IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 24-82

WAYNE WHITE, MICHAEL WOOD, JOSHUA GANDEE AND OTHERS SIMILARLY SITUATED AND INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 91,

Plaintiffs Below, Petitioners,

v.

CITY OF PARKERSBURG,

Defendant Below, Respondent.

(On Appeal from the Final Order of the Honorable Robert A. Waters; Circuit Court of Wood County, West Virginia; Case No. 18-C-259)

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The underlying civil action concerns a wage dispute brought by the Petitioners for alleged violations of the West Virginia Wage Payment and Collection Act. Plaintiffs' Amended Complaint was filed on October 4, 2018, wherein Count I, alleges that Defendant incorrectly altered the City's Longevity Plan terms and conditions for which compensation Plaintiffs received up until March 2017. *Appx.25*. Count II of Plaintiffs' Complaint alleges that the City incorrectly applied Plaintiffs' EMT certification pay ordinance by failing to place the City's EMT certification policy in writing and failing to properly make the policy available to them. *Appx. 26*.

Importantly, Petitioners' Amended Complaint alleges that the City violated the Wage Payment and Protection Act by paying Plaintiffs' "longevity pay at a rate below that set forth in Exhibit A." *Appx. 25*. The Exhibit A is a copy of the Longevity ordinance enacted in 2008 and applied prospectively and solely to earned longevity from 2008 to 2011. *Appx. 31*. In 2011, longevity pay was stayed. *Appx. 40*.

The fundamental questions presented are if the City's Longevity and EMT pay ordinances were applied correctly from March 2017 forward. The City admits that from November 8, 2011, until March 2017 it was not applying the subject ordinances correctly. The second question presented asks if a municipality like the City of Parkersburg can prospectively correct its application of specific pay benefits provided by ordinances passed by a municipality without violating the West Virginia Wage Payment and Collection Act.

The City's specific longevity ordinance provides an annual amount of "longevity pay" awarded to each employee for each year of service. Although the City has operated under several Longevity ordinances prior to 2008, they have consistently passed new Longevity ordinances over the years with each new ordinance prospectively increasing longevity pay for each year worked

thereafter. Herein, Plaintiffs' Longevity claim specifically alleges that the terms of the current Longevity pay plan applying to years worked after 2008 are the employment terms which have been altered. *Appx. 25*. The below Longevity plan is the only Longevity ordinance which Plaintiffs' Complaints assert was unlawfully changed and applied.

> LONGEVITY PLAN (Revised 05/20/08)
> Effective July 1, 2008 (not retroactive) all full-time regular employees, policy 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 ($624) dollars per year for each year of city service. Fire civil service employees working a 48 hour work-week will receive longevity of twenty-five ($.25) cents per hour for each year of city service. Fire civil service employees working a 54 hour work-week will receive longevity of twenty-two point 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.
> *(Appx. 24)*

This ordinance provided City firemen with $624.00 for each year the firemen worked after 2008. The firemen received longevity pay at different annual levels prior to 2008, for example: if a fireman worked between the years 1994-1996, they receive longevity pay of $250.00 for each year worked during this specific time frame, and if they worked from 1997-2007 they receive longevity pay of $416.00 for each year worked during that specific time frame. *Appx. 590-595*. Although the hourly rate is calculated based on the number of scheduled weekly hours the ordinance provides the same amount of total annual compensation per longevity year regardless of the number of scheduled hours. The resulting total is an addition to a fireman's base salary and other benefits.

The "not retroactive" language in the disputed 2008 Longevity ordinance indicates that the only years worked for which a fireman received $624.00 per year worked is for the years worked after July 1, 2008. Although the prior ordinances were produced in discovery and in the city's motion for summary judgment, the longevity years paid according to these pre-2008 ordinances nor the

ordinances themselves have been disputed nor alleged to have been interpreted or applied unlawfully by the City. *Appx. 173, 22-41.* Therefore, the only longevity payments relevant to this case are the payments made for the years worked after 2008.

The City revised its Longevity plan on May 20, 2008, effective July 1, 2008. At the time of revision every fireman was a 48-hour employee. The 2008 ordinance clearly states that from July 1, 2008, forward each fireman will receive a rate paid according to hours worked that each totaled $624.00 per longevity year after the effective date. This is done by multiplying either a 40-, 48-, or 54-hour shift by the corresponding rates of $.30, $.25, and $.2222 to, in each case, totaling $624.00 per longevity year. *Appx. 217.*

An additional benefit the City provides its firemen is a benefit for obtaining and maintaining an EMT certification. This EMT benefit is implemented by City Council in Article 125 as set forth below.

> All members of the Department who attain the designation of Firefighter/EMT and maintain certification as an Emergency Medical Technician shall receive an increase in pay of forty-two cents ($.42) per hour for all forty-eight (48) hour work week personnel and fifty cents ($.50) per hour for all day shift personnel effective July 1, 2008.
> (See: *Appx. 209)*

These EMT rates were adjusted up or down in increments according to the number of hours the firemen were scheduled to work each week. At the time the EMT ordinance became effective on July 1, 2008, all firemen were 48-hour employees however, if a fireman worked 48 or 40 hours per week your EMT benefit both totaled around $1,040.00, because rounding each shift and rate combination resulted in slightly more or less. *Appx. 220*

Plaintiffs continued to accrue and receive longevity payment for each new year until July 1, 2011, when the City passed "An Ordinance Suspending the Operation of the Longevity Plan." *Appx. 204.* This ordinance halted any additional years worked after 2011 from being paid according to the

2008 ordinance. However, they continued to be paid their longevity benefit for each year worked according to the applicable ordinance for years prior to July 1, 2011. For instance, years between July 1, 2008, and July 1, 2011, were paid in accordance with the 2008 ordinance and the years prior to 2008 were paid according to prior ordinances as mentioned above.

Admittedly, overpayments began in 2011. City Council enacted "An Ordinance Amending and Reenacting the Compensation Plan and Section IX, Benefits, of the City of Parkersburg Policies and Procedures" was adopted November 8, 2011, changing the number of weekly hours worked by members of the fire department. *Appx. 192.* The ordinance in relevant part states that the "Longevity plan…[is] hereby amended and re-enacted (changing the work week for certain Fire Civil Service employees from 48 hours to 54 hours per week)" *Appx 192, 193.* From this time forward all firemen now worked 54-hours per week rather than 48-hours per week.

When Plaintiffs became 54-hour employees in November of 2011 until March 2017, the City failed to recalculate and apply the EMT and Longevity benefits according to a 54-hour work week schedule set forth in the ordinance. Specifically, Plaintiffs received the $.25 longevity rate reserved for 48-hour employees rather than the $.2222 rate to be applied to 54-hour employees, per the 2008 Longevity ordinance. This resulted in the City substantially overpaying Plaintiffs for longevity years earned under the 2008 ordinance. Similarly, firemen who obtained their EMT certification continued to receive the 48-hour rate prescribed by the EMT ordinance rather than a lower prorated rate 54-hour rate that would amount to $1,040.00 of additional annual EMT benefit pay.

These continued overpayments went unnoticed until Plaintiff White was transitioning to a new job within the Fire Department. White's new position was a 54-hour a week position while his prior position was 40-hours per week, this change inherently required that he receive less longevity pay per hour to comply with the 2008 ordinance. *Appx. 229.* Prior to this position change, White

was receiving $1,110.72 more per year than he was entitled. *Appx. 230.* Upon further investigation it became apparent the City had been paying every firefighter in the department receiving longevity and EMT benefits at the higher 48-hour rate instead of the lower 54-hour rate.

The City's failure to calculate the firemen's Longevity and EMT rates from 48-hours to 54-hour rates to total the set amounts for each ordinance resulted in continued overpayments made to Plaintiffs well in excess of the annual amounts approved by council in the respective ordinances. In an effort to comply with their own lawfully enacted City ordinances, on or about August 1, 2017, the City prospectively began paying Plaintiffs Longevity and EMT rates totaling the annual amounts indicated in the 2008 ordinance.

On August 1, 2017, the City also prospectively pro-rated the EMT rate from $.42 per hour to $.37 per hour to comply with the amount of yearly EMT pay approved by Council providing close to $1,040.00 to each qualifying fireman. *Appx. 220.* The City did not attempt to collect the prior six years of overpayments made to each Plaintiff.

On appeal, the Intermediate Court of Appeals' ("ICA") Memorandum Decision found that the City's application of the 54-hour longevity rate unambiguously set forth in the 2008 Longevity ordinance is not considered a "change or reduction in wages such as that contemplated by the WCPA." *Appx. 977.* As to the Petitioners' claim that they are entitled to the continued overpayment of longevity pay, the Court unsurprisingly found that an erroneous application of a higher rate of the respective pay "does not create a vested interest in such an overpayment to the respondents in perpetuity." *Id.*

The Court went on to find although no City personnel worked a 54-hour weekly schedule at the time the EMT ordinance was enacted, the EMT ordinance by itself fails to provide "notice" under the WPCA . Specifically, the Court noted that the "City of Parkersburg had the authority to

prospectively alter the EMT rate of pay and arguably had a duty to correct an outdated pay rate, we are also mindful of the need for compliance with the notice requirements of the WPCA." *Appx. 978*. Citing that the record was unclear whether the City otherwise provided notice of its prorated 54-hour rate change the Court was unable to determine if the WPCA was violated and remanded this EMT issue to the trial Court for determination. *Id.*

Last, the Intermediate Court determined that the International Affiliation of Fire Fighters Local 91 (hereinafter "IAFF") is a fraternal organization lacking representative standing under the three-prong test in *Affiliated. Appx. 979*. Citing *Warth v. Seldin,* 422 U.S. 490, 95 S. Ct. 2197 (1975), the Court found that the association had alleged representative standing for an unknown number of affected firefighters and the IAFF's claims are not common to its membership due to the nature of any given member's damages requiring separate and unique proof. *Appx. 980*. The Intermediate Court of Appel reversed the trial court's October 22, 2021, Amended Order, remanded the matter for entry of an order granting in part the City's Motion for Summary Judgment, dismissed Count I of Petitioners' Complaint, dismissed the IAFF and the entirety of its claims against the City. *Id.*

SUMMARY OF ARGUMENT

The Intermediate Court's ruling confirmed that the City of Parkersburg has the right and duty to apply its ordinances and respective rates as written. Petitioners' arguments, in part, rely on the unsupported and incorrect premise that Petitioners were receiving the "correct" amount of longevity and EMT pay when working 54-hour schedule while being paid according to a 48-hour rate. Petitioners continue to assert that they are entitled to a the higher 48-hour pay rate (while working 54-hours) simply because the City erroneously applied the ordinances for nine years. The

applicable law shows that Petitioners' assertions and the trial Court's Order were properly reversed by the West Virginia Intermediate Court of Appeals.

The ICA's decision confirms that a municipality can prospectively correct its application of an erroneous pay practice which was contrary to binding ordinance and not violate the West Virginia Wage Payment and Protection Act. The City is not required to continue to abide by a pay practice that violates its own lawfully passed ordinance. It has the legal right to prospectively conform its pay practices to its ordinance, without any respective penalty or negative implications to its employees.

As to the IAFF, this fraternal group has no involvement in this matter, has not suffered any lost wages, and have not standing to be a party to this civil action.

The Petitioners' final attempt to claim additional unearned overpayments related to longevity ordinances prior to the 2008 ordinances are factually meritless, not included in the initial trial Court's Order, and should not be awarded. *See Order at Appx. 568.* Petitioners should not have succeeded in receiving these additional overpayments after petitioning the trial Court to re-write its initial Order and include an award of years of prorated longevity pay outside of the 2008 ordinance in dispute and at specific rates never complained of or alleged in this civil action.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rules 10(c)(6) and 19 of the West Virginia Rules of Appellate Procedure the Petitioner avers that the decisional process will be significantly aided by oral argument. The instant matter is accompanied by extensive factual background and procedural timeline which could likely be clarified by counsel for the Court. Specifically, Rule 19(a)(1) is satisfied here due to the trial Court's *Final Order* awarding longevity back pay and prospective relief in excess of the weight of evidence. Rules 19(a)(2)-(3) also apply as the trial Court's Amended Order and Final Order both

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.

STANDARD OF REVIEW

Respondent respectfully avers that the *de novo* standard of review this Court applies to an appeal from a circuit Court's order of summary judgment should be applied to this instant appeal from the ICA's decision to reverse the Circuit Court's erroneous decision granting the Petitioners' motion for summary judgment. Applying this same *de novo* standard, the ICA does not weigh the evidence but determines if there is a genuine issue of fact to be tried. Entry of an order granting summary judgment is appropriate when the record taken as a whole does lead a rational trier of fact to find in favor of the nonmoving party. If the moving party shows no genuine issue of material fact, then the moving party is entitled to judgment as a matter of law. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Marcus v. Holley*, 217 W. Va. 508, 516, 618 S.E.2d 517, 525 (2005).

It is not the defendant's burden "to negate the elements of claims on which [plaintiff] would bear the burden at trial." *Powderidge Unit Owners Ass 'n v. Highland Props.*, Ltd, 196 W. Va. 692, 698-99, 474 S.E.2d 872, 879 (1996) (citation omitted). Rather, it is the defendant's burden "only [to] point to the absence of evidence supporting [plaintiff's] case." *Id.* at 699 When a motion for summary judgment is properly supported, the burden shifts to the opposing party to demonstrate that summary judgment is not appropriate. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60, 459 S.E.2d 329, 337 (1995). To show that summary judgment is not appropriate, the opposing party, "must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving

party's favor." *Id.* To meet their burden, plaintiffs "must identify specific facts in the record and articulate the precise manner in which that evidence supports [their] claims." *Powderidge*, 196 W. Va. at 699, 474 S.E.2d at 879; *see also Precision Coil*, 194 W. Va. at 59, n. 9, 459 S.E.2d at 336, n. 9 (1995) (where the party opposing a motion for summary judgment fails to make a showing sufficient to establish the existence of an essential element of his or her case on which he or she will bear the burden of proof at trial, "Rule 56(e) mandates the entry of a summary judgment[.]").

The Court in *Precision Coil* further observed that, although a trial court considering a motion for summary judgment must view inferences from the underlying facts in the light most favorable to the party opposing summary judgment, it should consider only "reasonable inferences." *Precision Coil*, 194 W. Va. at n. 10, 459 S.E.2d at n. 10. More specifically, "We need not credit purely conclusory allegations, indulge in speculation, or draw improbable inferences. Whether the inference is reasonable cannot be decided in a vacuum; it must be considered 'in light of the competing inferences' to the contrary." *Id.* "The evidence illustrating the factual controversy cannot be conjectural or problematic." *Precision Coil*, 194 W. Va. at 60, 459 S.E.2d at 337.

ARGUMENT

I. THE INTERMEDIATE COURT'S REVERSAL OF THE CIRCUIT COURT'S DETERMINATION WAS CORRECT BECAUSE THE CITY'S 2017 PROSPECTIVE ACTION TO CORRECT AN INCORRECT APPLICATION OF THE 2008 LONGEVITY AND EMT ORDINANCES WAS LEGALLY CORRECT.

Petitioners argue that the City arbitrarily lowered Petitioners' EMT and Longevity pay without legal justification. The Intermediate Court correctly concluded that the Circuit Court's finding was an erroneous application of the City's longevity and EMT pay ordinances and was simply incorrect. It is factually clear that the City was overpaying Petitioners for several years by providing them a higher 48-hour rate on both longevity and EMT pay rather than the 54-hour rate

for the 54-hour week they worked since 2011. They make this claim in spite of the ordinance specifically providing a 54-hour rate of $.2222 per hour. This assertion is incorrect, the longevity ordinance clearly states that if firemen work 54-hours they should receive $.2222 extra per hour worked which equals the annual amount of $624 per longevity year after 2008.

There was no "reinterpretation" of the 2008 ordinance as there is nothing ambiguous to interpret here, the 2008 ordinance makes clear that City of Parkersburg firemen to receive $624.00 per applicable longevity year, no more and no less. Put simply, the City changed the effected firemen's weekly hours in 2011 to 54-hours the 2008 ordinance required that they be paid $.2222 per hour resulting in $624.00 per longevity year between 2008 to 2011 when accrual of longevity was stopped and 54-hour weeks began. There is no other logical application of the 2008 longevity ordinance. The Intermediate Court agreed, stating that it did not "find that the application of the 54-hour rate explicitly denoted in the 2008 longevity pay plan constitutes a change or reduction in wages such as that contemplated by the WCPA." *Appx. 977.*

Furthermore, the City's ability to enforce and correctly apply its own ordinances is paramount to an objective and just system of municipal governance. The Intermediate Court recognized the City's right and its duty to correct its own errors and apply its ordinances correctly. This Court has set precedent to this right when ruling that "in the absence of a contractual obligation providing otherwise, a public employer is permitted to unilaterally modify a longstanding policy affecting the rights of employees where notice is provided to such employees and where the modification of policy does not retroactively impair previously earned and vested rights, such as pension benefits." *Boggess v. City of Charleston,* 234 W. Va. 366, 377, 765 S.E.2d 255, 266 (2014).

The Intermediate Court was also correct in holding the City's right found in *Boggess,* "public employers must be permitted to exercise discretion in making changes in policies and procedures as mandated by the electorate and in order 'to control its annual budgetary and discretionary functions[,]' this is contrasted by the 'absence of an employee's right to the continued existence of a particular means or method of compensation.'" *Id. at 375. Appx. 977.*

II. PLAINTIFFS HAVE NO VESTED RIGHT TO CONTINUED OVERPAYMENTS OF LONGEVITY AND EMT CERTIFICATION PAY.

Unlike the trial court, the ICA correctly recognized that Petitioners are not entitled to a continued overpayment nor is it a vested right due to the length of time of said error. Specifically, petitioners argue that the length of time the City's overpayments were made to plaintiffs made such payments a vested right entitled to be received thereafter. This argument is another instance of Petitioners arguing a non-existent and unsupportable legal position. The ICA correctly found that "nothing in the briefs or record below to support such a contention, nor do we find any such support in our jurisprudence. Notably, respondents do not point to any statutory or common law that would tend to define such vested rights as those fringe benefits erroneously paid in excess." *Appx. 977.*

Characterizing the City's prospective corrective measures as an unauthorized change in EMT and longevity pay policy terms and conditions which violated the Wage Payment and Collection Act is not legally accurate. The applicable longevity and EMT ordinances' terms and conditions remained unaltered since their adoption in 2008. The extent of the City's actions in 2017 was to effectively stop overpaying plaintiffs EMT and longevity benefits based upon a 48-hour week and begin paying the City firefighters the correct amount as defined within the City's ordinances. No terms or conditions of the relevant ordinances were ever changed nor were they

ever "reinterpreted," the ordinances and their intents are clear and unambiguous. The City simply just applied its ordinances correctly after many years of incorrect application.

The City was fully within its rights to prospectively correct its misapplication of the subject ordinances. This Court has made it clear that a public employer is permitted to unilaterally modify any longstanding policy affecting the rights of employees as long as notice was provided, and the modification does not impair a previously earned and vested right such as pension benefits. *Boggess v. City of Charleston,* 234 W. Va. 366, 377, 756 S.E.2d 255, 266 (2014). Clearly, since the *Boggess* Court articulated this right to change even a longstanding fringe benefit and by simultaneously recognizing pension benefits as a "vested right" (but not fringe benefits), the longstanding overpayment of fringe benefits by the City is not a "vested right" as the Circuit Court has declared it to be.

III. THE CITY'S CORRECTION TO PLAINTIFFS' EMT AND LONGEVITY BENEFITS CEASED WHAT WERE OVERPAYMENTS TO THE PETITIONERS AND DID NOT RESULT IN PLAINTIFFS RECEIVING LESS THAN THE ANNUAL AMOUNTS AUTHORIZED BY CITY COUNCIL IN THE RESPECTIVE ORDINANCES.

Pursuant to *Boggess,* the City has the right to prospectively correct its application of an ordinance to stop what was a clear overpayment. It is important to note that the City did not change the Longevity or EMT ordinance's language or alter the amount of annual pay received for either benefit it provided under the ordinance. Thus, no "authorization" from City Council was needed. City Council had already set forth its annual benefit amount for these benefits when the ordinances were enacted.

If, as the Petitioners assert, the City is to revert back to paying 54-hour employees at the 48-hour rate the City would be forced to continue paying Petitioners overpayments and ignore its ordinances. This argument is legally incorrect and irrational to assert that a City has no right to

properly apply its ordinances and to govern its own finances, all in a prospective manner. This does not violate the West Virginia Wage Payment and Collection Act.

Petitioners' assert that the "ICA simply handwaves away the requirement under West Virginia Code section 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 is 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 section 21-5-9..."

In taking this position, Petitioners ignore the ICA's holding and analysis of precedent set forth in *Boggess v. City of Charleston,* 234 W.Va. 366, 377, 756 S.E.2d 255, 266 (2014) and *Warth v. Seldin,* 422 U.S. 490, 95 S. Ct. 2197 (1975). As stated, the ICA held that there existed no "vested rights" for continued overpayments of wages to employees and the City has right to correctly apply its ordinances when it particularly did so in a prospective manner with any harm to the employees for prior incorrect wage payments by the City.

IV. THE INTERMEDIATE COURT'S REVERSAL OF THE CIRCUIT COURT'S FINAL ORDER OF AUGUST 31, 2022, WAS CORRECT AS THE TRIAL COURT ADDRESSED ISSUES NOT RAISED IN PLAINTIFF'S AMENDED COMPLAINT, NOT SUPPORTED BY THE RECORD, AND WOULD RESULT IN DECADES WORTH OF LONGEVITY AND EMT PAYMENTS CONTRARY TO THE 2008 ORDINANCES.

The ICA correctly determined that the Circuit Court's Order amounted to clear error in its legal analysis and conclusion and factual recitation. The August 31, 2022, Order was drafted by Petitioners and entered by the Circuit Court effectively granted back pay for longevity pay earned and paid at rates according to pre-2008 ordinances which have separate and unique terms and conditions. *Appx. 781-795.* These ordinances were never alleged to have been invalid in the Amended Complaint or Petitioners' Motion for Summary Judgment. Although plaintiffs were

certainly aware that these rates and ordinances applied to longevity years prior to 2008, they failed to raise or dispute these facts. *Appx. 867-888.*

After the Trial Court's Amended Order was entered directing the City to perform specific damage calculations and *after* allowing the City to perform these extensive calculation the Petitioners accused the City of conducting its damage calculations according to the exact formula ordered by the Court's Order. Rather than admit they were now asking for monies paid according to ordinances they had never disputed or sought to amend their complaint, the Petitioners provided the trial Court with a narrative that somehow cast blame on the City for following the Court's Amended Order. *Appx. 833-866 & Appx. 867-888.*

Contrary to Petitioners and plaintiffs below argument, a cursory overview of the Amended Complaint, dispositive motions, and the Trial Court's Amended Order show the exact opposite of the Petitioners' position. *Appx. 22-41, 132-432, 564-568, 781-795.* The City did not "raise" these pre-2008 ordinances as a defense against the 2008 ordinance disputed in this matter because plaintiff never argued that the City incorrectly applied them. The lower trial court completely ignored that the plaintiffs' Complaint and summary judgment only sought back pay pursuant to the rates disputed in the 2008 ordinance. *Appx. 581–597, App. 661-780.* The lower trial court ignored the plain language of properly passed City pre-2008 ordinances which set an annual total amount of longevity pay regardless of the number of hours worked. By its actions, the lower trial court arbitrarily and unilaterally increased the annual amounts articulated in the pre-2008 longevity ordinances even though Plaintiff's complaint is void of any allegations against those particular pre-2008 ordinances.

It is not the City presenting new facts or arguments to the Circuit Court, but the plaintiffs who now, for the first time, seek repayment for pro-rated longevity under pre-2008 ordinances

which they knew existed and were pro-rated in 2017, but which they *never* alleged were paid incorrectly. Put simply, Petitioners' Amended Complaint specifically disputes the longevity payments under the 2008 ordinance and, as the Circuit Court notes in the June 24, 2022, hearing:

> The Court: Can you be specific? What reduction besides what we've talked about happened in 2017.
>
> The Court: Again, what is the other that I haven't been told about that you're now saying was, quote, another reduction besides what we've been talking about all this time.
>
> The Court: The 25 cents to .2222 cent reduction? Can you be more specific?
>
> *Appx. 843, 843*

Although they claim that they "sued over the entire reduction of pay" they have not presented any facts showing longevity years earned prior to 2008 were paid incorrectly nor have they have they ever sought the "entire reduction of pay," they have only sued over the 2008 ordinance and difference between .2222 and .25. *Appx. 845.*[1]

The lower Court's Final Order, dated August 31, 2022, awards longevity pay for almost two decades of longevity years and numerous pre-2008 ordinances beyond the lower Court's Amended Order, dated October 22, 2021, and the Petitioners' Amended Complaint. This is the

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[1] Paragraph twelve (12) through fourteen (14) of their Complaint states in part:

> 12. Thereafter, Plaintiffs and all other similarly situated employees continued to receive longevity pay previously accrued at the rate of .25 cents per hour per each year of city service from 2011 through 2017, although no new longevity pay was added to plaintiffs; wages after July 1, 2011. Thus, plaintiffs were paid longevity pay by Defendant according to the policies set forth in Exhibit A (2008 longevity ordinances) from 2011 to 2017…
>
> 13. …From 2017 to date, Plaintiffs and all similarly situated employees have been paid longevity pay at a rate below that set forth in Exhibit A. (2008 longevity ordinances)
>
> 14. The action of the Defendant City of Parkersburg in altering the terms and conditions of the payment of the longevity pay as set forth above violate the West Virginia Wage Payment and Collection Act in that the terms and conditions of the Plaintiffs' employment and terms of payment of wages were set forth in Exhibit A. (2008 longevity ordinance.)
> *Appx. 22-24.*

only reason why the City has produced said prior ordinances in order to rebut the plaintiffs' now claimed longevity damages. These ordinances were mentioned in the City's summary judgment memorandum and made clear in payroll records specifically showing the applicable rates of prior ordinances

Petitioners' Motion for Summary Judgment fails to reference any pre-2008 ordinance or rate, which are both necessary to compute and allege the decade of prorated longevity pay which they now claim to be entitled. Petitioners fail to provide any reference in the record which would tend to support their new claim.[2] The trial Court ignored this and failed to recognize that this civil action is controlled by Petitioners' Amended Complaint. In doing so it incorrectly found that the City waived this "defense" because it only raised these pre-2008 ordinances when attempting to comply with the Court's Order regarding the City's calculation of longevity and EMT pay. What duty does a party have to assert a defense to a claim not asserted? It is clear that the trial Court's actions were arbitrary and capricious and contrary to law. Rather, it was Petitioners who waived such claims by not setting them forth in their Amended Complaint or not seeking to amend the Amended Complaint.

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[2] Petitioners' state in their dispositive motion:

> Through this motion Plaintiffs move for summary judgment as to liability. the City admits that all Plaintiffs have been negatively affected by its 2017 reinterpretation of the two ordinances at issue in this civil action. The two pay policies at issue adopted small increases to employees' hourly rates of pay: one based upon longevity and the other based upon the employees' EMT certification.
>
> The two decisions challenged herein reduced the longevity and EMT hourly pay increments. Each reduction in pay was based on Defendant's 2017 reinterpretation of the longevity and EMT pay policies adopted by the City Council in 2007. Because no facts are in dispute as to either the 2008 pay policies or Defendants 2017 reinterpretation of those two policies, summary judgment as to liability in favor of Plaintiffs is appropriate. (emphasis added)
> *Appx. 132-167*

V. THE INTERMEDIATE COURT WAS CORRECT IN REVERSING THE CIRCUIT COURT'S RULING THAT THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 91 HAS REPRESENTATIVE STANDING TO BRING WAGE PAYMENT AND PROTECTION ACT CLAIMS NOTWITHSTANDING THE PETITIONERS' REQUEST FOR INJUNCTIVE RELIEF.

Petitioners argue that ICA decision should be reversed because the individual Petitioners' "claims are common to the entire IAFF 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" they claim, "is completely ignored by the ICA opinion." However, this argument simply ignores the WPCA's defined terms and remedies as well as the *Affiliated* test requiring that neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit.[3]

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[3] In *Affiliated* it was determined that an association which has suffered no injury itself, but whose members have been injured as a result of a challenged action, may have standing to sue *solely* as the representative of its members when the organization proves that:

> 1. at least one of its members would have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit. *Id.* at 658.

The West Virginia Wage Payment and Collection Act defines "employee" as "an individual employed by an employer." W. Va. Code section 21-5-5a(2) (2003). The Act provides a cause of action for employees who have been paid in some manner which violates section 21-5-1, et seq. by specifically enumerating such action as set forth in section 21-5-12:

> **Employees' remedies**
>
> (a) Any person whose wages have not been paid in accord with this article, or the commissioner or his designated representative, upon the request of such person, may bring any legal action necessary to collect a claim under this article. With the consent of the employee, the commissioner shall have the power to settle and adjust any claim to the same extent as might the employee.

Further requiring the individual affected employee's participation in bringing an action under the suit the Act provides:

> (b) **Any employee or prospective employee has a right to sue an employer or prospective employer for a violation of the provisions of section five-b [§ 21-5-5b] of this article.** If successful, the employee or prospective employee shall recover threefold the damages sustained by him or her, together with reasonable attorneys' fees, filing fees and reasonable costs of the action. Reasonable costs of the action may include, but shall not be limited to, the expenses of discovery and document reproduction. Damages may include, but shall not be limited to, back pay for the period during which the employee did not work or was denied a job.
> W. Va. Code section 21-5-5d **(emphasis added)**

The ICA properly concluded that the WPCA "expressly limits its remedies to causes of action brought either by the affected employees(s) or the Commissioner of Labor/the commissioner's designee. Nothing in the language of the WPCA contemplates a cause of action brought by an organization with representative standing. Accordingly, the nature of the claim and the relief sought tends to require the participation of the individual member of the association" *Appx. 980.*. The "relief" sought by the Petitioners are the Petitioners' requested declaratory judgment and the "claims" made by these individuals amount to their claims for the overpayments Petitioners stopped receiving after 2017. Neither these claims nor relief can be brought under the WPCA without the individual's participation.

In order for the requested relief to be brought as it has each individual must bring their claims individually or it is not possible to calculate and discern any damages. Put another way, the IAFF could not bring these claims on behalf of its members without each member bringing them individually as the IAFF itself has not been affected in its capacity as a social club by the City. It would simply not be possible to calculate any amount of damages without taking into account each specific firemen and each start date, EMT certification, and rank.

The case of *Snyder v. Callaghan*, 168 W. Va. 265, 284 S.E.2d 241 (1981) further addresses this third *Affiliated* element. In *Snyder* the West Virginia Supreme Court of Appeals adopts the United States Supreme Court's reasoning in *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197 (1975) when seeking to clarify this same element of representational standing, *Warth* states:

> The damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof. Thus, to obtain relief in damages, each member of [the association] who claims injury as a result of the respondent's practices must be a party to the suit, and [the association] has no standing to claim [*283] damages on his behalf. *Id.* at 515-516, 95 S.Ct. at 2214.

Petitioners' claims are not common to the entire membership, nor shared by all in equal degree. Indeed, many firemen have decades of longevity years being paid at several different rates by several different longevity ordinances, not all firemen are EMT certified nor receive EMT benefits. This means that some firemen are more affected than others and not every member of the IAFF has been affected by the City's Longevity and EMT 2017 pay correction. It is clear that whether the Petitioners are seeking a declaratory judgment or an award for wages, the affected petitioners must participate individually or else not be included in the suit. Petitioners prove individual participation is required when listing only the affected firemen in their brief, remove these three named plaintiffs and "similarly situated" employees and there is simply no suit.

The ICA was correct in its analysis of the WPCA and precedent leading it to reverse the Circuit Court's erroneous conclusion "That under the test set forth in *Affiliated Construction Trades Foundation v. W. Va. DOT,* 227 W. Va. 713, S.E.2d 809 (2011), the Plaintiff International Association of Fire Fighters Local 91 has standing to assert a claim in this matter." It is clear that only an individual can bring a claim or seek relief in securing a declaratory judgment under the WPCA's specific parameters and the IAFF cannot bring the same claims its individual members bring against the City. Therefore, the ICA's reversal of the Circuit Court's ruling must be upheld, and the IAFF dismissed for lack of representative standing.

CONCLUSION

The issues brought before the Court have enormous impact on municipalities statewide and their ability to correct wage payment errors prospectively or else having to defend itself against a suit brought by its own employees.

Therefore, Respondent, City of Parkersburg, requests the High Court to uphold and confirm the Intermediate Court's Decision reversing the circuit court's October 22, 2021, Amended Order

and its grant of Petitioners, Plaintiffs Below, Motion for Summary Judgment As to Liability and denial of City of Parkersburg's Motion for Summary Judgment, and remand to the Circuit Court of Wood County for the entry of an order granting City of Parkersburg's Motion for Summary Judgment, in part, dismissing Count I of Petitioners' First Amended Complaint, dismissing the claims of International Association of Fire Fighters Local 91 in their entirety, and for further proceedings consistent with the Intermediate Court's Decision as to Count II of Petitioners' First Amended Complaint.

CITY OF PARKERSBURG,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 24-82

WAYNE WHITE, MICHAEL WOOD, JOSHUA GANDEE AND OTHERS SIMILARLY SITUATED AND INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 91,

Plaintiffs Below, Petitioners,

v.

CITY OF PARKERSBURG,

Defendant Below, Respondent.

(On Appeal From the Final Order of the Honorable Robert A. Waters; Circuit Court of Wood County, West Virginia; Case No. 18-C-259)

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, City of Parkersburg, do hereby certify that on this 15rd day of July 2024, a true copy of the foregoing ***"Respondent's Brief"*** has been served via electronic filing to the following counsel of record:

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