

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

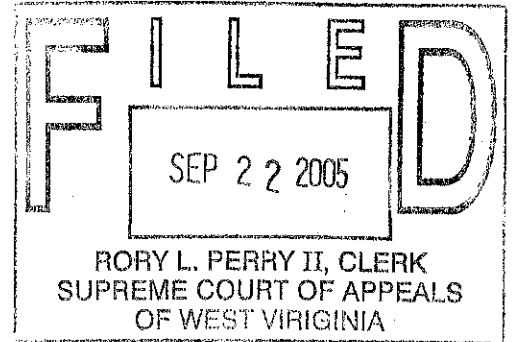
DUNBAR FRATERNAL ORDER OF POLICE,  
LODGE #119, RANDY L. GILLESPIE,  
LODGE PRESIDENT,

Plaintiffs-below, Appellees,

v.

THE CITY OF DUNBAR

Defendant-below, Appellant.



Civil Action No. 98-C-2262  
(Irene C. Berger, Judge)  
No. 32655

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APPELLEES' BRIEF

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Submitted by:

John F. Dascoli, I.D. # 6303  
**THE SEGAL LAW FIRM**  
A Legal Corporation  
810 Kanawha Boulevard, East  
Charleston, West Virginia 25301  
(304) 344-9100

## I. INTRODUCTION

This case began when the City of Dunbar violated its Collective Bargaining Agreement (CBA) with Appellees by (1) wrongfully withholding health insurance premiums from both the Dunbar Police HMO participants and the non-HMO participants and (2) failing to bargain in good faith and reach a new contract with Dunbar FOP Lodge 119 as required by Article XXII of the CBA. The City started all of this related litigation by refusing to honor its contractual obligations. Judge Berger properly required the City to live up to its promises and it should be required to do so.

## II. STATEMENT OF FACTS

Appellee Dunbar Fraternal Order of Police Lodge #119 is a voluntary, unincorporated association of police officers who are employed by the City of Dunbar. Appellee Randy L. Gillespie was the President of Dunbar Fraternal Order of Police (FOP) Lodge #119 at the time of the filing of this action and is currently a police officer employed by the City of Dunbar. Appellee Dunbar FOP Lodge 119 is recognized by the City of Dunbar as the exclusive bargaining agent for the Dunbar police officers. Appellant City of Dunbar is a municipal corporation and the employer of Appellees.

On or about October 16, 1995, Appellee Dunbar FOP Lodge 119 and Defendant the City of Dunbar entered into a Collective Bargaining Agreement (hereinafter referred to as CBA or Agreement). This CBA is attached to Plaintiffs' Memorandum of Law In Support of Summary Judgment as Exhibit 1. The terms of the CBA expire on October 16, 1998. However, the CBA requires good faith negotiations between the parties within sixty (60) days of the termination of the terms of the Contract in order for new terms to be agreed upon. See Article XXII of the Agreement. If the parties cannot agree to new contractual terms before the termination of the Agreement, then the prior terms remain in effect until the new terms are agreed upon. Id. There is no "termination

clause” or “evergreen clause” of the CBA in question, i.e., the parties must “bargain in good faith with regard to a successor contract.” Id.

Appellees have attempted to enter into good faith collective bargaining in order to agree upon new terms for the CBA. See letter from Randy Gillespie to Mayor Rigney dated August 14, 1998, attached to Plaintiffs’ Memorandum of Law In Support of Summary Judgment as Exhibit 2. By letter dated August 13, 1998, the City of Dunbar stated that it will no longer bargain with Dunbar FOP Lodge #119. See letter from City Attorney Stephen Swisher to the Dunbar Fraternal Order of Police Lodge #119 c/o Randy Gillespie, attached to Plaintiffs’ Memorandum of Law In Support of Summary Judgment as Exhibit 3. On August 14, 1998, Dunbar FOP Lodge #119 filed a grievance with the City of Dunbar attempting to require the City of Dunbar to bargain. See letter from Randy L. Gillespie to Chief Terry L. Coleman, attached to Plaintiffs’ Memorandum of Law In Support of Summary Judgment as Exhibit 4. At a City Council meeting which took place on Tuesday, September 8, 1998, the Dunbar City Council refused to accept the grievance affirming its position of refusing to negotiate with the Dunbar FOP Lodge #119.

Appellees filed the underlying civil action on September 24, 1998. On October 19, 1998 the lower court entered an AGREED ORDER requiring the parties to “abide by the present terms of the CBA between the parties beyond October 16, 1998 and until a decision is reached on the merits or until further order of the Court.”

The City of Dunbar was also previously involved in litigation with the Dunbar Professional Firefighters IAFF Local 1228. The case was styled as The City of Dunbar v. The Dunbar Professional Firefighters IAFF Local 1228, Civil Action No. 99-C-388 (Judge Bloom (formerly Judge MacQueen) presiding). The Dunbar Firefighters case, like the present one, involved the issue

of whether the City of Dunbar violated contractual terms with the Dunbar Firefighters by unilaterally requiring them to pay certain premiums for health insurance benefits. The issue had previously been submitted to a Grievance Board which determined that the City of Dunbar unlawfully withheld monies from the pay of Firefighters to pay a portion of their health insurance premiums and must refrain from doing so effective February 1, 1999. The City of Dunbar appealed and/or sought a declaratory judgment regarding the Grievance Board's decision before Judge MacQueen. A Motion for Summary Judgment was submitted and argued before Judge MacQueen.

Judge Bloom subsequently presided over the case after Judge MacQueen retired. The outcome of the Dunbar Firefighters case on the health insurance issue was determinative of one (1) of the major issues in this case because under the Agreement between the City of Dunbar and the Dunbar Police Officers, members of the Dunbar Police Department are to "pay no more premium or be provided any less benefit coverage than any other bargaining unit in the City of Dunbar." See Article XVI of the Agreement (entitled "HEALTH INSURANCE), attached to the Complaint as Exhibit 1.

In this case previous counsel for the City offered to prepare a proposed set of stipulations which could be presented to the lower court along with memoranda of law from each party, eliminating the need for any evidentiary hearings in this matter. However, after the Dunbar Firefighters filed a Motion for Summary Judgment before Judge MacQueen counsel for both parties in this action agreed to refrain from submitting an agreed stipulation of facts to the lower court until a ruling had been obtained from Judge MacQueen. On March 15, 2000, the lower court subsequently entered an ORDER GRANTING MOTION AND STAYING FURTHER PROCEEDINGS in which the lower court stayed this action until further order of the court.

The Dunbar Firefighters prevailed in Civil Action No. 99-C-388 when Judge Bloom entered an Order on June 28, 2001. The City of Dunbar appealed Judge Bloom's Order and this Court refused to hear the City's Petition For Appeal on February 7, 2002. See No. 012365. After February 7, 2002 the Dunbar Firefighters began contract negotiations with the city of Dunbar towards reaching a new Collective Bargaining Agreement. Also, the Dunbar Firefighters took various steps to obtain compliance from the City of Dunbar with Judge Bloom's Order and, at the time of the City's Petition to this Court, had resolved all issues with the City of Dunbar except the City of Dunbar's failure to pay the increased part of the health insurance premiums (wrongfully withheld by the City of Dunbar) for one (1) Dunbar Firefighter who participated in the HMO plan offered by the City.

Accordingly, all issues similar to the issues contained in this action except for the HMO issue were resolved in the Dunbar Firefighters case, Civil Action No. 99-C-388. After the Dunbar Firefighters received back pay for the health insurance premium amounts wrongfully withheld, prejudgment interest and the payment of all attorney fees and costs pursuant to Judge Bloom's Order, the Dunbar Police Officers involved in the instant action began making demands on the City of Dunbar to be similarly compensated for the health insurance premiums wrongfully withheld.

Subsequently the Dunbar Police Officers, like the Dunbar Firefighters, received back pay awards for the health insurance premiums wrongfully withheld and interest on those amounts at the rate of ten percent (10%) per annum. However, like in the Firefighters case, the City of Dunbar has refused to pay the difference between the health insurance premiums wrongfully withheld from the Dunbar Police HMO participants and the non-HMO participants of the Dunbar Police Department. Besides the HMO issue, the only other issues that remained for the lower court to decide in this action were (1) whether or not the City of Dunbar should be required to bargain in good faith and

reach a new contract with Dunbar FOP Lodge #119 (as required by Article XXII of the Collective Bargaining Agreement) and (2) whether the City of Dunbar is liable for Appellee's' attorney fees and costs for having to bring this action.

Subsequent to the filing of the Petition For Appeal and Response thereto in this matter, Judge Bloom entered a subsequent Order in the Dunbar Firefighters case. See April 7, 2005 Order attached hereto as **Addendum A**. The City has not appealed the Order and it is final. The Order requires the City to pay the difference between the health insurance premiums wrongfully withheld from the Dunbar Firefighter HMO participants and the Dunbar Firefighter non-HMO participants.

### **III. STANDARD OF REVIEW**

The West Virginia Supreme Court of Appeals has consistently held that “[t]he question to be decided on a motion for summary judgment is whether there is a genuine issue of material fact and not how that issue should be determined.” Syl. Pt. 5, Aetna Casualty & Surety Co. v. Federal Insurance Company of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963). Moreover, the Court has consistently explained that:

Roughly stated, a “genuine issue” for the purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed “material” facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

Syl. Pt. 5, Jividen v. Law, 194 W.Va. 705, 461 S.E.2d 451 (1995).

If the moving party makes the properly supported motion for summary judgment, then the

burden shifts to the non-moving party to either (1) rehabilitate the evidence attacked by the moving party; (2) produce additional evidence showing the evidence of a genuine issue for trial; or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). Syl. Pt. 3, in part, Williams v. Precision Coil Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995).

#### **IV. RESPONSE TO ASSIGNMENTS OF ERROR AND DISCUSSION OF LAW**

##### **A. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY DENYING CITY OF DUNBAR'S MOTION FOR LEAVE TO FILE AN AMENDED ANSWER OVER FIVE (5) YEARS AFTER THE DATE IT FILED ITS ORIGINAL ANSWER.**

The City of Dunbar's first alleged error is that Judge Berger abused her discretion in refusing to grant the City's motion for leave to file an amended answer nearly five (5) years after the filing of its original answer in October of 1998. The Dunbar Police Officers strongly objected to the motion and set forth a detailed Response (dated September 12, 2003) to Defendant's Motion for Leave to File Amended Answer. In the City of Dunbar's Amended Answer it sought to deny factual allegations previously admitted, deny factual allegations that it had been deemed to have been admitted and assert numerous new affirmative defenses that it failed to assert in its original answer and during the nearly five (5) years since the filing of its original Answer.

In Consolidation Coal Co. v. Boston Old Colony Insurance Co., 203 W.Va. 385, 508 S.E. 2d 102 (1998), this Court recognized the long-standing principle that a trial court "is vested with a sound discretion in granting or refusing leave to amend pleadings in civil actions. Leave to amend should be freely given when justice so requires..." Id. at Syl. Pt. 8. However, this Court also recognized that:

The liberality allowed in amendment of pleadings does not entitle a party to be dilatory in asserting claims or to neglect the case for a long period of time.

Id. at 110, 393 (citation omitted).

Here, the City of Dunbar alleges that Judge Berger was erroneous in refusing to allow it to change long standing factual admissions and assert a variety of new legal theories and defenses in the underlying action. Clearly the City of Dunbar was dilatory in asserting those claims. Although then new counsel for the City sought to take a different approach in defense of the underlying action, the change of counsel several years after its original answer was filed should not give the City of Dunbar the right to deny the factual assertions previously admitted, deny factual allegations that it has been deemed to have admitted and assert numerous new affirmative defenses that it failed to assert in its original answer and during the nearly five (5) years since the filing of its original answer and its motion for leave to file amended answer. Accordingly, this Court should reject this alleged error.

**B. THE CIRCUIT COURT CORRECTLY RULED THAT THE CITY OF DUNBAR MUST PAY THE DIFFERENCE BETWEEN THE HEALTH INSURANCE PREMIUMS WRONGFULLY WITHHELD FROM THE DUNBAR POLICE HMO PARTICIPANTS AND THE NON-HMO PARTICIPANTS OF THE DUNBAR POLICE DEPARTMENT.**

As noted above the Dunbar Firefighters already prevailed on the same health insurance issues raised in both Civil Action No. 99-C-388 and the present action. However, the City of Dunbar has refused to pay the increased part of the health insurance premiums wrongfully withheld by the City of Dunbar for one (1) Dunbar Firefighter who participated in the HMO Plan offered by the City. The City of Dunbar has taken the same position with respect to Dunbar Police Officers who participate

in the HMO Plan. However, it is uncontraverted that the increased HMO health insurance premiums wrongfully withheld by the City of Dunbar were effective the same date (July 1, 1998) of the increased non-HMO health insurance premiums wrongfully withheld by the City of Dunbar. As the wrongful withholding of HMO participant health insurance premiums were part of the same action involving the wrongful withholding of non-HMO participant health insurance premiums, the prior adjudication on the health insurance issue applies to the HMO participants as well.

Although Judge Bloom was not initially asked to rule on the HMO participants issue, his ruling that any change during the contractual term to the health insurance premium withholding violated the City's contract with the Dunbar Firefighters (and correspondently the Dunbar Police Officers) has equal force to both HMO and non-HMO participants. Moreover, in its April 5, 2005 Order, attached hereto as **Addendum A**, Judge Bloom specifically ordered the City "to pay the premiums for both HMO and non-HMO participants." See Order at page 5. Likewise it is clear that Judge Berger correctly ruled that the City of Dunbar must pay all health insurance premiums for Dunbar Police Officers irrespective of HMO participation.

- C. THE CIRCUIT COURT CORRECTLY ORDERED THE CITY OF DUNBAR TO MEDIATE IN GOOD FAITH TOWARDS A SUCCESSOR CONTRACT WITH DUNBAR FOP LODGE #119 AS REQUIRED BY ARTICLE XXII OF THE COLLECTIVE BARGAINING AGREEMENT AND REQUIRED THE CITY TO PAY FOR THE MEDIATOR'S FEES "INASMUCH AS ITS FAILURE HAS NECESSITATED THE MEDIATION."**

Throughout its Brief the City ignores one of the Judge Berger's most important findings:

the Court finds that the City had the obligation, under Article XII of the FOP contract, to negotiate in good faith with respect to a successor contract prior to the expiration of the existing contract. The City violated this Article in failing to bargain in good faith in

response to the FOP's letter of August 14, 1998. The requirement to negotiate in good faith is clearly set forth in the contract.

See September 3, 2004 Order at pages 2-3. Based on this finding Judge Berger ordered "the parties to mediate in good faith" on a successor contract and required "the City to bear the cost of the mediation inasmuch as its failure has necessitated the mediation." Id.

As Judge Berger concluded, Section XXII of the CBA required the City of Dunbar to begin negotiating in good faith with Dunbar FOP Lodge #119 within sixty (60) days of the termination of the CBA. The terms of the CBA were set to expire on October 16, 1998 prior to the filing of this Civil Action and this Court's subsequent Agreed Order dated October 19, 1998 freezing the contract in place until the resolution of this action. Under the CBA, the City of Dunbar was required to begin negotiations by August 17, 1998 but refused to do so. The City of Dunbar agreed to the language in Section XXII of the CBA and this Court should uphold Judge Berger's requirement that the City bargain in good faith towards reaching a new contract.

The City of Dunbar raises numerous issues regarding the termination clause of the CBA including that it makes the CBA an illegal and/or perpetual contract. In Local 598, Council 58 American Federal v. City of Huntington, 173 W.Va. 403, 317 S.E.2d 167 (1984), the West Virginia Supreme Court ruled that the collective bargaining agreement entered into by the City of Huntington was not void and that the City of Huntington would be held to the contractual terms that it agreed upon. Like in the Local 598 case, the City of Dunbar operated under the CBA for a number of years. Then, prior to even attempting to bargain in any manner towards a new contract, the City unilaterally refused to recognize Dunbar FOP Lodge #119 and violated the CBA by refusing to bargain towards the new contract. The City of Dunbar should not be allowed to refuse to bargain in any manner

towards reaching a new contract as required by Section XXII and then many years after operating under the CBA declare it to be void.

Further, the City of Dunbar provides no case law stating that a local fiscal body is restricted from entering into a multi-year CBA. The City is actually asserting that the CBA it operated under for nearly three (3) years before this case started was void from its inception. The City of Dunbar has certainly waived such argument by its conduct in course of performance in this case. The City of Dunbar points out that the Local 598, Council 58 American Federal v. City of Huntington case involved only a one (1) year agreement and accordingly one (1) year CBAs are valid. The Local 598 case in no way restricted its ruling to one (1) year CBAs. Id. at Syllabus (stating that under its general contract powers under W.Va. Code § 8-12-1 “a municipality is empowered to enter into a collective bargaining agreement”). In fact, in City of Fairmont v. Retail Wholesale, and Department Store Union, AFL-CIO, 166 W.Va. 1, 4, 283 S.E. 2d 589, 591 (1981), this Court noted that the City of Fairmont had a three (3) year collective bargaining agreement for some of its hospital employees. The City of Dunbar can cite no West Virginia Supreme Court case prohibiting multi-year CBAs between local fiscal bodies and their employees.

The City of Dunbar also relies on West Virginia Code § 11-8-26 to support its position regarding multi-year contracts. However, in a case decided under West Virginia Code § 11-8-13 (the former version of § 11-8-26), the West Virginia Supreme Court recognized that multi-year municipal contracts are valid. See Syl. Pt. 5, Huntington Water Corporation v. City of Huntington, 115 W.Va. 531, 177 S.E. 290 (1934) (stating that under § 11-8-13 the validity of a municipal contract covering a period of years is ordinarily tested by the cost of the service for the first year); Allison v. City of Chester, 69 W.Va. 533, 72 S.E. 472 (1911). The City argues that these are “water services” cases

and "salary" cases have been and should continue to be treated differently. The Appellees disagree. Employees that operate the water system (or in this case that provide police protection) are just as important as the water itself.

**D. THE CIRCUIT COURT CORRECTLY RULED THAT THE CITY OF DUNBAR IS LIABLE FOR PLAINTIFFS' ATTORNEY FEES AND COSTS FOR HAVING TO BRING THIS ACTION.**

If Appellees prevail they should be awarded reasonable attorney fees and costs under West Virginia Code § 21-5-12 of the West Virginia Wage Payment and Collection Act.<sup>1</sup> Section 21-5-12 provides that employees can receive reasonable attorney fees and costs for having to pursue litigation to force employers to pay wages and fringe benefits due and owing. Appellees were forced to go to court to enforce the clear terms of their CBA with Defendant both in terms of bargaining over a new contract and recovering wrongfully withheld health insurance premiums.

The failure of public officials to discharge **their clear duties** can be the basis for an award of attorney fees and costs and mandamus actions. See State ex rel. W.Va. Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection, 193 W.Va. 650, 458 S.E. 2d 88 (1995). Coincidentally, Judge Berger ordered "the City to pay the attorney's fees and costs for the Plaintiffs since the FOP has prevailed on **issues that were clear** from the language of the contract." See September 3, 2004 Order at 3. Accordingly, by refusing to follow the clear language of the CBA the City refused to discharge its clear legal duty entitling Appellees to an award of attorney fees and costs.

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<sup>1</sup>Appellees are also entitled to an award of costs under West Virginia Code § 55-13-10 of the Uniform Declaratory Judgment Act which provides that a court "may make such award of costs as may seem equitable and just."

Although the present action was neither styled as a mandamus action or did it make specific reference to the West Virginia Wage Payment and Collection Act, a lower court properly awarded attorney fees and costs because it found that the City of Dunbar disregarded its clear contractual obligations. Moreover, any civil action alleging that an employer refused to pay the proper amount of wages and/or fringe benefits falls under the purview of the West Virginia Wage Payment and Collection Act and such act does not require that employees specifically reference the Act in their initial pleading in order to seek remedies available under it. In any event, under Rule 15 (b) of the West Virginia Rules of Civil Procedure this action can be treated as referencing the Wage Payment and Collection Act.

Finally, it should be noted that the Dunbar Firefighters received payment for all attorney fees and costs for having to force the City of Dunbar to pay the health insurance premiums wrongfully withheld and to also force the City of Dunbar to bargain in good faith towards reaching a new collective bargaining agreement with the Dunbar Firefighters. Here, the Dunbar Police Officers should also receive reimbursement for the reasonable attorney fees and costs incurred for having to take substantially similar action against the City of Dunbar for refusing to honor its contractual obligations.

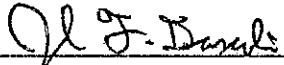
## VI. CONCLUSION

The circuit court did not abuse its discretion by denying the City of Dunbar's Motion for Leave to File an Amended Answer over five (5) years after the date it filed its original Answer. The circuit court correctly ruled that the City of Dunbar must Pay the difference between the health insurance premiums wrongfully withheld from the Dunbar Police HMO Participants and the non-

HMO Participants of the Dunbar Police Department. Judge Berger correctly ordered the City of Dunbar to mediate in good faith towards a successor contract with Dunbar Fop Lodge #119 as required by Article XXII of the Collective Bargaining Agreement and required the city to pay for the mediator's fees "inasmuch as its failure has necessitated the mediation." Finally, the circuit court correctly ruled that the City of Dunbar is liable for Plaintiffs' attorney fees and costs for having to bring this action.

WHEREFORE, Appellees request that this Court uphold Judge Berger's September 3, 2004 Order in all respects.

**DUNBAR FRATERNAL ORDER OF POLICE,  
LODGE #119, RANDY L. GILLESPIE,  
LODGE PRESIDENT**  
By Counsel,

  
\_\_\_\_\_  
John F. Dascoli, I.D. #6303  
**THE SEAL LAW FIRM**  
A Legal Corporation  
810 Kanawha Boulevard, East  
Charleston, West Virginia 25301  
(304) 344-9100

**FILED**  
IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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THE CITY OF DUNBAR,  
a municipal corporation,

CATHY S. GATSON, CLERK  
KANAWHA CO. CIRCUIT COURT

Appellant/Petitioner,

v.

CIVIL ACTION NO. 99-C-388  
Judge Louis H. Bloom

THE DUNBAR PROFESSIONAL  
FIREFIGHTERS IAFF LOCAL 1228  
an affiliate of the AFL-CIO,  
a legal organization,

Appellee/Respondent.

**ORDER**

Pending before the Court is the "*Appellee/Respondent's Motion for Relief Under Rule 70 to Compel the City of Dunbar to Continue to Bargain Towards a Successor Collective Bargaining Agreement*" (hereinafter "Motion"). Said Motion relates to a February 13, 2001 Order of this Court which affirmed the January 1999 grievance board decision. Appellees' Motion asks this Court to compel the appellant to comply with the prior order. Appellant has not responded to the Motion.

After full consideration of the motion, the official court file of this action, and applicable law, the Court does hereby **GRANT** appellees' motion, based on the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

1. By Agreement dated April 3, 1995, the parties entered into a collective bargaining agreement for the purpose of setting terms and conditions of employment for the fire fighters of the Dunbar Municipal Fire Department.

2. The Agreement was effective as of February 26, 1995 and was to remain in full force and effect until midnight on February 25, 1998.
3. The Agreement contained a provision which allowed the appellant to give timely notice to the appellee of its desire to modify, amend, or terminate the agreement. Under such condition, negotiations were required and bargaining was to be made in good faith with regard to a successor contract.
4. During the negotiation period the Agreement provides that it remains in full force and effect for "such an additional period of time as is necessary to negotiate a successor contract."
5. The Agreement requires the city to "pay the full amount of the premiums attributable to coverage of regular full-time employees (and his or her dependents) for participation in the City's Insurance Benefits Plan concerning life and health insurance."
6. The Agreement also requires that eye and dental coverage should remain equal to what was in effect as of January 1, 1995.
7. The Appellant gave timely notice of its desire to terminate the Agreement. The Appellant also terminated eye care and added a \$25.00 a month charge for hospital insurance coverage.
8. The appellee filed a grievance pursuant to the procedure provided in the Agreement, based on the eye care issue, the \$25 deduction, and the failure to negotiate toward a successor contract.
9. The grievance board decided that the City illegally withheld \$25 each month from the appellees' paychecks and illegally stopped the eye care benefits it had previously offered to the appellees. The board also found that the appellant failed to bargain in good faith

toward a successor contract with the appellees and the board ordered them to begin negotiations.

10. The Appellant appealed the grievance board decision to this Court.
11. On February 13, 2001, this Court affirmed the grievance board's decision.
12. The Appellant's appeal to the Supreme Court of Appeals of West Virginia was refused by order filed February 19, 2002.
13. The Appellee's motion claims that the appellant has failed to comply with two issues argued before the grievance board. Appellee's Motion claims that the appellant has not paid the difference between the HMO and non-HMO premium for the firefighters. Appellee's Motion claims that appellants have not made a good faith effort to bargain to a successor contract where the appellant refused to bargain more than monthly, and often went months without agreeing on the next negotiating session.
14. In Late February, 2004, Appellant delivered a memorandum to the Appellee that states that the Collective Bargain Agreement was terminated.
15. Appellee's motion argues that it is not the appellant's decision as to when it has complied with the good faith bargaining requirement of the Agreement.
16. Appellee's motion asks this Court to order the appellant to pay the difference between the HMO and non-HMO premiums, appoint a mediator and require the parties to mediate in good faith regarding a successor contract, require the appellant to pay for the cost of mediation, and require the mediator to issue a report regarding the efforts to negotiate. The appellee also asks that the Court order that the appellant pay all attorneys' fees and costs that it has incurred in this matter after the issuance of the letter terminating the Agreement.

17. The grievance board decision that was affirmed by this Court considered the monthly deduction in terms of those members who participated in the HMO, and those in a non-HMO plan. In regard to both groups, the grievance board found the appellant's actions were illegal.
18. A companion case involving the City of Dunbar and the Dunbar Fraternal Order of Police was decided by Thirteenth Judicial Circuit Court Judge, Irene C. Berger, in September 2004 for civil action number 980C-2262. In that action, the Court found that the agreement between the parties in that case contained a parity provision for which insurance premiums were dependent on the coverage for other bargaining units of the City of Dunbar. In examining the Agreement between the City and the firefighters union, the Court found that the City was obligated to pay the full amount of the premiums, regardless of whether the individual was under the HMO or non-HMO plan.
19. The Court finds that Judge Berger's ruling was consistent with the grievance board's decision in this case, and this Court's Order which affirmed the grievance board's decision.

#### STATEMENT OF THE LAW

1. Rule 70 of the *West Virginia Rules of Civil Procedure* provides, in pertinent part:

"If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court as a special commissioner and the act when so done has like effect as if done by the party."

CONCLUSIONS OF LAW

1. The Grievance Board's decision, which was affirmed by this Court, requires that the City pay the full amount of the insurance premiums. Therefore the Court **GRANTS** the appellees' motion to compel and **ORDERS** the appellant to pay the premiums for both HMO and non-HMO participants.
2. The Court concludes that the appellant has not complied with its duty to enter into good faith bargaining toward a successor agreement. Therefore, the Court does hereby **GRANT** the appellees' motion to compel and **ORDERS** the parties to mediate in good faith regarding a successor contract within thirty days of the entry of this Order.
3. To facilitate the mediation, the Court does hereby **APPOINT** G. Nicholas Casey, Jr. as a Special Commissioner, **DIRECTED** to participate in the mediation between the parties.
4. The Court further **ORDERS** the appellant to bear the costs of the mediation inasmuch as its failure has necessitated the mediation.
5. The Court further **ORDERS** Commissioner Casey to report to the Court regarding the parties' efforts to negotiate in good faith. Any party who fails to negotiate in good faith will be subject to contempt sanctions.

The Court notes and preserves the objections of any party to the entry of this Order.

The Court **DIRECTS** the Clerk to mail a certified copy of all counsel of record, and to Special Commissioner Casey. The Court also **DIRECTS** the Clerk to remove this case from the Court's active docket.

Entered this 7<sup>th</sup> day of April, 2005.



The Honorable Louis H. Bloom

Date: 4/2/05  
 Certified copies sent to:  
 counsel of record  
 parties  
 other  
 (please indicate)  
 By \_\_\_\_\_  
 certified/1st class mail  
 fax  
 hand delivery  
 interdepartmental  
 Other directives accomplished:  
 \_\_\_\_\_

STATE OF WEST VIRGINIA  
 COUNTY OF KANAWHA, SS  
 I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
 AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
 IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
 GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 7<sup>th</sup>  
 DAY OF April, 2005  
 \_\_\_\_\_ Jm CBX

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DUNBAR FRATERNAL ORDER OF POLICE,  
LODGE #119, RANDY L. GILLESPIE,  
LODGE PRESIDENT,

Plaintiffs-below, Appellees,

v.

Civil Action No. 98-C-2262  
(Irene C. Berger, Judge)  
No. 32655

THE CITY OF DUNBAR

Defendant-below, Appellant.

CERTIFICATE OF SERVICE

I, JOHN F. DASCOLI, do hereby certify that I have served a copy of the foregoing  
*APPELLEES' BRIEF* on the following individual by United States mail, postage prepaid this 22<sup>nd</sup>  
day of September, 2005.

Allison S. Williams, Esquire  
DINSMORE & SHOLH LLP  
900 Lee Street  
Huntington Square, Suite 600  
Charleston, West Virginia 25301

  
\_\_\_\_\_  
JOHN F. DASCOLI, I.D. # 6303