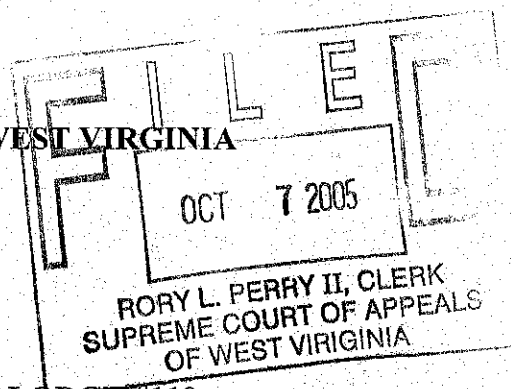


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 REPLY BRIEF

Counsel for Appellant
Forrest H. Roles
WV State Bar ID No. 3162
Allison S. Williams
WV State Bar ID No. 8187
DINSMORE & SHOHL LLP
900 Lee Street
Huntington Square Suite 600
Charleston, WV 25301
Telephone: (304) 357-0900

Counsel for Appellee
John F. Dascoli
WV State Bar ID No. 4749
The Segal Law Firm
810 Kanawha Boulevard, East
Charleston, WV 25301
Telephone: 304-344-9100

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I. INTRODUCTION

In its brief, the FOP argues three major points. First, the FOP argues that the City was required to pay for the difference between the more expensive HMO premiums and the lesser expensive basic PEIA premiums. Second, the FOP argues that the City must continue bargaining and that the CBA remains in effect indefinitely until an agreement is reached. Finally, the FOP argues that the City should pay the FOP's fees and costs associated with this litigation.

In reality, the FOP contract required only that the FOP members pay no more premium than any other bargaining unit. The FOP concedes that the Grievance Panel in the IAFF litigation did not resolve the issue of whether the City was required to pay for the difference between HMO premiums and basic PEIA premiums. Thus, the FOP has presented no evidence that IAFF was paying less for HMO premiums than the FOP members, and the circuit court erred in concluding that the City was required to pay for the additional HMO premiums, especially since the court held it had no obligation to provide HMO coverage.

The FOP does not deny that it claims this CBA will remain in effect until a successor agreement is reached and that their mere refusal to agree to a successor agreement can keep this agreement in effect forever. Nor does the FOP dispute that this CBA provides for a requisite amount of wages and benefits over a number of years. Such an agreement violates West Virginia Code § 11-8-26 and is void. This Court should reverse the lower court's summary judgment decision and should reverse the order requiring the City to pay for the FOP's fees and costs.

II. STATEMENT OF FACTS

The FOP concedes that the HMO issue was not resolved in the IAFF litigation, Civil Action No. 99-C-388 (Appellee's Br. at 5). Thus, contrary to the FOP's allegations in the Statement of Facts, the City did not illegally withhold the difference between the HMO premiums and the basic premiums from the firefighters pay. Thus, the City did not violate the CBA with the FOP because the FOP members were not paying more than the firefighters.

In addition, the FOP has attached an Order entered by Judge Bloom in the IAFF litigation on April 5, 2005. The inclusion of this Order is inappropriate. This Order was rendered in another case after Judge Berger issued her Order in this case. It was not part of the record below, and she could not have considered its contents in reaching her decision since it was issued afterwards. Moreover, the IAFF litigation involved the overturning of the Grievance Panel's decision. Both the lower court and the FOP (in its brief) concede that the HMO issue was not decided by the Grievance Panel. Therefore, Judge Bloom had no jurisdiction to enter an order enforcing an issue that did not arise in the context of the grievance panel decision.¹ Thus, this order is not valid.

In sum, the facts show that the IAFF was paying for the difference between HMO premiums and basic PEIA premiums. The FOP contract required only that they pay no more than anyone else. The FOP members were not paying anymore than the IAFF members. Therefore, this Court should reverse the circuit court.

¹ In addition, counsel for the IAFF served someone other than counsel of record in the IAFF case with the motion seeking the April 4, 2005 decision and, moreover, did not send notice a hearing. The circuit court never held a hearing on the matter, thereby failing to trigger any deadline for the City to respond. Therefore, this order was issued improvidently.

III. POINTS AND AUTHORITIES RELIED UPON

West Virginia Code 11-8-26.....	3,8,9,12
West Virginia Code § 55-13-10.....	10, 11
<i>Consolidation Coal v. Boston Old Colony Ins. Co</i> , 203 W. Va. 385, 508 S.E.2d 102 (1998).....	5
<i>Huntington Water Corp. v. City of Huntington</i> , 115 W. Va. 531, 177 S.E. 290 (1934).....	9
<i>Meador v. County Court of McDowell County</i> , 141 W. Va. 96, 87 S.E.2d 725(1955).....	8, 9
<i>State v. County Court of Lewis County</i> , 110 W. Va. 533, 158 S.E. 790 (1931).....	8, 9

VI. DISCUSSION OF LAW

A. The City of Dunbar did not neglect the case and was not dilatory in filing the motion for leave to file an amended answer because there was a stay in the case.

The circuit court erred when it failed to allow the City to amend its Answer. In its brief, the FOP contends that the circuit court's decision denying the motion to amend the answer was correct under *Consolidation Coal v. Boston Old Colony Ins. Co*, 203 W. Va. 385, 508 S.E.2d 102 (1998), which provides, in pertinent part, as follows:

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.

203 W. Va. at 393, 508 S.E.2d at 110.

Yet, even under an application of this holding to the facts of the present case, the circuit court abused its discretion. The City of Dunbar did not neglect the case, as there was a stay in the case. The City was not dilatory in filing the motion to amend the answer, as there was a stay in the case. The City could not file any motions requesting leave in the case until the stay was lifted. The FOP's argument that the City should be required to litigate a case when the FOP wanted the litigation stopped to wait for the decision in the IAFF litigation. As soon as the stay

was lifted, the City filed its motion for leave. Since the City was not dilatory or negligent, this Court should reverse the circuit court's decision.

B. The circuit court erred in ruling that the City was required to pay for the difference in premiums because the FOP presented no evidence that they were paying less than any other bargaining unit.

The circuit court erred in ordering the City to pay for the difference between the more expensive HMO coverage and the lesser expensive basic coverage. The CBA requires only that the FOP members pay no more premium than any other bargaining unit. Since the IAFF members must pay for the difference in premiums, the FOP members are not paying any more premiums than the IAFF members. Thus, the City has not violated the terms of the FOP's CBA.

In order to prevail on this issue, the FOP had to establish that the IAFF members are paying less than the FOP members for health insurance coverage. The evidence is simply not there. The FOP tried to establish that the Grievance Panel decision regarding the IAFF CBA required the payment. However, even the circuit court in this case concluded that the Grievance Panel decision does not in and of itself require the City to pay the difference between HMO and basic premiums.

Now, in an effort to create evidence showing the City was required to pay under the IAFF CBA, the FOP contends that "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" (Appellee's Br. at 9). However, even the Grievance Panel's decision expressly conflicts with the FOP's proposition. The Grievance Panel decision provides, in pertinent part, as follows:

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]

(1/12/99 Decision of Grievance Panel (emphasis added, R. at 69 Ex. G). The decision expressly references the \$25 deductions and, contrary to the FOP's argument, expressly references two different dates. Since the decision expressly refers to the \$25 amount and two different dates, the FOP cannot argue that premiums outside of the \$25 deduction were encompassed by the Grievance Panel decision.

Again, to try to create some legal reason why the City had to pay the difference between HMO and basic premiums for IAFF members, the FOP attempts to rely on an Order entered by Judge Bloom in the IAFF case on April 5, 2005, which the FOP has attached as an Addendum. First, this Order and the FOP's argument is improperly before this Court. Since Judge Bloom did not enter the April 5, 2005 Order until after Judge Berger entered the decision, it was not a part of the record before the circuit court *in this case*, and Judge Berger could not have relied upon it in reaching her decision. Moreover, the FOP concedes in its brief that "Judge Bloom was not initially asked to rule on the HMO participants issue" (Appellee's Br. at 9). Therefore, the FOP concedes that it requested Judge Bloom to enter and to enforce a decision regarding a matter that was never a part of the case considered by Judge Bloom, and Judge Bloom had no jurisdiction to enter the April 5, 2005 Order. Thus, the order is unenforceable.

In addition, in the IAFF litigation, Judge Bloom was asked only to enforce or to overturn the Grievance Panel's decision. Since the HMO issue was not addressed by the Grievance Panel decision, Judge Bloom had no jurisdiction to render a decision on a matter that was not addressed by the Grievance Panel's decision. Even Judge Berger concluded that the Grievance Panel decision did not encompass the HMO issue. Thus, the April 5, 2005 Order is unenforceable, and it is improperly before this Court because it was not a part of the record below.

In short, the circuit court had no legal basis for finding that the City was required to pay for the difference in premiums. The FOP had to prove that they were paying more than the IAFF members. The only evidence that the FOP presented to the circuit court was the Grievance Panel decision. Yet, the circuit court concluded that the grievance panel decision did not require the IAFF members to pay less for HMO coverage than the FOP members. Moreover, the circuit court expressly concluded that the City had no obligation to offer the HMO insurance. There being no evidence that the FOP members were paying any more than another bargaining unit, the circuit court erroneously concluded that the City was required to pay for the difference in premiums. Therefore, this Court should reverse the circuit court's decision.

C. The FOP does not deny that it is seeking to enforce the CBA for an indefinite period of time and has failed to provide any cases allowing cities to enter into perpetual agreements.

In its response, the FOP does not deny its position throughout this litigation: *If the parties are unable to reach an agreement, the FOP contends that the CBA lasts forever until the parties reach a new contract.* Thus, the FOP, by refusing to enter into a successor agreement, is able to keep this CBA in effect perpetually.² The FOP, however, is able to cite no precedent upholding the enforceability of a perpetual agreement.

To the contrary, the City has been able to cite precedent holding that multi-year salary contracts are not legal. In its initial brief, the City cited multiple cases in which this Court has held that a local fiscal body is unable to obligate its future funds through a multi-year salary contract under West Virginia Code § 11-8-26. *See Meador v. County Court of McDowell County*, 141 W. Va. 96, 118-26, 87 S.E.2d 725, 738-43 (1955); *State v. County Court of Lewis*

² The FOP seems to suggest that it is merely seeking a 60 day period during which the parties participate in bargaining toward a new agreement. At this point, in accordance with the circuit court's order, the City of Dunbar and the FOP have participated in bargaining toward a successor agreement with the mediator, who determined that the parties are at an impasse in the mediation. Since the FOP still contends the CBA is in effect, the FOP is using the circuit court's ruling to establish a perpetual agreement.

County, 110 W. Va. 533, 158 S.E. 790 (1931). The FOP has not distinguished the CBA in any way from the salary contracts at issue in the *Meador* and *County Court of Lewis County* cases. The FOP has responded merely that the multi-year municipal contracts are valid under *Huntington Water Corp. v. City of Huntington*, 115 W. Va. 531, 177 S.E. 290 (1934). Yet, the FOP is unable to come up with any response contradicting the City's recitation of the clear trend in precedent establishing that salary contracts are different from water contracts under West Virginia Code § 11-8-26. The FOP did not, and cannot, respond to the City's argument because the timing of the cases makes it perfectly clear that the West Virginia Supreme Court of Appeals was aware that it was treating these situations differently. In short, the FOP has cited no case in which a multi-year salary agreement has been upheld. Since a collective bargaining agreement is a contract for wages and benefits, it was clear that the City and the FOP could not enter into this multi-year arrangement. Moreover, the FOP and the City could not enter into an arrangement providing for the wages and benefits that the FOP could unilaterally extend forever by refusing to agree to a successor contract.

In fact, the FOP's brief rests primarily on the argument that the City of Dunbar should not be allowed make this argument because it operated under the contract for many years. The FOP essentially states that an illegal contract automatically becomes legal because the parties entered into it. This argument, however, flies in the face of West Virginia Code § 11-8-26 and legal precedent interpreting it. Notwithstanding the fact that the salary agreements in both the *County Court of Lewis County* and *Meador* cases had been in effect for several years, the West Virginia Supreme Court of Appeals refused to enforce the salary agreements. The bottom line is that the FOP and the City entered into an agreement that violates West Virginia Code § 11-8-26, and any such agreement is void.

D. The FOP concedes that it did not raise the claims under which it sought attorney's fees and costs.

In its response, the FOP contends that it should be awarded fees and costs under the West Virginia Wage Payment and Collection Act and under cases seeking a writ of mandamus. However, even the FOP expressly acknowledges in its brief that the Complaint never stated a claim under the Wage Payment and Collection Act and never stated a claim for writ of mandamus (Appellee's Br. at 12-13). The Complaint expressly states that it seeks a declaratory judgment. Count I alleges specifically that the FOP seeks "enforcement of contractual requirement to bargain in good faith" and does not seek wages and fringe benefits. Count II alleges specifically that the FOP wants this Court to "enjoin the City from changing the wages, hours, or working conditions of the Dunbar City police officers while negotiations are ongoing." The specific provisions under Count II seek reinstatement of all working conditions "until a new agreement is negotiated" and a prohibition from "altering the CBA . . . until a new agreement is negotiated." Clearly, these provisions do not seek wages and fringe benefits due and owing. They seek prospective relief. In sum, the Complaint does not state a claim for writ of mandamus or a claim under the Wage Payment and Collection Act.

The FOP contends that this case can be treated as a Wage Payment and Collection Act case under Rule 15(b) of the West Virginia Rule of Civil Procedure. However, Rule 15(b) only permits issues not raised in the pleadings to be tried by express or implied consent. In this case, the City objected to this characterization of this case as one arising under the Wage Payment and Collection Act (Mem. in Opp. to Pl's Mot. for Summ. J. at 7-9., R. at 70)

The FOP does not deny the that circuit court failed to cite the statutory basis for its award of attorney's fees and costs. The FOP brought its claim under West Virginia Code § 55-13-10 of the Uniform Declaratory Judgment Act. While this statute permits an award of costs, it does not

reference an award of attorney's fees. Hence, this Court should reverse the award of attorney's fees and costs.

Moreover, West Virginia Code § 55-13-10 provides that a court "*may* make such award of costs as may seem just and equitable." This provisions does not require such an award. Rather, such an award is discretionary, and in this case, if the circuit court was awarding fees and costs under the Declaratory Judgment Act, the circuit court abused its discretion.

The circuit court awarded attorney's fees and costs because it ruled that the "issues were clear from the language of the contract" (9/3/2004 Order at 3, R. at 101). However, the court also ruled that the City had no contractual obligation to provide the HMO benefits. Since the contract language did not require the City to provide the benefits, it was not clear the City had to pay for those benefits. Thus, attorney's fees and costs are inequitable in this case.

Moreover, the FOP contends that it is entitled to attorney's fees and costs just because the IAFF received such an award. The FOP contends that the FOP should receive reimbursement for "having to take substantially similar action against the City of Dunbar for refusing to honor its contractual obligations." The FOP overlooks that the circuit court ruled the grievance panel decision did not address whether the City had to pay the difference between the HMO and basic premiums. Thus, the FOP did not have to take actions for conduct similar to that litigated in the IAFF case.

Finally, the circuit court's decision leaves the City in a predicament. 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 new agreement. This ruling does not leave the FOP with much incentive to reach an agreement, and this Court should reverse the ruling.

V. RELIEF SOUGHT AND CONCLUSION

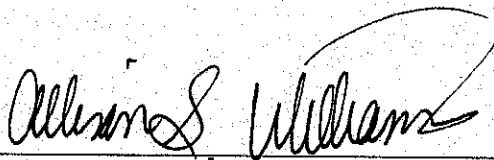
The circuit court erroneously denied the City's motion for leave to file an amended answer. There was no evidence that the City was dilatory or negligent in filing its motion for leave to amend the answer, as the case had been stayed. While the circuit court indicated that the FOP was on notice of the City's position, the circuit court failed to address any of the City's arguments in its summary judgment order. 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. The FOP has cited no case law to the contrary. By granting the FOP's motion for summary judgment and not enforcing the termination clause, the lower court has enforced an illegal perpetual agreement. This Court should reverse the decision of the trial court.

Respectfully submitted this 7th day of October, 2005.

THE CITY OF DUNBAR

By counsel



Forrest H. Roles (WV State Bar #3162)
Allison S. Williams (WV State Bar #8187)
DINSMORE & SHOHL LLP
900 Lee Street
Huntington Square Suite 600
Charleston, WV 25301
Telephone: (304) 357-0900

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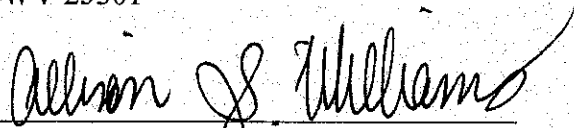
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**THE CITY OF DUNBAR,
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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing **APPELLANT'S REPLY BRIEF** was served this 7th day of October, 2005, by first-class U.S. mail, postage prepaid, on the following:

John F. Dascoli
THE SEGAL LAW FIRM
810 Kanawha Blvd., East
Charleston, WV 25301


Allison S. Williams (WV State Bar #8187)
DINSMORE & SHOHL LLP
900 Lee Street
Huntington Square, Suite 600
Charleston, WV 25301
Telephone: (304) 357-0900