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)

PETITIONERS' REPLY BRIEF

/s/ Walt Auvil
WALT AUVIL (WVSB #190)
KIRK AUVIL (WVSB #12953)
Counsel for Plaintiffs Below/Petitioners

The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-3058

Table of Contents

Table of Authorities

West Virginia Cases

Other Authority

I. STATEMENT REGARDING ORAL ARGUMENT IN DECISION

Petitioners have no objection to the Respondent's request for oral argument and believe that the decisional process may be aided by oral argument. The overlapping hearings, rulings, as well as the factual record in this matter are somewhat complex and could perhaps be aided by oral argument. However, the argument in the Respondent's brief that the Circuit Court's rulings have "put the City in an untenable position where it has been forced to continue overpayments or else violate the West Virginia Wage Payment and Collection Act" makes no sense because the Circuit Court's orders in this matter were all stayed by agreement of the parties pending the resolution of this appeal. Petitioners are unclear what the Respondent could possibly be referring to in this regard.

II. ARGUMENT

1. Petitioners and other affected firefighters were never part-time employees of the City of Parkersburg

The Respondent begins its brief with a statement of the case which repeats a critical foundational error upon which its entire argument rests. This error is also one relied upon by the Intermediate Court of Appeals (hereinafter "ICA") in finding in the Respondent's favor. Respondent states that Petitioners should properly have been paid under the "appointed part-time employees" pay scheme it set forth in its 2008 longevity pay ordinance. However, contrary to both the ICA ruling and the Respondent's argument to this Court, by its plain terms the longevity pay plan instituted by the Respondent in 2008 does **not** provide "city firemen with $624.00 for each year the firemen work after 2008." Compare Respondent's brief, Page 2 and Appx. 24. The parties agree that **none** of the fireman affected by Respondent's 2017 reduction in hourly wages – including the Petitioners herein - were ever "appointed part-time employees". Appointed part-time employees are the **only** category of City employees referred to in the ordinance as designated to

receive "longevity of six hundred and twenty four ($624.00 dollars per year for each year of city service)."

None of the Petitioners, by the Respondents' own admission, were "appointed part-time employees". Therefore, the $624.00 figure in the ordinance referring to those employees has no application to the Petitioners whatsoever. Rather, the Petitioners were all "fire civil service employees working a 48 hour work week," at the time of the adoption of the longevity plan at issue. Therefore by the terms of the ordinance, all were entitled to 25 cents per hour for each year of city service. Thus it is completely erroneous for the Respondent to again assert to this Court that the ordinance says something which it plainly does not say. In short, the Respondent is wrong to continually assert that there is some provision of the city pay plan which sets forth $624.00 per year as the appropriate pay scale for full-time 48-hour city fire fighters. As demonstrated in Petitioners' Brief, all other briefing in this matter, and in the Circuit Court's ruling, Respondent's position on this point has no basis whatsoever in the record inside or outside the four corners of the document, and the ICA erred by adopting the Respondent's utterly unsupported position.

2. Respondent must not be permitted to argue that Petitioners' longevity pay was changed based anything other than the City's 2017 reinterpretation of its 2008 ordinance

Respondent argues that there were different amounts which were provided for longevity pay before the adoption of the 2008 ordinance. However, as the Circuit Court noted in its ruling finding in favor of the plaintiffs, the City itself took the position that the only cause for the reduction in pay which the Petitioners suffered in 2017 was the City's reinterpretation of the 2008 ordinance. Therefore, the Respondent waived any claim that the reduction in 2017 was caused by any reinterpretation of other pay ordinances pre-existing the 2008 ordinance. Collateral estoppel was applied quite correctly by the trial court when Respondent tried to argue that in some way pre-

2008 ordinances provided for different hourly increments for longevity pay affected the 2017 reduction in the Petitioners' hourly rate. The Respondent firmly and repeatedly asserted to the trial court, the ICA, and this court itself, as well as through agents under oath in depositions, that the only basis for its 2017 reduction in Petitioners' (and other fire fighters) hourly rates of pay was its reinterpretation of the 2008 ordinance at issue. Accordingly, Respondent cannot and should not be permitted to now argue that some other ordinances pre-existing the 2008 ordinances were in some way involved in their decision to reduce the Petitioners' pay in 2017.

Respondent further argues that it should not be held to its prior position that the sole cause of the reduction in the plaintiff's rates of pay was its re-interpretation in 2017 of the longevity and EMT pay ordinances. That was the position it took throughout this litigation. At the eleventh hour, it now argues that some other pre-2008 ordinances somehow affected its calculation of the reductions it made to the Petitioners' rates of pay. It was not the Petitioners, but the Respondents who took the position that the only ordinance at issue in the reductions which it imposed in 2017 was the ordinance adopted in 2008 and suspended in 2011. The Respondent took the position that the 2008 ordinance was the only one at issue. This makes it exceedingly strange that Respondent now argues that the Petitioners should somehow be held responsible for not having raised issues regarding pre-2008 ordinances when it dismissed those issues itself. The Circuit Court properly relied upon the City's representation that the only ordinance it reinterpreted in 2017 which caused the reduction in the Petitioners' pay was the 2008 ordinance previously discussed.

3. Petitioners were paid correctly from 2011 to 2017

The **Respondent's** position is that on **July 1, 2011**, the City suspended the operation of the longevity plan and halted the accrual of any additional longevity pay at that point. Respondent's brief, Page 3-4. By Respondent's own admission, **after** it froze all accrual of additional longevity

pay on July 1, 2011, the City **then** altered the Petitioners' schedules from 48 hours per week to 54 hours per week. Respondent's Brief, Page 4.

Thus, by Respondent's own admission, **all of the longevity pay at issue herein was accrued during the time period when the Petitioners were scheduled at 48 hours per week**. The 2008 ordinance plainly provides that firefighters on 48 hour per week schedules accrue 25 cents per hour for each year of city service. All of the longevity pay Petitioners and other firefighters ever accrued was accrued by them when they were on 48 hour per week schedules. Thus, the City properly paid Petitioners the longevity pay which they had accrued during their 48 hour per week service at 25 cents per hour from 2008 until March 2017. Respondent refers to the wage payments it made to Petitioners during these years as "overpayments", but they were no such thing. Instead, these wages were properly paid based upon the longevity increments accrued by Petitioners between 2008 and 2011 when the City suspended accrual of additional longevity pay. The City properly paid Petitioners the increment of 25 cents per hour dictated by the 2008 ordinance from 2011 through 2017. Since the City's "reinterpretation" in 2017, it has continuously **underpaid** Petitioners and all other affected firefighters in the City of Parkersburg, hence this long-running civil action now in its third appearance before this Court. Respondent's Brief, Page 4. Contrary to the Respondent's position, there was never any overpayment to Petitioners because they were paid exactly what the 2008 ordinance required for longevity pay which they had accrued from 2008 to 2011. What the Respondents did in 2017 was to "recalculate" Petitioners' longevity pay and reduce their hourly rate of pay as explained in the Petitioner's initial brief, which sets forth the reductions in pay per hour suffered by each affected firefighter.[1]

[1]The amounts of the City's reduction in each affected firefighters' hourly rates of pay set forth in Petitioners' opening brief were provided by the Respondent.

4. The EMT pay ordinance provided longevity pay in hourly increments to Petitioners, not EMT pay benefits

Contrary to the City's repeated assertion, there is absolutely no reference to an amount of $1,040.00 per year of EMT pay benefit, nor is there any reference in the ordinance to $624.00 per year of longevity pay. Rather, both ordinances, the EMT pay ordinance (Appx. 209) and the longevity pay ordinance, both provide increments **on a cents per hour basis**. Respondent simply ignores the plain language of its own pay plan and asserts before this Court that the Court should ignore the plain language of the plan providing hourly increments as well. There is no basis in law or fact that would prompt a Court to take this approach. As such, the ICA ruling to that effect must be reversed.

5. The International Association of Fire Fighters Local 91 has standing to seek injunctive relief for Petitioners and its other members

The International Association of Fire Fighters Local 91 has representative standing to bring a claim for injunctive relief as set forth in Petitioner's initial briefing in this matter. None of the City's arguments responded to the fact that both *Snyder v. Callaghan* and *Warth v. Seldin* support the view that a union may bring claims on behalf of its affected members for injunctive relief without the necessity of having individual damages claims calculated. See *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197 (1975); see also *Snyder v. Callaghan,* 168 W. Va. 265, 284 S.E.2d 241 (1981). The ICA simply ignored the fact that the relief sought by the IAFF Local 91 was not for monetary relief for the individual members, but rather for injunctive relief against the City to require it to correctly calculate the wages of its members going forward according to the City's own pay ordinances. This Court should correct that misapplication of law by the ICA.

CONCLUSION

Based on the facts in the record in this matter, as well as the reasons set forth in the Petitioner's opening brief and this reply brief, the Intermediate Court of Appeals' memorandum decision reversing the Circuit Court was in error and should be reversed in all regards.

Respectfully submitted,

Petitioners, by Counsel

/s/ Walt Auvil_____
WALT AUVIL (WVSB #190)
KIRK AUVIL (WVSB #12953)
Counsel for Plaintiffs Below/Petitioners

The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-3058

IN THE SUPREME COURT OF APPEALS OF 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.

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

City of Parkersburg,
Defendant Below, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 2, 2024, he served a copy of Petitioners' Reply Brief upon Respondent via the File & Serve Xpress system which will send notice of the filing to the following:

Johnnie E. Brown WV State Bar No. 4620
Donovan M. Powell, WV State Bar No. 13914
PULLIN, FOWLER, FLANAGAN, BROWN & POE PLLC
J amesMark Building
901 Quarrier Street
Charleston, WV 25301
Telephone: (304) 344-0100/Facsimile: (304) 342-1545
Counsel for City of Parkersburg

/s/ Walt Auvil
WALT AUVIL (WVSB #190)
KIRK AUVIL (WVSB #12953)
Counsel for Plaintiffs Below/Petitioners

The Employment Law Center, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-3058