0015-16 | Chad Eddy          | 5/22/2017 | -0.34¢/hr. |
| City 0017-18 | Jason Enoch        | 5/22/2017 | -0.33¢/hr. |
| City 0019    | Jason Fleak        | 5/22/2017 | -0.27¢/hr. |
| City 0020-21 | Timothy Flinn      | 6/5/2017  | -0.33¢/hr. |
| City 0022    | Matthew Gebhardt   | 6/5/2017  | -0.29¢/hr. |
| City 0023    | Jimmie Harper, Jr. | 5/22/2017 | -0.29¢/hr. |
| City 0024-25 | Mark Kunselman     | 5/22/2017 | -0.37¢/hr. |
| City 0026-27 | Emmett Moore       | 5/22/2017 | -0.25¢/hr. |
| City 0028-29 | Carl Nestor        | 5/22/2017 | -0.34¢/hr. |
| City 0030-31 | Eric Poole         | 5/22/2017 | -0.34¢/hr. |
| City 0032-33 | Robert Roach       | 5/22/2017 | -0.38¢/hr. |
| City 0034    | David Sims         | 5/22/2017 | -0.30¢/hr. |
| City 0035-37 | Eric Taylor        | 5/22/2017 | -0.76¢/hr. |
| City 0038-39 | James Tracewell    | 5/22/2017 | -0.34¢/hr. |
| City 0040-41 | Eric Waybright     | 5/22/2017 | -0.34¢/hr. |
| City 0042-43 | Wayne White        | 4/12/2017 | -0.61¢/hr. |
| City 0044-45 | Robert Wix, Jr.    | 5/22/2017 | -0.36¢/hr. |
| City 0046-47 | Michael Wood       | 5/22/2017 | -0.29¢/hr. |

|              |                   |           |            |
|--------------|-------------------|-----------|------------|
| City 0048-49 | Bradley Workman   | 5/22/2017 | -0.29¢/hr. |
| City 0051    | Randall Affolter  | 5/22/2017 | -0.25¢/hr. |
| City 0051    | John Geary, II    | 5/22/2017 | -0.25¢/hr. |
| City 0052    | James Keeling     | 5/22/2017 | -0.25¢/hr. |
| City 0053    | Thomas Werry      | 5/22/2017 | -0.25¢/hr. |
| City 0054    | Benjamin Woodward | 5/22/2017 | -0.25¢/hr. |
| City 0055    | Randall Delancey  | 5/22/2017 | -0.21¢/hr. |
| City 0056    | Jason Matthews    | 6/5/2017  | -0.21¢/hr. |
| City 0057    | Jody Ludwig       | 5/22/2017 | -0.21¢/hr. |
| City 0057    | John Bartenschlag | 5/22/2017 | -0.17¢/hr. |
| City 0059    | Bradley Huggins   | 5/22/2017 | -0.17¢/hr. |
| City 0060    | Mark Byrd         | 5/22/2017 | -0.15¢/hr. |
| City 0061    | Bradley Dimit     | 5/22/2017 | -0.15¢/hr. |
| City 0062    | Jonathan Lee      | 5/22/2017 | -0.15¢/hr. |
| City 0063    | Patrick Davis     | 5/22/2017 | -0.11¢/hr. |
| City 0064    | Samuel Rutherford | 5/22/2017 | -0.11¢/hr. |
| City 0065    | Joshua Gandee     | 5/22/2017 | -0.08¢/hr. |

The two decisions challenged herein reduced both the longevity and EMT hourly pay increments already accrued by Petitioners. Each reduction in pay was based on Respondent's 2017 reinterpretation of the longevity and EMT pay policies adopted by the Respondent's City Council in 2008. Because no facts were in dispute as to either the 2008 pay policies or Respondent's 2017

reinterpretation of those two policies, the Circuit Court properly decided summary judgment as to liability in favor of Petitioners.

The parties agreed that exhibits thereto were the only documents relevant to Petitioners' liability claims.<sup>5</sup> Respondent confirmed that there two documents were the only ones relevant to liability in its 30(b)(7) deposition:

Q. Is it accurate that City 0066 through City 0077, that that's the longevity pay policy ordinance that we discussed previously?

A. Yeah, 0066 and then through 0069, is that what you're -- 77?

Q. Yeah. Well, I'm trying to capture the entire ordinance that would be at issue, and I may not have chosen the proper documents, but the way I looked at it, it should have been 0066 through 0077 to capture the entire ordinance.

A. Yes, that is correct.

Q. Okay. So that set of documents, 0066 through 0077 in Exhibit 2, is the entire ordinance a part of which deals with the longevity pay issue that we previously discussed, correct?

A. Correct.

Q. Okay. And that is the only document related to the longevity pay as we've talked about earlier that the City has, correct?

A. Yes.

Q. Okay.

A. And I might add the EMT piece of that is located on City 0079. Jiles 30(b)(7) TR 82-83.

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<sup>5</sup> Defendant confirmed that there two documents were the only ones relevant to liability in its 30(b)(7) deposition:  
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A. Correct.

Q. Okay. And that is the only document related to the longevity pay as we've talked about earlier that the City has, correct?

A. Yes.

Q. Okay.

A. And I might add the EMT piece of that is located on City 0079. *Joint Appendix* at 659, Jiles TR 30(b)(7) TR 82-83.

The City acknowledged that the pay reductions imposed by Respondent in 2017 were never submitted to the Parkersburg City Council for approval, even though Council had set Petitioners' longevity and EMT pay to begin with:

Q. Okay. Was the change from the 42 cent per hour rate that we see in Exhibit 2, City 0079, was the change from the 42 cents per hour in that document to the 37 cents per hour that the City applied in May 2017, was that change submitted to the City Council for approval?

A. Nope. No, sir.

Q. Was the change in the longevity pay that was adopted in May 2017 submitted to the City Council for approval?

A. No. That did not appear necessary because it wasn't change in their longevity pay. It was a correction of an error.

A. Correct.

Q. Regardless of what it was, was it submitted to the City Council for approval?

A. No, it was not necessary.

Q. Well, with all due respect, Mr. Jiles, that isn't your call.

But regardless of that, it was not, correct?

A. No, sir.

Q. And the pay policies that created the longevity pay were created by the City Council, correct?

A. The longevity rates?

Q. Yes, sir.

A. Yes.

Q. And the pay rate that gave the EMT pay, the certification additional pay, that was also created by the City Council, correct?

A. Yes, sir.

Q. But when the changes were made in May 2017, those were not created by the City Council. Those changes were adopted by you, the City, correct, without the City Council's input?

A. We corrected the error in which those rates were applied.

Q. Well, regardless of what you call it, you changed the rate of pay of the individuals involved with regard to longevity and with regard to EMT pay, and you did that without submitting those changes to the City Council, correct?

A. Correct, because it was a correction of an error. *Joint Appendix* at 657, Jiles 30(b)(7) TR 50-51.

## **VII. Argument**

**1. The City's 2017 reduction of its firefighters' longevity increment and EMT pay was in violation of its written pay policies, nine years of the City's pay practices and the West Virginia Wage Payment Collection Act and the Intermediate Court's Reversal of that determination by the Circuit Court was error.**

### **A. Longevity Pay**

The City of Parkersburg's 2008 adoption of an ordinance (Exhibit A, to Amended Complaint, *Joint Appendix* at 96) established a number of employment policies and procedures applicable to Petitioners and all similarly situated employees. These policies included the addition of a small longevity increment to the hourly rate of pay for fire civil service employees. Amended Complaint ¶ 9, Answer to Amended Complaint ¶ 9, *Joint Appendix* at 92, 124. The pertinent portion of the ordinance provides:

#### LONGEVITY PLAN

(Revised 05/20/08)

Effective July 1, 2008 (not retroactive) all full-time regular employees, police civil service employees, and fire (40-hour) civil service employees will receive longevity of thirty (\$.30) cents per hour for each year of city service. Appointed part-time employees will receive longevity of six hundred twenty-four (\$624) dollars per year for each year of city service.<sup>6</sup> **Fire civil service employees working a 48 hour work-week will receive longevity of twenty-five (\$.25) cents per hour for each year of city service. Fire civil service employees working a**

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<sup>6</sup> None of the Appellees were appointed part-time employees.

Q. Designation number 53 asks for all information in defendant's possession as to whether any plaintiff to this action was at any time a part-time employee.

A. Not that I'm aware.

Q. So none of the plaintiffs in this action were appointed part-time employees of the City; is that correct?

A. I believe so, yes. *Jiles 30(b)(7) TR 85, Joint Appendix* at 166.

**54 hour work-week will receive longevity of twenty-two point two two (\$.2222) cents per hour for each year of city service.** Employees will receive said longevity on their anniversary date of employment. Longevity will be included in the base pay for purposes of overtime, etc. The granting of all longevity pay is contingent upon City Council action and approval through the City budget. (emphasis added)

*Amended Complaint ¶ 10, Answer to Amended Complaint ¶ 10; Joint Appendix at 92, 99, 124.*

The City suspended new longevity pay increments in 2012 and has never reinstated them. Thus no one – including Petitioners – has accrued longevity pay since then. However, the City explicitly but did **not** alter or reduce accrued and existing longevity pay firefighters had gained between 2008 and 2012. *Joint Appendix at 108.*<sup>7</sup> This, **all** longevity pay increments accrued by Petitioners and all other firefighters were accrued at the rate of \$.25 per hour as the ordinance stated because all were 48 hour employees when they accrued the pay. They continued to be paid at the proper accrued hourly rate until the City’s 2017 reinterpretation of the ordinance, an ordinance that has remained unchanged from its inception in 2008 to date.

Now the City asserts that in 2017 it discovered that it had erroneously calculated and paid Petitioners’ longevity pay. The City then reduced longevity pay based upon its 2017 reinterpretation of the ordinance. The “correction” made by the City annualized the rate of longevity increases, and limited all such increases to a total of \$624 per year. *Amended Complaint ¶ 13, Answer to Amended Complaint ¶ 13, Joint Appendix at 92, 126.* As a result, Respondents’ longevity pay was reduced as set forth herein above. *Amended Complaint ¶ 3, Answer to Amended Complaint ¶ 3, Joint Appendix at 91; 125.*

While the City attempted to justify its “reinterpretation”, its justification required ignoring the plain language of the ordinance. It is undisputed that the pay policy governing longevity pay

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<sup>7</sup> Q. Designation 50 asks for all information in defendant's possession regarding whether City 0078 reflects the June 2012 suspension of the longevity plan for the City of Parkersburg effective June 2012?

A. That's correct. *Jiles 30(b)(7) TR 84, Joint Appendix at 659.*

from 2008 through 2011 provided that Petitioners were to receive \$.25 cents per hour for each year of city service. It is also undisputed that this longevity increment was paid to Petitioners at that rate from 2008 through 2011. When accrual of additional longevity pay was suspended by the city in 2012, the then-accrued longevity increments (accrued to Petitioners between 2008 and 2011) continued to be paid at \$.25 per hour until the City's 2017 reinterpretation. Respondent then reduced Petitioners' hourly pay longevity which had accrued between 2008 and 2011 based upon the City's 2017 reinterpretation of the ordinance.

### B. EMT Pay

Petitioners White, Wood and Gandee maintain certifications as Emergency Medical Technicians. In 2008, a pay policy was enacted providing a forty-two (\$.42) cent per hour EMT pay increment for all employees of the fire department who maintained such certification and who worked forty-eight (48) hours per week. The City also set the EMT increment at fifty (\$.50) cents per hour for employees who worked day shift. No written change has ever been made to the policy.<sup>8</sup> However, in conjunction with its reinterpretation of longevity pay in May 2017, the City also reinterpreted its EMT pay policy and reduced EMT pay for each Petitioner as well.

The City insisted that its 2017 reduction in the Petitioners' pay represented a correction to the "mandated level in accordance with City ordinances." This position flies directly in the face of the plain language of both ordinances. Moreover, the language of the ordinance matters as an employer's failure to comply with its written pay policies is a violation of West Virginia Wage Payment and Collection Act. Not only is the City required to comply with its written policies regarding payment of wages to Petitioners, the City must also provide to Petitioners written

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<sup>8</sup> The EMT pay policy referred to in the deposition is also *Exhibit B* to the *Amended Complaint*. *Amended Complaint* ¶ 15, *Joint Appendix* at 94; 108-109; 127.

notification of any changes to such pay practices. WV Code §21-5-9 (1-3).<sup>9</sup>

For instance, as to EMT pay, the City asserted that the ordinance requires a “total base pay increase of \$1,040.00 per year”...“for all qualifying EMT firefighters.” However, the EMT pay ordinance has no such language. There is no reference in the City’s EMT pay ordinance to the amount posited by Respondent as the “correct amount” upon which Respondent based its reduction of EMT pay for Petitioners. Rather, the City adopted an ordinance which provides for an hourly increment for each fire department employee who maintains certification as an EMT.

Additionally, the hourly rate which the City claims to have applied to “correct” Petitioners’ EMT certification pay does not appear within the ordinance supposedly authorizing it. Rather, the ordinance provides for two potential hourly additions to the pay of EMT certified firefighters: \$.42 per hour for 48-hour employees and \$.50 per hour for “day shift personnel.” The hourly rate that Respondent refers to as the “corrected hourly rate” of (\$.37 per hour) appears nowhere in the ordinance.

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<sup>9</sup> W. Va. Code § 21-5-9. Notification, posting and records.

Every person, firm and corporation shall:

- (1) **Notify his employees in writing**, at the time of hiring **of the rate of pay**, and of the day, hour, and place of payment.
- (2) **Notify his employees in writing**, or through a posted notice maintained in a place accessible to his employees **of any changes in the arrangements specified above prior to the time of such changes**.
- (3) **Make available to his employees in writing** or through a posted notice maintained in a place accessible to his employees, **employment practices and policies with regard to** vacation pay, sick leave, **and comparable matters**.
- (4) Furnish each employee with an itemized statement of deductions made from his wages for each pay period such deductions are made.
- (5) Keep posted in a place accessible to his employees an abstract of this article furnished by the commissioner, and
- (6) Make such records of the persons employed by him, including wage and hour records, preserve such records for such periods of time, and make such reports therefrom to the commissioner, as the commissioner shall prescribe by regulation as necessary or appropriate for the enforcement of the provisions of this article. (emphasis added).

The ICA concluded without citation to any authority that the Respondent's revocation of a 9-year pay practice did not "constitute a change or reduction in wages such as that contemplated by the WCPA." Thus, the plain language of the statute is read out of existence by the ICA in favor of the Respondent's interpretation which allows anything that is considered a "correction" of a "error" to pass without notice or without justification.

**2. There was no overpayment of longevity or EMT certification pay by the City and the Intermediate Court's Reversal of that determination by the Circuit Court was error.**

Turning to the issue of EMT pay, the City asserts that by calculating Petitioners' longevity increment and paying the same on an hourly basis since the adoption of the ordinance in 2008 until 2017 it has been in violation of the Longevity Plan ordinance and that "\$624.00 annually is the controlling amount," even though it also admits that this "controlling amount" applies by the plain language of the ordinance only to a category of employees the City admits none of Petitioners ever were.

The City also admits that it had an established pattern and practice from the adoption of the longevity plan ordinance in 2008 until 2017 of paying Petitioners at the amount set forth in the ordinance (\$.25 per hour) for Longevity Pay for each year of city service. The City has no history of unilaterally doing what it decided to do in 2017, which was to retroactively recalculate longevity pay previously awarded to the Petitioners so as to lower the longevity pay which Petitioners had accrued from 2008 through 2011.

The ICA memorandum decision correctly notes that the 2008 Longevity Ordinance at issue "unambiguously states different pay rates for 48 hour and 54 hour employees". *Joint Appendix at 976*. The ICA goes on to note - again correctly - that in 2011 the fire civil service employees (the Petitioners in this action) were changed from 48 hour shifts to 54 hour shifts. *Id.*

What the ICA opinion completely ignores, however, is that none of the longevity pay at issue in this case was accrued by the firemen after the 2011 change from 48 hours to 54 hours shifts. Thus, contrary to the City of Parkersburg argument which the ICA accepted, the reason that Parkersburg didn't change the Petitioners' rate of pay when it changed their schedule from 48 to 54 hours was that none of the accrued longevity pay at issue had been accrued under the 54 hour schedule. Rather, all of it had been accrued under the 48 hour schedule which provided for a \$.25 per hour increment for each year of service.

Further, the ICA simply handwaves away the requirement under West Virginia Code §21-5-9 that employer notify an employee of the rate of pay and any changes to that rate by accepting the City's explanation that its 9-year practice of paying the employees correctly was "an error" and therefore, did not require notice when it was revoked in 2017. This position completely guts, without explanation or rationale, the requirement of West Virginia Code § 21-5-9 which requires the employer to notify an employee of the rate of pay and any changes to that rate. Only an ordinance – duly passed altering or rescinding the increments provided to Petitioners' hourly rates pay – could provide notice consistent with the requirement of West Virginia Code § 21-5-9. The City neither sought nor received any alteration in either of the two 2008 pay practice ordinances at issue, a point raised by the Circuit Court in ruling for the Petitioners.

Not only that, but the determination of whether this act by the City was an error or not is a question for the jury. If, as the ICA opinion holds, the employer can pay an employee a rate of pay for 9 years and then unilaterally change that rate with no notice to the employees, the code section is rendered a nullity. And in light of these errors, it is in dire need of correction by this Court that the ICA's opinion returns the crystal-clear violation of the Wage Payment Collection Act to the

Circuit Court for further proceedings based upon the issue as framed by the ICA. *Joint Appendix at 978.*

The Petitioners accrued longevity pay, which was part of their base wage from 2008 to 2011. The longevity pay accrual was then stopped in 2011 at the same time that the Petitioners' schedule was changed from 48 hours to 54 hours per week. Thus, all of the accrued longevity pay which the Petitioners were entitled to was accrued at 48 hours (\$.25/per hour) and was paid at that rate from 2011 through 2017. In 2017, the City retroactively impaired that previously accrued wage rate by unilaterally reducing the Plaintiffs' rate of previously accrued longevity pay from \$.25 per hour to \$.2222 per hour. There is absolutely nothing in the ordinances at issue nor in the law cited by the ICA which permits an employer to retroactively reduce previously accrued wage rates earned by employees which the employer had been paying for years.

The ICA opinion further notes - this time correctly - that "the fact that the City of Parkersburg paid the 48 hour rate in error does not create a vested interest in such an over payment to the Petitioners in perpetuity." While this assumes incorrectly that the 48 hour payment was in error, it also incorrectly frames the argument of the Petitioners as requiring that the City pay "in perpetuity" the longevity pay or any other pay. The Petitioners have never contended that the City is required to maintain the longevity pay or to pay them any particular rate of pay so long as their rate of pay does not fall below the statutory minimum wage. The City is free to change - prospectively - the pay rate for the Petitioners or any other employee.

What the City of Parkersburg did in this case was to alter a 9-year-old pay practice to reduce the Petitioners' rate of pay based upon a reinterpretation of already accrued longevity pay which the Petitioners had accrued before the change in their shifts to 54 hours per week. This fact is completely ignored in the ICA opinion, yet it was relied upon by the Circuit Court when

concluding that the Plaintiffs had a vested interest in the pay rate which they were receiving in 2011 from 2017. Appendix 000977.

Ironically, the ICA, in its Footnote 7, correctly quotes the governing law that is applicable to the very situation which the Petitioners asserted and which was undisputed in the trial court below. The ICA notes that in Bogges v. City of Charleston, 234 W.Va. 366, 377, 765 S.E.2d 255, 266 (2014), the Bogges Court recognized "an important distinction between the retroactive impairment of previously earned invested rights, such as pension benefits, which are a form of deferred compensation, and those actions which simply alter the terms of future employment. Id. at 376, 765 S.E.2d at 265. The former is generally disallowed while the latter is permitted. Id." The situation which was prohibited in Bogges is exactly the situation which the City imposed upon the Plaintiffs herein.

**3. The City's belated attempt to reframe its defense to its firefighters' efforts to restore City's 2017 cuts to their hourly rate of pay was correctly rejected by the Circuit Court in its final order of August 31, 2022 and the Intermediate Court's Reversal of that determination by the Circuit Court was error.**

Based upon the parties' filings identifying the Revised 5/20/08 ordinance as the only ordinance relevant to Petitioner's 2017 "recalculation" of Petitioners' longevity pay the Court issued an order dated October 22, 2021, ruling in favor of the Petitioners as to liability. Thereafter, Petitioners requested that Respondent reinstate the hourly rate of pay Petitioners had enjoyed before Respondent's 2017 recalculation. After considerable delay, Respondent produced a lengthy spreadsheet which it contended properly reflected Petitioners' correct hourly rates. Petitioners immediately noticed that the Respondent's calculations did not fully restore the cuts Respondent imposed in 2017. Respondent initially provided no rationale for why its proposed restoration did not return Respondents to their pre-2017 hourly rates. Petitioners therefore prepared an order

requiring Respondent to fully restore Petitioners' pay and submitted it for entry. Respondents' proposed order was the subject of a hearing before the Circuit Court.

The Trial Court held that “[t]he City of Parkersburg’s argument that all eligible city employees were to receive a set \$624.00 per year is negated by the language of the statute and the failure to consider that due to over time, the employees would be receiving different amounts for longevity.” October 22, 2021, Amended order, paragraph 12, *Joint Appendix* at 573. The Circuit Court concluded that “the City of Parkersburg’s actions in reducing the Respondents’ pay violates the West Virginia Wage Payment and Collection Act.” October 22, 2021 Amended order, paragraph 19, *Joint Appendix* at 574. The Circuit Court further held that the 2017 “pay reductions were made without written notification of changes to pay practices.” October 22, 2021 Amended order, paragraph 16, *Joint Appendix* at 574.

The October 22, 2021 Order of the Court quite properly reflected the fact that Respondent had consistently maintained throughout the litigation that the sole cause of its 2017 reduction in the Respondents’ hourly rates of pay was its “reinterpretation” of the May 20, 2008, longevity pay ordinance to reduce the Petitioners’ rate of longevity pay from \$0.25 cents per hour to \$0.2222 cents per hour. After the Circuit Court’s October ruling the Respondent attempted an eleventh hour about face on this issue, seeking for the first time to rely upon its alleged reinterpretation of other, earlier ordinances as well in reducing Petitioners’ pay in 2017.

**4. The International Association of Fire Fighters Local 91 has representative standing under the test enunciated in *Affiliated Construction Trades Foundation v. W. Va. DOT*, 227 W.Va. 651, 713 S.E.2d 809 (2011) and the Intermediate Court’s Reversal of that determination by the Circuit Court was error.**

Finally, the ICA addresses and reverses the Circuit Court's finding that the IAFF Local 91 has representative standing to bring Petitioners’ claims under the WCPA. In reversing the Circuit Court's determination that the IAFF Local 91 had standing, the ICA completely ignores the fact

that the IAFF Local sought injunctive relief on behalf of all of its members to correct the pay practices of the Respondent going forward. Thus, contrary to the ICA's conclusion that the "claims are presumably not common to their entire membership", the claims are common to the entire membership because the entire membership has an interest in the correction of the Respondent's pay practices going forward so that those conform to the WPCA. This distinction is completely ignored by the ICA opinion

Respondent relies upon language from the third prong of the test for standing set forth in *Affiliated Construction Found. v. W. Va. DOT*, 227 W. Va. 653, 713 SE 2nd 809 (2011), and argues that the International Association of Fire Fighters Local 91 lacks standing to assert a claim in this matter. Respondent's memorandum, p. 12. Respondent makes a variety of arguments about differences between the IAFF and the plaintiffs in the *Affiliated* case. However, there is no factual basis set forth in the record that supports any of Respondent's claims about the scope of authority that IAFF enjoys. Assertions by Respondent in its memorandum do not constitute a basis in the record for determining whether the claims asserted by the IAFF require participation of individuals in this lawsuit.

The only part of the three-part *Affiliated* standing test which Respondent argues the IAFF does not meet is the third prong regarding representative standing. However, the amended complaint requests "injunctive relief prohibiting the Defendant from taking further action in violation of the Petitioner's written pay policies." The injunctive relief sought by the complaint is not relief which requires the participation of individual members of Local 91. To the contrary, it is exactly the type of relief which the West Virginia Supreme Court has held a union representing affected workers has standing to seek:

We see nothing in the record to indicate that the participation of ACT's individual members is required for resolution of the judiciable controversy in this action.

Declaration by the Court will clarify whether or not state law required the DOH to seek competitive bidding for the Red Jacket project, and, if state law were violated, the appropriate remedy to address that violation. Similarly, a declaration by the Court will clarify whether or not state law requires the inclusion of a prevailing wage clause in the Red Jacket contract and, if so, the appropriate remedy to address that violation.

*Affiliated Construction Found.* at 713 S.E.2d 819.

Similarly, herein IAFF Local 91 seeks a declaration that Petitioner's actions violate the West Virginia Wage Payment & Collection Act and, if so, to order Petitioner to correct that violation for IAFF's members prospectively. This Local 91 clearly has standing to request as injunctive relief pursuant to *Affiliated*.

Respondents assert that the three named Petitioners stand in the same relationship to the pay practices of the Respondent as do all other similarly situated members of Local 91 who have been affected by the reduction in longevity increment pay. The relevance of these allegations is that the International Association of Firefighters Local 91 has an interest in representing all similarly situated members of the Local who have been subjected to the Respondent's improper pay practices and it seeks relief prospectively to correct those practices going forward so that Respondent resumes paying Petitioners and all other similarly situated employees who are members of the International Association of Firefighters Local 91 properly in the future, as Respondent did from 2008 through 2017.

The ICA concluded without citation to any authority that the Respondent's revocation of a 9-year pay practice did not "constitute a change or reduction in wages such as that contemplated by the WCPA." Thus, the plain language of the statute is read out of existence by the ICA in favor of the Respondent's interpretation which allows anything that is considered a "correction" of an "error" to pass without notice or without justification.

The ICA opinion further notes - this time correctly - that "the fact that the City of Parkersburg paid the 48 hour rate in error does not create a vested interest in such an over payment to the Petitioners in perpetuity." While this assumes incorrectly that the 48 hour payment was in error, it also incorrectly frames the argument of the Petitioners as requiring that the city pay "in perpetuity" the longevity pay or any other pay. The Petitioners have never contended that the City is required to maintain the longevity pay or to pay them any particular rate of pay so long as their rate of pay does not fall below the statutory minimum wage. The City is free to change - prospectively - the pay rate for the Petitioners or any other employee.

What the City of Parkersburg did in this case was to alter a 9 year pay practice to reduce the Petitioners' rate of pay based upon a "reinterpretation" of already accrued longevity pay which the Petitioners had accrued before the change in their shifts to 54 hours per week. This fact is completely ignored in the ICA opinion, yet it was relied upon by the Circuit Court when concluding that the Plaintiffs had a vested interest in the pay rate which they were receiving in 2008 from 2017. Appendix 000977.

### **VIII. Conclusion**

As the Court can see, the only way for the Respondent to escape liability for the pay it owes its firefighters is to ignore and flout this State's laws; that is, when it isn't interpreting them out of existence. The Respondent has retroactively pickpocketed its own firefighters, and the ICA has given them cover to do it. Now this Court has the opportunity to right that wrong as identified above. It is not only the correct thing to do to support our first responders, but it is what the law requires. For these reasons, Petitioners ask this Court to reverse the ICA's decision upholding the trial court's grant of summary judgment, reinstate the Circuit Court's judgment in

favor of Petitioners, and remand this matter to the Circuit Court for further proceedings consistent with the Circuit Court's judgment in favor of Petitioners.

Respectfully submitted,

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JOSHUA GANDEE  
Petitioners by Counsel,

/s/ Walt Auvil

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

**Wayne White, Michael Wood, Joshua Gandee,  
and others similarly situated, and the  
International Association of Fire Fighters Local 91,**

**Plaintiffs Below, Petitioners,**

**v.**

**SUPREME COURT CASE NO. 24-82**

**ICA NO. 22-ICA-142**

**Civil Action No. 18-C-259 (Wood County)**

**City of Parkersburg,**

**Defendant Below, Respondent.**

**CERTIFICATE OF SERVICE**

Counsel for Petitioners hereby certifies that on May 28, 2024, the undersigned filed the foregoing Petitioner's Brief via the File & ServeXpress system, which will send notice of the filing to Respondent's Counsel identified below:

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