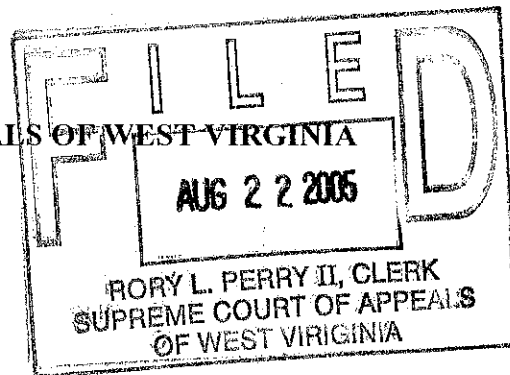


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 05-32655



**DUNBAR FRATERNAL ORDER OF POLICE, LODGE #119,
RANDY L. GILLESPIE, LODGE PRESIDENT,
Plaintiffs below, Appellees**

vs.

**THE CITY OF DUNBAR,
a municipal corporation, Defendant Below, Appellant**

**Honorable Irene Berger, Judge
Circuit Court of Kanawha County
Civil Action No. 98-C-2262**

APPELLANT'S BRIEF

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I. INTRODUCTION

This appeal is about whether a municipality can enter into a never-ending contract, the costs of which will eventually bankrupt the municipality. Almost *ten* years ago, the City of Dunbar (the "City" or "Dunbar") and the Dunbar Fraternal Order of Police Lodge #119 ("FOP") entered into a collective bargaining agreement ("CBA" or "Agreement") that, by its express provisions, terminated on October 16, 1998. When Dunbar attempted to exit the Agreement, the FOP filed this lawsuit, contending that the CBA never ends. Throughout this litigation, the City has taken the position that a municipality cannot enter into a "never-ending contract." The Circuit Court of Kanawha County entered an Order on November 13, 2003, denying the Appellant's Motion for Leave to File an Amended Answer (R. at 49), which would have enabled Dunbar to assert additional statutory authority in support of this defense. Then, on September 3, 2004, the Circuit Court of Kanawha County entered an Order granting the FOP's motion for summary judgment (R. at 101), ruling, among other things, that the CBA never ends. Since such a ruling will harm municipal taxpayers throughout this State, this Court can and should reverse the circuit court's orders.

II. STATEMENT OF FACTS

The City of Dunbar is a municipal corporation located in Kanawha County, West Virginia (Compl. ¶ 4, R. at 3).¹ On October 16, 1995, the City and the FOP entered into a collective bargaining agreement in which the City recognized the FOP as the bargaining agent for all Dunbar police officers below the rank of police chief, who are also members of the FOP

¹ Upon review of the record, it became clear to undersigned counsel that in some circumstances, one number was assigned to an entire multiple-page document in the record, but with respect to other multiple page documents in the record, a number was assigned to each page of the document. Therefore, when referring to a page in a multiple-page document that was not individually numbered, counsel will attempt to refer this Court to the specific exhibit.

(CBA art. II, § 1, R. at 69 Ex. A). The CBA governed the terms and conditions of employment for the police officers until October 16, 1998, at which point the Agreement should have terminated by its express provisions (CBA art. III, § 1, R. at 69 Ex. A).

Apart from any obligation created by the CBA, Dunbar has provided and continues to provide health insurance coverage to all city employees -- not just the police officers -- through PEIA. City employees are permitted to select the type of coverage they desire from among the various plans offered by PEIA. The City cannot limit or exclude any particular plan. In other words, without consulting the City, PEIA can unilaterally add plans that city employees are permitted to select, and even if the plan costs more than the City wishes to pay, the City cannot prohibit its employees from selecting a plan more costly to the City. Rather, the City's only decision relates to how the costs of the premiums will be allocated, such as whether it will require its employees to make contributions toward the cost.

For purposes of simplifying the health insurance plans underlying this litigation, PEIA offers a basic health insurance indemnity plan and an HMO plan. In 1997, PEIA notified the City that all insurance rates would increase substantially, particularly rates for the HMO plan, which would carry a much higher rate than the PEIA basic plan.

Facing the increased premiums, the City sent out a memorandum, in October 1997, indicating that, in 1998, a portion of those premium costs would be passed along to all city employees, including the police officers and fire fighters. All employees were required to make either a \$10 or a \$25 monthly contribution toward their hospitalization coverage, depending upon whether they selected single or family coverage, respectively. In addition, those employees who selected the more expensive HMO coverage were required to pay the difference in premiums between the PEIA indemnity plan and the more expensive HMO plan.

At the time of the change, the FOP asserted that the police officers were not required to pay any contribution toward their health insurance coverage and contended that those officers who selected HMO coverage were entitled to reimbursement for the difference in premiums.

The FOP contract does not, in and of itself, require the City to pay for the police officers' health insurance or for the difference in premiums. Rather, in making this claim, the FOP relies on the following provision:

Health Insurance

The members of the Police Department covered under this agreement, will pay no more premium or be provided any less benefit coverage than any other bargaining unit in the City of Dunbar.

(CBA Art. XVI, R. at 69 Ex. A). At the time the City began requiring premium contributions, there was a collective bargaining agreement in effect between the City of Dunbar and the International Association of Fire Fighters, Local 1228 ("IAFF") (R. at 69 Ex. E). Thus, the FOP contends that the police officers are entitled to the difference in premiums, not exclusively because of the FOP contract, but because of the IAFF contract. However, like the FOP members who selected HMO coverage, the IAFF members who selected HMO coverage were also required to pay the difference in premiums.

Relying on the language in its own contract, the IAFF filed a grievance, on June 29, 1998, contesting both the requirement that fire fighters selecting HMO coverage pay the difference between the HMO plan and PEIA indemnity plan and the requirement that the fire fighters pay the \$10 or \$25 monthly contribution for hospitalization coverage (R. at 69 Ex. F). In accordance with the terms of the IAFF contract, a grievance board decided the matter (R. at 69 Ex. G). While the grievance board decided that IAFF Agreement prohibited the City from requiring IAFF members to contribute the \$10 or \$25 monthly contribution toward

hospitalization coverage, the grievance panel did not render a decision about whether the City could require IAFF members to pay for the difference between HMO and basic indemnity premiums (R. at 69 Ex. G). The Grievance Panel ruled, in pertinent part, as follows:

The purpose of this meeting was to take information based on grievances filed by the City of Dunbar Firefighters (Local 1228).

1) *The firefighters felt that the City of Dunbar illegally deducted \$25.00 a month for hospitalization out of their paychecks.*

* * *

4) [unrelated text omitted] Stephen Swisher, (Attorney for the City of Dunbar), agreed with the facts presented that the City of Dunbar had arbitrary [sic] *deducted \$25.00 from the firefighters pay check, beginning January 1998, and then again in July 1998 when HMO took over.*

* * *

Issue 1:

The City of Dunbar did in fact act illegally when they began to *take \$25 a month out of the check for hospitalization. First, in January then in July for HMO participates.* [sic] Article 7, Paragraph 2; Health Insurance, the city to pay the full amount of the premium attributable to regular full time employees (his/her) dependence in participation in the cities insurance plan concerning Life and Health Insurance. [sic]

(1/12/99 Decision of Grievance Panel (emphasis added), R. at 69 Ex. G).

The City sued to overturn the Grievance Panel's decision ("IAFF litigation"). *See City of Dunbar v. Dunbar Prof. Firefighters IAFF Local 1228*, Civil Action No. 99-C-388. Even though the CBA between the City and the IAFF provided for the judicial review of the grievance board's decision under the *Steelworkers* trilogy,² (IAFF CBA Art. 11, R. at 69 Ex. E), the court decided to apply the narrower standard adopted by the West Virginia Supreme Court of Appeals in *Board of Educ. v. Miller*, 160 W. Va. 473, 236 S.E.2d 439 (1977). Concluding under the

² *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Miller decision that the City had not shown fraud or collusion, the court held that the decision of the grievance board was not subject to judicial review (R. at 69 Ex. H).

Disagreeing with the court's conclusion, the City subsequently filed a petition for review with the West Virginia Supreme Court of Appeals. In February 2002, this Court denied review of the case (R. at 69 Ex. I). Thus, the City reimbursed the IAFF members and the FOP members for the \$10 and \$25 contributions they made toward hospitalization coverage.

In this lawsuit, the FOP contends that the CBA prohibits the City from requiring the police officers to pay the difference between HMO and basic indemnity premiums. However, the City did not violate the Agreement, because the FOP members have never paid more than IAFF members. *Both FOP and IAFF members selecting HMO coverage have been responsible for the difference in premiums.*

Relying on the CBA's termination provision, the City sent a letter, dated August 13, 1998, advising the FOP that it no longer desired to recognize the FOP as the collective bargaining agent for the Dunbar police officers and that it did not intend to negotiate a successor agreement (R. at 69 Ex. B). The CBA between the City and the FOP expressly provides for its own termination:

Section 1. This Agreement shall become effective October 16, 1995 and shall terminate on October 16, 1998.

(CBA Art. III § 1 R. at 69 Ex. A). Despite its acknowledgement of the language expressly providing for the termination of the agreement, the FOP filed this lawsuit, contending that the collective bargaining agreement never ends (Compl. ¶ 9, R. at 3). The FOP relies on the following provision in the contract:

RENEGOTIATION AND AGREEMENT

The parties to this Agreement hereby agree, commencing at least 60 days prior to the expiration of this Agreement, to bargain in good faith with regard to a successor contract. While negotiations are continuing, this Agreement shall remain in full force and effect for such additional period of time as is necessary to negotiate a successor contract.

(CBA Art. XXII, R. at 69 Ex. A). In short, the FOP contends that this CBA remains in effect until a successor agreement is reached. Thus, under the FOP's interpretation, this CBA could remain in effect forever. The City contends that such interpretation is illegal because it creates a perpetual contract that obligates funds unavailable to the city council which adopted the CBA in 1995.

In sum, this litigation was triggered by the unexpected increase in health insurance premiums to a level that the City of Dunbar could no longer afford. The FOP contends that its current contract, read in parity with the IAFF contract, requires to City to pay for 100% of its members' health insurance premiums -- including the difference between more the expensive PEIA HMO premiums and the lesser expensive PEIA premiums, the choice between which is made solely by the employee. Moreover, under its interpretation of the CBA, the FOP, by refusing to reach a successor agreement, can keep the 1995 CBA in effect in perpetuity and can require the City to pay for 100% of its members' health insurance premiums in perpetuity. Under legal precedent, this Court cannot and should not enforce such an agreement.

III. PROCEDURAL HISTORY

The FOP filed this lawsuit on September 24, 1998. In Count I of the Complaint, the FOP contends that the CBA contains no termination clause (R. at 3). The FOP further claims that the City was required to bargain for a successor agreement and that the 1995 CBA remains in effect until a successor agreement is reached (R. at 3).

In Count II of the Complaint, the FOP contends that the City unilaterally altered the terms of the contract by requiring Dunbar police officers to pay contributions toward their health insurance coverage (R. at 3). Count II further alleges that the City should be required to abide by the CBA despite its expiration on October 16, 1998, and to continue paying health insurance premiums until they reach a successor agreement regardless of how long that process takes or if the process never results in a contract (R. at 3).

No activity occurred in this case for more than one year following the filing of the Complaint. On January 11, 2000, the circuit court clerk served a notice requiring the FOP to show good cause why the case should not be dismissed (R. at 12). The FOP responded that it was waiting for a decision in *IAFF* litigation (R. at 13-15). The FOP acknowledged that it should have requested a stay but failed to do so (R. at 15). Then, on March 11, 2000, the circuit court ordered a stay in the case pending an outcome in the *IAFF* litigation (R. at 21-22). The *IAFF* ultimately prevailed at the circuit court level, and on February 7, 2002, the West Virginia Supreme Court of Appeals denied the City's petition for review (R. at 69 Ex. 1).

Over one year after the West Virginia Supreme Court of Appeals denied the City's petition for appeal in the *IAFF* litigation, the FOP moved the circuit court, on July 24, 2003, to lift the stay in the FOP case (R. at 25-29). The circuit court held a hearing on August 18, 2003, at which point the stay was lifted (R. at 37). At this hearing, the City advised the circuit court of its intent to file a motion for leave to file an amended answer (R. at 37), and on September 2, 2003, the City filed its motion (R. at 39-42). The proposed amended answer set forth a number of additional defenses, including the defense that the collective bargaining agreement into which the parties entered was illegal under West Virginia Code § 11-8-26 because it obligated City

funds beyond which the local fiscal authority that entered into the contract could legally spend (R. at 39, 61).

The FOP responded that the City should not be permitted to amend its answer because five years had passed since the FOP initiated the litigation (R. at 55-60). Yet, the expansive time period between the initiation of the lawsuit and the City's request to file an amended answer was due to the one and one-half years in which the FOP did not prosecute the case and the three-year stay requested by the FOP. Moreover, since no discovery had occurred in the case, the FOP clearly would have had an opportunity to respond to the City's defenses. Yet, on November 14, 2003, the circuit court entered an order denying the City's motion for leave to file an amended answer, finding that the "Plaintiff is on notice of the Defendant's position by virtue of the remainder of the Answer" (R. at 49).

The parties filed cross-motions for summary judgment. On September 3, 2004, the circuit court granted the FOP's motion for summary judgment (R. at 101-04). The circuit court concluded that the IAFF Grievance Board had not rendered a decision determining whether or not the IAFF members could be assessed for the difference between the more expensive HMO premium and lesser expensive PEIA basic premium (R. at 101). Moreover, the circuit court concluded that, under the IAFF agreement, "the City was under no obligation to offer the additional HMO coverage" (R. at 102). The circuit court then concluded that, "once it did so, it was bound by the language of Article Seven, Section 2 of the Firefighter contract which obligated the City to pay the full amount of the premium" (R. at 102). In other words, the circuit court concluded that the City had an obligation to pay under the IAFF contract for something that it had no obligation to provide under the IAFF contract. The circuit court then applied this

conclusion to the FOP case and required the City to pay for the difference between HMO and indemnity premiums for those police officers who select the more expensive HMO coverage.

The circuit court further ordered that the City was required "to negotiate in good faith with respect to a successor contract prior to the expiration of the existing contract" (R. at 103), ignoring the contract's language that it had already expired by its own terms. The circuit court ordered the parties to mediate toward an agreement and ordered the City to pay for the mediator's fees (R. at 103). Furthermore, the circuit court ordered the City to pay for the FOP's fees and costs to litigate the case (R. at 103).

On January 3, 2005, the City filed its petition for appeal of the circuit court's order denying its motion for leave to file an amended answer and granting the FOP's motion for summary judgment. This Court granted the City's petition, and this appeal ensued.

**IV. ASSIGNMENTS OF ERROR RELIED UPON AND MANNER IN WHICH
THE LOWER TRIBUNAL DECIDED**

- A. The circuit court abused its discretion by denying the City's motion for leave to file an amended answer when the amendments would not have prejudiced the FOP.**
- B. The circuit court erroneously granted the FOP's motion for summary judgment by failing to address arguments specifically raised in the City's motion for summary judgment and in the City's opposition to the FOP's summary judgment motion; by finding the City was required to pay for the difference between the HMO premium and the PEIA Basic Plan premium when the City had no obligation to provide HMO coverage; and by determining that the City had an obligation to bargain toward a successor agreement despite the termination clause in the collective bargaining agreement.**

- C. The circuit court erroneously ordered the parties to mediate toward a successor agreement and ordered to City to pay for the mediator's fees, without giving the parties the initial opportunity to bargain without a mediator.
- D. The circuit court erroneously awarded attorney's fees and costs to the FOP without citing a statutory basis for the award.

V. POINTS AND AUTHORITIES RELIED UPON

West Virginia Code § 11-8-26.....10, 14, 16, 17, 18, 19, 20, 21, 22, 27

W. Va. R. Civ. P. 15(a).....15

W. Va. R. Civ. P. 5617

Allison v. City of Chester, 69 W. Va. 533, 72 S.E. 472 (1911)21, 22

Cottrill v. Ranson, Syl. Pts. 1, 4, 200 W.Va. 691, 490 S.E.2d 778 (1997).....17

Greenfield v. Schmidt Baking Co., 189 W. Va. 447, 485 S.E.2d 391 (1997).....16

Huntington Water Corp. v. City of Huntington, 115 W. Va. 531, 177 S.E. 290 (1934).....21

Ireland v. Board of Education, 115 W. Va. 614, 177 S.E. 452 (1934).....21

Local 598, Council 58, Amer. Fed. v. City of Huntington, 173 W. Va. 403, 405, 317 S.E.2d 167, 169 (1984).....22

Mauck v. City of Martinsburg, 178 W. Va. 93, 357 S.E.2d 775 (1987).....14

Meador v. County Court of McDowell County, 141 W. Va. 96, 87 S.E.2d 725 (1955).....18, 21

Payne's Hardware & Bldg. Supply, Inc., v. Apple Valley Trading Co. of W.Va., Syl. Pt. 1, 200 W.Va. 685, 490 S.E.2d 772 (1997).....17

Rosier v. Garron, Inc., 156 W. Va. 861, 199 S.E.2d 50 (1973)15

State v. County Court of Lewis County, 110 W. Va. 533, 158 S.E. 790 (1931).....19, 20, 21, 22

State ex rel. Hall v. Taylor, 154 W. Va. 659, 178 S.E.2d 48 (1970).....18

Williams v. Precision Coal, Inc., Syl. Pt. 2, 194 W.Va. 52, 459 S.E.2d 329 (1995).....17

VI. DISCUSSION OF LAW

- A. **The circuit court erroneously abused its discretion by denying the City's motion for leave to file an amended answer when the amendments would not have prejudiced the FOP, by indicating that the FOP was on notice of the City's position, and then by failing to address the City's argument in its summary judgment decision.**

Immediately following the circuit court's decision to lift the stay in this case, the City of Dunbar moved for leave to file an amended answer (R. at 39, 61). The circuit court denied the motion on the grounds that the "Plaintiff is on notice of the Defendant's position by virtue of the remainder of the Answer" (R. at 49). Based on this ruling denying the motion but suggesting that the points raised in the proposed amendments were addressed by the initial Answer, both the City and the FOP addressed the arguments raised by the proposed amendments in their summary judgment briefs (R. at 69 at 9-13; R at 83). However, the circuit court's summary judgment order did not expressly decide any of these arguments (R. at 101-04). Thus, the circuit court abused its discretion by denying the City's motion for leave to file an amended answer on the basis that the initial Answer put the FOP on notice of the arguments and then by failing to expressly address those arguments in its summary judgment order.³

The West Virginia Supreme Court of Appeals generally reviews an order denying a motion for leave to file an amended answer for an abuse of discretion. *See Mauck v. City of Martinsburg*, 178 W. Va. 93, 357 S.E.2d 775 (1987). The West Virginia Rules of Civil

Procedure provide as follows:

³ Although the circuit court should have granted the City's motion for leave to file an amended answer, this Court can reverse the ultimate outcome of this case without remanding it. Since the circuit court's order suggested that it would consider the merits of the City's position because the FOP was on notice of the City's position by virtue of the initial Answer, both the City and the FOP briefed the merits of whether the contract was void under W. Va. Code § 11-8-26.

While the circuit court did not expressly address the merits of those arguments in the summary judgment order, the circuit court, by ordering the City to bargain toward a successor agreement and to pay for the difference in premiums, presumptively found the CBA to be legal. As a result, this Court can reverse the circuit court's summary judgment decision without remanding the case on the basis of the Court's denial of the motion for leave to file an amended answer.

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; *and leave shall be freely given when justice so requires*. A party shall plead in response to an amended pleading within the time remaining for the response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

W. Va. R. Civ. P. 15(a) (emphasis added).

The purpose of the words "and leave [to amend] shall be freely given when justice so requires" is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments. *See Rosier v. Garron, Inc.*, 156 W. Va. 861, 199 S.E.2d 50 (1973). The court should grant motions to amend under this rule when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue. *See id.*

In this case, the City's proposed amendments to the Answer met all three requirements. First, the proposed amendments would have permitted presentation of the merits of the action because they elaborated primarily on statutory authority forming the basis of the City's defense in its initial Answer that a perpetual municipal contract is illegal (R. at 39).

Second, the FOP would not have been prejudiced by the proposed amendments. While the FOP argued to the circuit court that it should not allow the amendments because of the five-year time period between the filing of the initial Answer and the motion for leave to file an amended answer (R. at 55-60), the circuit court overlooked the fact that the *FOP was responsible for the lengthy time span*. The FOP failed to prosecute this case and then requested

a stay in this case because the FOP wanted to wait for a decision in the *IAFF* litigation (R. at 55-60). The City was not dilatory in requesting the amendments because the case had been stayed (R. at 21-22, 37). If the City had filed a motion for leave during the stay, the FOP would have argued that it had requested the stay to delay the filing of any such motions until the stay was lifted. Thus, the circuit court abused its discretion by prohibiting a party from amending its pleading when the other party's request for the stay was responsible for the passage of time.

Third, the FOP was not prejudiced by the proposed amendments because it would have, and in fact did have, an opportunity to address the arguments raised by the proposed amendments (R. at 83). At the time the City filed its motion for leave to file an amended answer, no discovery had occurred, and summary judgment motions had not yet been briefed. Therefore, the FOP would have had ample opportunity to address the issues.⁴ In sum, the circuit court erred in denying the City's motion for leave to file an amended answer, and this Court should reverse the circuit court's decision.

B. The circuit court erroneously granted the FOP's motion for summary judgment by failing to address arguments specifically raised in the City's motion for summary judgment and in the City's opposition to the FOP's summary judgment motion; by finding the City was required to pay for the difference between the HMO premium and the PEIA Basic Plan premium when the City had no obligation to provide HMO coverage; and by determining that the City had an obligation to bargain toward a successor agreement despite the termination clause in the collective bargaining agreement.

1. Standard of Review

A circuit court's entry of summary judgment is reviewed de novo. See *Greenfield v. Schmidt Baking Co.*, 189 W. Va. 447, 485 S.E.2d 391 (1997). The West Virginia Rules of Civil Procedure provide that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

⁴ In fact, the FOP, by addressing the arguments relating to W. Va. Code § 11-8-26 in its summary judgment brief, demonstrated that it had ample time to address the proposed amendments to the Answer.

any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56. A court should grant a motion for summary judgment “only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law.” *Payne’s Hardware & Bldg. Supply, Inc., v. Apple Valley Trading Co. of W.Va.*, Syl. Pt. 1, 200 W.Va. 685, 490 S.E.2d 772 (1997); *Cottrill v. Ranson*, Syl. Pt. 1, 200 W.Va. 691, 490 S.E.2d 778 (1997).

The moving party has the burden of establishing by affirmative evidence the absence of a genuine issue of material fact. *Payne’s Hardware*, Syl. Pt. 4, 200 W.Va. at 685, 490 S.E.2d at 772. Once the moving party does so:

the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Id. “Summary judgment is appropriate if, from the totality of the evidence presented, the record 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 Point 2, *Williams v. Precision Coal, Inc.*, Syl. Pt. 2, 194 W.Va. 52, 459 S.E.2d 329 (1995).

In this case, the circuit court erred in its application of the law to the facts. This Court should, therefore, reverse the circuit court's decision.

2. The circuit court erred in rendering summary judgment in favor of the FOP because the CBA violates West Virginia Code § 11-8-26.

The circuit court erred in granting summary judgment to the FOP because the CBA requires the expenditure of funds in perpetuity that the Dunbar City Council could not obligate at the time the CBA was executed, in violation of West Virginia Code § 11-8-26. The FOP's

Complaint alleged both that the CBA requires the City to pay for certain health insurance obligations and that the CBA does not end. By granting summary judgment to the FOP, the circuit court erred by effectively fixing the obligation of the City of Dunbar to pay ever-increasing health care coverage costs. This is accomplished by maintaining an expired CBA which violates West Virginia Code § 11-8-26. This Court can and should overturn the circuit court's decision.

West Virginia law provides, in pertinent part, as follows:

Except as provided in sections fourteen-b, twenty-five-a and twenty-six-a of this article, a local fiscal body shall not expend money or incur obligations :

- (1) In an unauthorized manner;
- (2) For an unauthorized purpose;
- (3) In excess of the amount allocated to the fund in the levy order;
- (4) In excess of the fund available for current expenses.

W. Va. Code § 11-8-26. Under this provision, a local fiscal body cannot enter into a contract, the performance of which would invade revenue for a subsequent year. *See Meador v. County Court of McDowell County*, 141 W. Va. 96, 87 S.E.2d 725 (1955). The underlying policy of this statute is to limit the incurrence of debt and to prohibit conduct which would bind subsequent legislative bodies to make appropriations in subsequent fiscal years. *See State ex rel. Hall v. Taylor*, 154 W. Va. 659, 178 S.E.2d 48 (1970).

Before the lower court, the City argued that this CBA is not enforceable because it obligates revenues unavailable to the Dunbar City Council that adopted the agreement in 1995. By state law, the City of Dunbar's fiscal year annually runs from July 1 to June 30. Moreover, an excess levy voted on by the electorate is used to fund the police and fire departments, and this levy is a funding source for wages and benefits provided to police and fire fighters. It costs more to operate these departments than what the excess levy provides, but if the City ever lost the

levy, it could bankrupt the City. Although the CBA at issue in this case was executed in 1995, it sets forth the wages and benefits payable to police officers for 1995, 1996, and 1997 (*See, e.g.*, CBA art. III, art. VI, art. VIII §2, art. XIII, art. XVI, art. XVII, art. XXI, R. at 69 Ex. A). Further, since the FOP contends that the CBA remains in effect until a successor agreement is reached (Comp. ¶21, R. at 3), it sets forth wages and benefits for fiscal years beyond 1998. In short, the performance of this CBA invades revenues from fiscal years and levy funds subsequent to the year in which the agreement was executed. Thus, in executing this agreement, the FOP and the 1995 Dunbar City Council have bound the members of future Dunbar City Councils to make certain appropriations in subsequent fiscal years. Since a local fiscal body is forbidden from obligating itself in such a manner under West Virginia Code § 11-8-26, the terms of this Agreement are void.

By reversing the circuit court's decision, this Court would be merely upholding its own precedent prohibiting a local fiscal body from obligating future funds through a multi-year salary contract. *See State v. County Court of Lewis County*, 110 W. Va. 533, 158 S.E. 790 (1931). In that case, the assessor of Lewis County and the county court, in 1928, fixed the annual salaries of deputy assessors at \$1,000, payable in installments of \$200 during the first five months of each year of their tenure in office. In 1931, the county court reduced their salaries. The deputy assessors filed suit, claiming that the court was required to pay their salaries at the rate of \$200 a month for the first five months of 1931. The Court denied the request, holding:

Opposed to the inferences is the unqualified statutory inhibition against the county court incurring "any obligation or indebtedness which such fiscal body is not expressly authorized by law to expend or incur," and the general legislative policy limiting all obligations of the county court to levy for the current fiscal year. The salary of an assistant assessor, legally fixed, becomes an obligation. Since the county court had no express authority to incur in 1928 the obligation, which fixing the salaries then for

1930-1-2 would have entailed, the petitioners demonstrate no clear legal right to the writ, even if the proof were with them.

Id.

The CBA at issue here is no different from the contract at issue in *County Court of Lewis County*. The FOP's claim that its members have a legal right to the wages and benefits set forth in the CBA is no different from the deputy assessors' claims that they were entitled to fixed wages in *County Court of Lewis County*. Just like the local fiscal body in *County Court of Lewis County* was unable to obligate funds fixing salaries for future years, the Dunbar City Council could not obligate funds fixing the wages and benefits of the police officers for future years. Moreover, by granting the FOP's motion for summary judgment, and thereby refusing to enforce the termination provision in the CBA, the circuit court enforced a never-ending contract that obligates city funds for an indefinite period of time, which *clearly* violates West Virginia Code § 11-8-26.

In sum, the CBA is illegal based on its express terms which obligate funds unavailable to the City for multiple years. In addition, the CBA is illegal based on the circuit court's implicit acceptance of the FOP's position that the terms of the contract can never expire until a successor contract is reached.⁵ Based on this Court's legal precedent, this Court can and should enforce the will of the legislature with regard to the obligation of city funds and reverse the circuit court's decision.

Before the lower court, the FOP argued that the CBA is legal because this Court has upheld multi-year water contracts under West Virginia Code § 11-8-26 (R. at 83). However, the trend in legal precedent demonstrates that this Court has clearly distinguished between multi-

⁵Even in the private sector, when the parties cannot agree to a successor contract, the employer can implement its last best offer, even if that offer is less than or different from the terms of the expired contract. In other words, in the private sector, a union cannot keep the same contract in effect forever by refusing to agree to another contract.

year contracts for water services and multi-year contracts fixing wages and benefits. In *Allison v. City of Chester*, 69 W. Va. 533, 72 S.E. 472 (1911), this Court upheld a multi-year municipal contract to purchase water services because "a supply of water is an absolute necessity, indispensable to the very existence of the people, and without such authority to so contract, a municipality would be entirely helpless." However, after rendering the *Allison* decision in 1911, this Court rendered, in 1931, the *County Court of Lewis County* decision, in which this Court refused to enforce an agreement setting the salaries of deputy assessors. Then, in 1934, this Court rendered a decision in *Huntington Water Corp. v. City of Huntington*, 115 W. Va. 531, 177 S.E. 290 (1934), in which this Court upheld the validity of a multi-year municipal contract for water services. However, also in 1934, this Court decided in *Ireland v. Board of Education*, 115 W. Va. 614, 177 S.E. 452 (1934), that a written employment agreement entered into by a board of education to set the salary for a physician providing medical services during the following fiscal year was invalid. Then, relying on the *County Court of Lewis County* decision, this Court refused in *Meador v. County Court of McDowell County*, 141 W. Va. 96, 118-26, 87 S.E.2d 725, 738-43 (1955), to require a county to pay for or to allocate funds in its budget to pay for the salary of a probation officer in fiscal year 1954 at the same level which had been committed to him in 1952, even though the court had continued to pay him the same salary in 1953.

In sum, this Court's precedent does not set forth a trend in which this Court rendered the decision in *County Court of Lewis County* and then overturned its decision with respect to all municipal contracts, including those setting future wages and benefits. Rather, this Court has consistently upheld the principles set forth in *County Court of Lewis County* with respect to municipal contracts involving wages and has consistently upheld the principles set forth in *Allison* in municipal water cases. Therefore, the trend in precedent shows that this Court

distinguishes between contracts for companies to provide water services and contracts fixing wages and benefits.

This Court has historically refused to enforce multi-year contracts setting the salary of local employees. Moreover, this Court's precedent relating to the enforcement of collective bargaining agreements is consistent with its precedent addressing West Virginia Code § 11-8-26. In *Local 598, Council 58, Amer. Fed. v. City of Huntington*, 173 W. Va. 403, 405, 317 S.E.2d 167, 169 (1984), this Court enforced a municipal collective bargaining agreement; however, the term of the contract was for only *one fiscal year*. Therefore, in this case, this Court can render a decision consistent with both its precedent enabling cities to enter into collective bargaining agreements and prohibiting cities from entering into multi-year contract obligating future funds by holding that a municipality can enter into a collective bargaining agreement with its employees for the duration of only one fiscal year. This is especially acute, as the contract in question has imposed for a decade now and may remain in effect until such times as it forces the City of Dunbar to go bankrupt.

The FOP further contends that the City is required to enter into another agreement setting future wages and benefits and, additionally, that the wages and benefits set forth in the 1995 agreement remain in effect until a new agreement is reached (Comp. ¶21, R. at 3). In short, a collective bargaining agreement fixing the wages and benefits of the police officers for multiple years, without express authority, becomes an obligation to which the FOP can demonstrate no legal right. This Court can and should reverse the circuit court's decision.

3. The circuit court erred by granting the FOP's motion for summary judgment, thereby effectively ruling that the CBA has no termination clause.

The CBA between the City and the FOP expressly provides for its own termination:

Section 1. This Agreement shall become effective October 16, 1995 and shall terminate on October 16, 1998.

(CBA Art. III § 1 R. at 69 Ex. A).

Yet, the FOP, relying on the following language in the Agreement, contend that the CBA has no termination clause and never ends:

RENEGOTIATION AND AGREEMENT

The parties to this Agreement hereby agree, commencing at least 60 days prior to the expiration of this Agreement, to bargain in good faith with regard to a successor contract. While negotiations are continuing, this Agreement shall remain in full force and effect for such additional period of time as is necessary to negotiate a successor contract.

(CBA Art. XXII (R. at 69 Ex. A)).

Under the plain language of the contract, the CBA, and the City's obligations under the CBA, terminated on October 16, 1998 (R. at 69 Ex. A). Thus, the circuit court erred by failing to enforce the termination clause, and this Court should reverse the circuit court's decision.

In this case, the FOP was not merely seeking enforcement of the terms and conditions set forth in the CBA. Rather, the FOP was seeking to require the City of Dunbar to enter into another collective bargaining contract (Comp. Prayer for Relief ¶ 4, R. at 3). By granting the FOP's motion for summary judgment, in which prohibits expiration of the CBA, and requires the terms of the CBA to remain in effect until a successor contract is reached, the circuit court has given the FOP the right to fix the wages and benefits of its members, taking away that right from the fiscal body which must pay for these items. Under the circuit court's order, the only way this CBA ends is if both the City and the FOP enter into a successor agreement. However, the City's ability to enter into a successor agreement depends upon the FOP's willingness to accept the terms of the successor agreement. So long as they FOP refuses, the City must pay for fixed

obligations imposed by the circuit court and the FOP. In short, the circuit court erred in upholding this multi-year collective bargaining agreement that seeks to force the City to pay all of the ever-increasing cost of health care coverage forever. This Court should reverse the lower court's decision.

4. **The circuit court erred in granting summary judgment to the FOP because FOP members who have selected HMO coverage are not paying any more toward their premiums than the IAFF members with HMO coverage.**

The circuit court erroneously concluded that the FOP members could not be required to pay for the difference between the more expensive HMO coverage and the lesser expensive PEIA basic coverage. In rendering this decision, the circuit court relied on the following contract language:

Health Insurance

The members of the Police Department covered under this agreement, will pay no more premium or be provided any less benefit coverage than any other bargaining unit in the City of Dunbar.

(CBA Art. XVI (R. at 69 Ex. A)). The circuit court then considered the language in the IAFF contract, which provides, in pertinent part, as follows:

Health Insurance, the CITY shall pay the full amount of the premium attributable to coverage of the regular, full-time employees (and his or her dependents) for participation on the City's Insurance Benefits Plan concerning life and health insurance. The plan shall contain hospitalization, major medical coverage, short term disability and life insurance. Eye and dental coverage should remain equal to what is in effect as of Jan. 1st. 1995. Under no circumstances shall the coverage for any of the above benefits be less than what is in effect as of January 1st 1995.

(IAFF CBA art. 7, § 2 (R. at 69 Ex. E))

In reviewing the language of the IAFF contract, the circuit court concluded that "the City was under no obligation to offer the additional HMO coverage" (9/3/04 Order (R. at 102)). Moreover, the circuit court concluded that the IAFF Grievance Board had not rendered a decision requiring the City to pay for 100% of the more expensive HMO premiums (R. at 101). Nevertheless, the circuit court concluded that, once the City provided the HMO plan, "it was bound by the language of Article Seven, Section 2 of the Firefighter contract which obligated the City to pay the full amount of the premium" (9/3/04 Order (R. at 102)).⁶ In other words, the circuit court concluded that the City had an obligation to pay under the IAFF contract for something that it had no obligation to provide under the IAFF contract. The circuit court then applied this conclusion to the FOP members and required the City to pay the difference between the more expensive HMO premiums and the lesser expensive indemnity premiums for those police officers who selected HMO coverage.

The circuit court erred in its interpretation of the FOP and IAFF contracts. All the FOP contract requires is that the FOP pay no more premium than any other bargaining unit. At all times pertinent to this litigation, both IAFF members and FOP members who have selected the HMO plan have been responsible for the difference between the more expensive HMO premium and the lesser expensive PEIA premium. Thus, the FOP members have not paid more than the IAFF members for health insurance.

The FOP contends that, under the IAFF Agreement, the City is required to pay for 100% of its member's health insurance regardless of the cost of the health insurance plan. This is an incorrect interpretation. Under the IAFF contract, so long as the City pays for the full premium of a health insurance plan meeting the minimum requirements of the IAFF agreement, the City

⁶ The City had no option with regard to providing the HMO coverage since the City cannot opt out of specific plans offered by PEIA.

has met its contractual obligation. The City has provided the PEIA basic indemnity plan, which meets the minimum requirements set forth in the IAFF contract, and the City is currently paying for 100% of the basic indemnity plan's premium. There is nothing in the IAFF Agreement that prohibits the City from charging police officers for the price difference if they select a more expensive plan. The police officers' full premium is paid for by the City so long as they select the lesser expensive basic plan, and the City has not violated the CBA by requiring police officers to pay for additional costs incurred by the City due to his or her personal selection of more expensive coverage. In short, no FOP member has paid any more premium than any IAFF member for HMO coverage. Thus, the City did not violate the contract, and the circuit court clearly erred in rendering a contrary decision. This Court should reverse the circuit court's order granting summary judgment to the FOP as to this issue.

C. Without even giving the parties an opportunity to negotiate on their own, the circuit court erroneously ordered the parties to mediate in good faith regarding a successor contract and ordered the City to pay for the mediator's fees.

In rendering its decision, the circuit court, without citing to any legal authority, erroneously ordered to parties to mediation (R. at 103). Such relief was not sought by the FOP. The circuit court's decision erroneously overlooks the FOP's role in this creating this litigation -- its position that, despite the termination clause, the CBA is perpetual and will never end unless and until the parties reach a successor agreement (Compl. ¶21, R. at 3). In addition, this decision leaves the City in a perplexing situation. So long as the FOP does not agree to a new contract, the City must pay for the costs of the terms of employment set forth in the current CBA and must pay for the costs of the mediator while continuing to bargain toward a successor agreement. Considering that the City is incurring all of the costs, this ruling does not leave the FOP with

much incentive to reach a successor agreement. This Court should reverse the circuit court's decision requiring the City to negotiate with a mediator and to pay for mediation.

D. The circuit court erroneously awarded attorney's fees and costs to the Appellee-Plaintiffs.

The circuit court assessed the City with the FOP's fees and costs relating to this litigation (R. at 103). The circuit court erred by failing to state any statutory or legal basis for the award (R. at 103). This is critical because the FOP sought attorney's fees and costs under statutes which were not alleged in the Complaint, such as the West Virginia Wage Payment and Collection Act (R. at 63 at 8). In its decision, the circuit court merely stated that "the FOP has prevailed on issues that were clear from the language of the contract" (9/3/04 Order (R. at 103)). Yet, in the summary judgment decision, the circuit court concluded that that City did not even have an obligation to provide the HMO Plan (R. at 102). Since the court concluded that the City did not have a contractual obligation to provide the benefits, the language could not have clearly expressed who had to pay for the premiums. Thus, the circuit court erroneously assessed the City with the FOP's fees and costs.

V. RELIEF SOUGHT AND CONCLUSION

The circuit court erroneously denied the City's motion for leave to file an amended answer. In denying the motion for leave to file an amended answer, the circuit court indicated that the FOP was on notice of the City's position. Yet, in its order granting summary judgment to the Respondent-Plaintiffs, the circuit court failed to address any of the City's arguments. Thus, the circuit court committed reversible error.

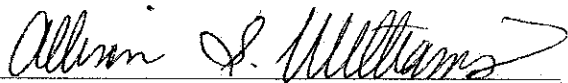
However, both parties briefed the issue of whether the CBA violated West Virginia Code § 11-8-26, and the circuit court in granting the FOP's motion for summary judgment, enforced the CBA, effectively concluding that it is legal. This Court has held that a multi-year contract

fixing the wages of local government employees from revenues that the City could not obligate constitutes an illegal contract. By granting the FOP's motion for summary judgment and not enforcing the termination clause, the lower court enforced an illegal perpetual agreement. This Court should reverse the decision of the trial court.

Respectfully submitted this 22nd day of August, 2005.

THE CITY OF DUNBAR

By counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 05-32655

**DUNBAR FRATERNAL ORDER OF POLICE, LODGE #119,
RANDY L. GILLESPIE, LODGE PRESIDENT,
Plaintiffs below, Appellees**

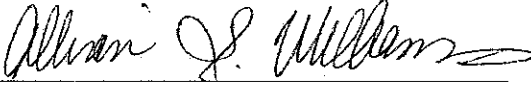
vs.

**THE CITY OF DUNBAR,
a municipal corporation, Defendant Below, Appellant**

CERTIFICATE OF SERVICE

I certify that two true and exact copies of the foregoing **APPELLANT'S BRIEF** was served this 22nd day of August, 2005, by first-class U.S. mail, postage prepaid, on the following:

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