IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2021 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 20-0295

LISA WILKINSON, HEATHER MORRIS, KATHRYN A. BRADLEY, PAMELA STUMPF, and LULA V. DICKERSON,
Plaintiffs Below, Petitioners

v.

WEST VIRGINIA STATE OFFICE OF THE GOVERNOR and JIM JUSTICE, in his official capacity as Governor, WEST VIRGINIA STATE AUDITOR'S OFFICE and JOHN B. McCUSKEY, in his official capacity as State Auditor, WEST VIRGINIA STATE TREASURER'S OFFICE and RILEY MOORE, in his official capacity as State Treasurer, WEST VIRGINIA OFFICE OF SECRETARY OF STATE and MAC WARNER, in his official capacity as Secretary of State, WEST VIRGINIA OFFICE OF THE ATTORNEY GENERAL and PATRICK MORRISEY, in his official capacity as Attorney General, SUPREME COURT OF APPEALS OF WEST VIRGINIA and CHIEF JUSTICE ELIZABETH D. WALKER, in her official capacity as Chief Justice,
Defendants Below, Respondents

Appeal from the Circuit Court of Kanawha County
The Honorable Thomas Evans III, Senior Circuit Judge
Civil Action No. 18-C-549

AFFIRMED

Submitted: March 16, 2021
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JUSTICE WOOTON delivered the Opinion of the Court.
JUSTICE ARMSTEAD, deeming himself disqualified, did not participate in this decision.
JUDGE TATTERSON, sitting by temporary assignment.

SYLLABUS BY THE COURT

1. "A circuit court's entry of summary judgment is reviewed *de novo.*" Syl. Pt. 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994).

2. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.,* 194 W.Va. 138, 459 S.E.2d 415 (1995).

3. "'Summary judgment is appropriate where the record taken as a whole 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 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)." Syl. Pt. 2, *Minshall v. Health Care & Ret. Corp. of Am*., 208 W. Va. 4, 537 S.E.2d 320 (2000).

4. "Where a party is unable to resist a motion for summary judgment because of an inadequate opportunity to conduct discovery, that party should file an affidavit pursuant to *W. Va. R. Civ. P.* 56(f) and obtain a ruling thereon by the trial court. Such affidavit and ruling thereon, or other evidence that the question of a premature summary judgment motion was presented to and decided by the trial court, must be included in the

appellate record to preserve the error for review by this Court." Syl. Pt. 3, *Crain v. Lightner*, 178 W. Va. 765, 364 S.E.2d 778 (1987).

5. """"Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.' Syllabus Point 7, [as modified,] *Atchinson v. Erwin,* [172] W.Va. [8], 302 S.E.2d 78 (1983)." Syllabus Point 4, as modified, *Hartsock–Flesher Candy Co. v. Wheeling Wholesale Grocery Co.,* [174] W.Va. [538], 328 S.E.2d 144 (1984).' Syllabus Point 4, *Gibson v. West Virginia Dep't of Highways,* 185 W.Va. 214, 406 S.E.2d 440 (1991)." Syl. Pt. 4, *MacDonald v. City Hosp., Inc*., 227 W. Va. 707, 715 S.E.2d 405 (2011).

WOOTON, Justice:

Petitioners Lisa Wilkinson, Heather Morris, Kathryn A. Bradley, Pamela Stumpf, and Lula V. Dickerson (collectively "the petitioners") appeal from the circuit court's grant of summary judgment on all claims contained in their Second Amended Complaint, which Complaint sought class certification, relief in mandamus, lost wages, and other monetary damages against six State Offices and their respective officeholders. All of the petitioners are state employees[1] who are paid one pay cycle in arrears pursuant to the provisions of West Virginia Code § 6-7-1 (2019). The petitioners' overarching claims are that when the Legislature amended the statute in 2014, changing the pay cycle for state employees from a semi-monthly to a bi-weekly basis, the result was a constitutional taking of five days of salary from every state employee in violation of article III, section 10 of the West Virginia Constitution, or, alternatively, the imposition of a "second arrearage" beyond that authorized by the statute. The petitioners characterize the Legislature's action, and the actions of the respondents in implementing the bi-weekly pay cycle and setting it into motion, as a "pay grab" done for the specific purpose of having five days of unpaid employee wages which could be used to create a budget surplus.

[1] Petitioner Wilkinson works on the Joint Commission on Government Finance, petitioner Bradley works for the West Virginia Department of Health and Human Resources, and petitioners Morris, Stumpf, and Dickerson work for the Supreme Court of Appeals of West Virginia.

After careful review of the parties' briefs and arguments, the appendix record, and the applicable law, we affirm the judgment of the circuit court granting summary judgment to the respondents.

I. Facts and Procedural Background

In May, 2010, the West Virginia Legislature initiated a comprehensive analysis of the State's systems and business processes, culminating in a State Business Case Analysis Report ("the Report") that recommended a number of "essential best practices" which, it was contended, would result in a substantial net ten-year savings to the State.[2] Thereafter, the Legislature created the Enterprise Resource Planning Board; a three-member board comprised of the Governor, Auditor and Treasurer; and a sixteen-member Steering Committee charged with providing oversight of the changes recommended in the

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[2] According to the Report,

> [t]he majority of State governments that have implemented an ERP system or HR/Payroll system pay their employees on a biweekly basis. Having the same number of days and hours in each pay cycle produces multiple operational benefits for the State. The calculation of the hourly rate and daily rate is constant since the same number of days is in each pay period. The hourly and daily labor cost rate is utilized to determine separation payment for annual leave and pro rata payment for increment pay and other leave balances. The current practice of semi-monthly payroll results in unequal days in a pay cycle depending on the number of days of the month. This has resulted in variations in calculations of the hourly rate and daily rate, and creates the situation where the timing of separation from the State can have a direct financial impact depending on the number of days in the working month.

Report.[3] Ultimately, all of these entities agreed with one of the Report's recommendations: a changeover to a bi-weekly (every two weeks) pay cycle for all state officials, officers, and employees.

As a first step in effectuating the changeover, the Legislature amended West Virginia Code § 6-7-1, effective July 1, 2014, to provide that "all state employees paid on a current basis will be converted to payment in arrears." In this regard, although the statute had provided for payment in arrears since July 1, 2002, prior to the 2014 amendment a number of individuals had been "grandfathered" and continued to be paid on a current basis.

Thereafter, during the implementation process for the changeover, the State's Enterprise Resource Planning System ("ERP System") was changed to pay all officials (other than elected officials), officers, and employees on a bi-weekly pay cycle, with the changeover set to transition employees from the previous semi-monthly pay cycle over the course of three years and in three "Waves": Wave 1 took place in 2015, Wave 2 in 2016, and Wave 3 in 2017.

Each of these Waves was accomplished in the same manner. First, it was determined that all bi-weekly paydays would fall on a Friday. Next, a date was selected

[3] *See* W. Va. Code §§ 12-6d-1 to -7 (2019).

on which employees would receive their final full semi-monthly paycheck. The next paycheck would be a transitional check in which the pay period was shortened by the number of days necessary to line up with the first bi-weekly check. After this transitional check, the next paycheck employees received was their first bi-weekly paycheck. It is important to note that each employee's transitional check included an adjustment payment in an amount necessary to ensure that he or she received all pay earned in that year.

In the instant case, all of the petitioners were transitioned in Wave 3. The final day of the semi-monthly pay cycle was May 12, 2017. Employees received their final full semi-monthly checks on May 15, 2017, their transitional checks (shortened by three days but containing the adjustment payment) on May 30, 2017, and their first bi-weekly checks on Friday, June 9, 2017.[4] In this regard, it is important to note that, as previously stated, the earnings period covered in the May 30, 2017, check was short three days (ending on May 12 rather than May 15) in order to match up with the new pay schedule; however, those three "missing" days (May 13-15) were included in the first bi-weekly check on June 9, 2017. After that date, and up through the present time, the petitioners have been paid every other Friday.

[4] This somewhat complicated procedure was necessitated by the changeover from the old payroll system, EPICS, to the new system, wvOASIS.

The old pay cycle and the new pay cycle differ in three respects that are material to this appeal. First, the old pay cycle was calendar-based. With the exception of their first year of employment, see text *infra*, state employees received twenty-four checks every calendar year: the first check was received on or about January 15, depending on whether that date fell on a weekend, in which case the check was received on the preceding Friday; and the final check was received on the last work day of the year. In contrast, the new pay system is completely uncoupled from the calendar. In any calendar year, again with the exception of an employee's first year of employment, state employees now receive twenty-six checks: the first check is received on the first Friday in January that falls two weeks after the final Friday payday in December; and the final check is received on the last Friday in December that falls within the final two weeks of the year. Second, an employee's bi-weekly paycheck is smaller than his or her previous semi-monthly paycheck, because there are now twenty-six paydays in a calendar year rather than twenty-four. Third, a "pay cycle" within the meaning of West Virginia Code § 6-7-1 is no longer calendar-based, i.e., the first 15 days of the month or the final 14, 15 or 16 days of the month, but is now the two-week period between Friday paydays, no matter where those Fridays fall on the calendar.

After 2017 had drawn to a close, petitioner Wilkinson added up the amount of pay reflected in the nine semi-monthly checks she received from January 1 – May 15, 2017, the amount reflected in the transitional check she received on May 30, 2017, and the amount reflected in the fifteen bi-weekly checks she received from June 9 – December 22,

2017, and found that the total was less than the amount of her annual salary. Accordingly, she concluded that the State owed her money. Thereafter, she filed her original Complaint on April 23, 2018, against respondents State Auditor McCuskey, then-State Treasurer John Perdue, and Kronos, Inc., alleging that they violated certain provisions of the Wage Payment and Collection Act, West Virginia Code §§ 21-5-1, -6 (2019), when the State transitioned from a semi-monthly to a bi-weekly pay cycle. Specifically, petitioner Wilkinson alleged that "as a result of the said [transition], she has not been paid all of the monies due her based upon her yearly salary." Petitioner filed her First Amended Complaint on June 22, 2018, containing the same allegations but adding Dataview Consulting, LLC, and ISG as Defendants. Petitioner filed her Second Amended Complaint (hereinafter "the Complaint") on June 13, 2019, adding petitioners Morris, Bradley, Stumpf, and Dickerson; adding respondents Governor Jim Justice, Secretary of State Mac Warner, Attorney General Patrick Morrisey, and then-Chief Justice Elizabeth D. Walker; and dismissing Kronos Inc., Dataview Consulting, LLC, and ISG from the case. The Complaint also added additional causes of action: that the transition to a bi-weekly pay system violated West Virginia Code §§ 21-5C-1 to -11 (minimum wage and maximum hours standards); that it violated article X, section 4 of the West Virginia Constitution (no debt shall be contracted by the State); and that it violated article III, section 10 of the West Virginia Constitution (equal protection of the law). Petitioners alleged that as a result of the transition, the State owed $30,000,000.00 to its employees.

The respondents filed motions to dismiss based on claims of immunity,[5] and motions for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, which provides in relevant part that

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The petitioners filed their response, and the circuit court held a hearing on the motions. Thereafter, in a comprehensive and well-reasoned opinion, the court granted summary judgment for the respondents on all of the petitioners' claims.[6] This appeal followed.

II. Standard of Review

This case is before us on appeal from the circuit court's entry of summary judgment in favor of the respondents. It is a long-established rule that "[a] circuit court's entry of summary judgment is reviewed *de novo.*" Syl. Pt. 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994). We have clarified that

> [i]n reviewing a circuit court's order granting summary judgment this Court, like all reviewing courts, engages in the

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[5] The respondents also contended that the case was not appropriate for class action certification, an issue which was not decided by the circuit court and, in light of our resolution of this appeal, is now moot.

[6] The court did not resolve, or even discuss, the immunity defense raised by respondents in the motions to dismiss. Although respondents raise this issue in their joint brief, they did not make it the subject of a cross-assignment of error; for that reason, and in light of our resolution of the summary judgment issue in respondents' favor, we find it unnecessary to address the question of immunity.

> same type of analysis as the circuit court. That is 'we apply the same standard as a circuit court,' reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party.

State ex rel. Vanderra Res., LLC v. Hummel, 242 W. Va. 35, 42, 829 S.E.2d 35, 42 (2019) (citing *Fayette Co. Nat'l Bank v. Lilly*, 198 W. Va. 349, 353 n.8 , 484 S.E.2d 232, 236 n.8 (1997), *overruled on other grounds by Sostaric v. Marshall*, 234 W. Va. 449, 766 S.E.2d 397 (2014)). Ultimately,

> '[s]ummary judgment is appropriate where the record taken as a whole 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 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

Syl. Pt. 2, *Minshall v. Health Care & Ret. Corp. of Am*., 208 W. Va. 4, 537 S.E.2d 320 (2000). Additionally, in the course of our review in this case we are called upon to determine the constitutionality of certain revisions to West Virginia Code § 6-7-1 (2019). With respect to such review, we have held that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.,* 194 W.Va. 138, 459 S.E.2d 415 (1995).

With these guiding principles in mind, we turn to the issues as framed by petitioners in their opening brief on appeal.

III. Discussion

A. Material Facts – Burden of Proof

At the outset, we must resolve whether there are disputed issues of material fact which would preclude summary judgment in this case. In this regard, it is well established that,

> [t]he movant's burden is 'only [to] point to the absence of evidence supporting the nonmoving party's case.' *Latimer v. SmithKline & French Laboratories,* 919 F.2d 301, 303 (5th Cir.1990). If the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response. If the movant, however, does make this showing, the nonmovant must go beyond the pleadings and contradict the showing by pointing to specific facts demonstrating a 'trialworthy' issue. To meet this burden, the nonmovant must identify specific facts in the record and articulate the precise manner in which that evidence supports its claims. As to material facts on which the nonmovant will bear the burden at trial, the nonmovant must come forward with evidence which will be sufficient to enable it to survive a motion for directed verdict at trial. If the nonmoving party fails to meet this burden, the motion for summary judgment *must* be granted. *See Nebraska v. Wyoming,* 507 U.S. 584, 590, 113 S.Ct. 1689, 1694, 123 L.Ed.2d 317, 328 (1993); *Lujan v. National Wildlife Federation,* 497 U.S. 871, 884, 110 S.Ct. 3177, 3186, 111 L.Ed.2d 695, 713 (1990).

Powderidge Unit Owners Ass'n v. Highland Props., Ltd., 196 W. Va. 692, 699, 474 S.E.2d 872, 879 (1996).

In the instant case, we begin with one material fact upon which all parties agree: as of July 1, 2014, all West Virginia employees other than elected officials are paid one pay cycle in arrears. West Virginia Code § 6-7-1 provides:

> All full-time and part-time salaried and hourly officials, officers and employees of the state, state institutions of higher education and the Higher Education Policy Commission shall be paid at least twice per month, and under the same procedures and in the same manner as the State Auditor currently pays agencies: Provided, That on and after July 1, 2002, all new officials, officers and employees of the state, a state institution of higher education and the Higher Education Policy Commission, statutory officials, contract educators with higher education and any exempt official who does not earn annual and sick leave, except elected officials, shall be paid one pay cycle in arrears. The term "new employee" does not include an employee who transfers from one state agency, a state institution of higher education or the Higher Education Policy Commission to another state agency, another state institution of higher education or the Higher Education Policy Commission without a break in service: *Provided, however,* That, after July 1, 2014, all state employees paid on a current basis will be converted to payment in arrears.[7] For accounting purposes only, any payments received by such employees at the end of the pay cycle of the conversion pay period will be accounted for as a credit due the state. Notwithstanding any other code provision to the contrary, any such credit designation made for accounting of this conversion will be accounted for by the Auditor at the termination of an employee's employment and such accounting shall be documented in the employee's final wage payment. Nothing

[7] State officials have interpreted "all state employees paid on a current basis" to exclude elected officials, whose terms of office are set by calendar – from the 1st day of one year to the final day of another. The respondents state that necessity was the mother of invention in this respect, because converting the semi-monthly pay cycle of an office holder, whose term is calendar-based, to a bi-weekly pay cycle, which bears no connection to the calendar, would present an accounting nightmare. *See* text *infra*, discussing petitioners' third assignment of error.

> contained in this section is intended to increase or diminish the salary or wages of any official, officer or employee.

(Footnote added). Under the former semi-monthly pay system, pay cycles were determined by the calendar; they ran from the 1st to the 15th and the 16th through the last workday of every month. If an employee began his or her state employment on January 1, the employee would not receive his or her first check until the final workday of the month. That first check would represent payment for work performed by the employee from January 1st - 15th – the employee's first pay cycle – and thereafter, every check received would be one pay cycle in arrears.[8] Under the new bi-weekly pay system, pay periods are uncoupled from the calendar; they run in two week increments between Fridays. Generally, an employee will now begin employment on the first Monday in a pay cycle and will receive his or her first paycheck on the fourth Friday thereafter. That check would represent payment for work performed by the employee during the first ten workdays of the employee's employment with the State – the employee's first pay cycle. Thereafter, every check the employee received would be one pay cycle in arrears

[8] It is unclear whether petitioners fully appreciate the significance of this, as their pleadings and arguments throughout the course of the case frequently allude to the State "keeping" employees' first paychecks until their retirement from government service. The State does not "keep" any pay; the final check an employee receives after his or her retirement represents payment for work performed during the final pay cycle, with any necessary adjustments.

We now turn to three issues of material fact which petitioners claim to be disputed, and upon which their entire case rests: first, petitioners' assertion that the State's transition to a bi-weekly pay cycle resulted in a loss of approximately five days of pay in 2017 for every state worker;[9] second, their assertion that the transition resulted in a "second arrearage," meaning one beyond that which is authorized by West Virginia Code § 6-7-1; and third, their assertion that elected officials received a "catch up gap payment" or "bonus payment" in 2017, a benefit to which all state employees were entitled but which none of them received. To counter these factual assertions, in the proceedings below respondents filed motions for summary judgment, appending the petitioners' pay records and an affidavit ("the Troy affidavit") from Sue Racer Troy, Chief Financial Officer of the Supreme Court of Appeals of West Virginia, tracing the petitioners' pay during the entirety of the relevant time period. In response, the petitioners submitted anecdotal evidence such as letters and memos from state officials and employees which, taken together and in a light most favorable to the petitioners,[10] demonstrate ongoing confusion at the outset of the

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[9] In both their pleadings and oral presentations in the circuit court and in this Court, the petitioners characterize what they allege to be a "pay grab" as a taking prohibited by our State Constitution: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." W. Va. Const., art. III, § 10 However, petitioners have not raised this takings argument on appeal in an assignment of error.

[10] This Court has previously observed that

> we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as credibility

transition as to how it would occur and what it would mean for state employees. Additionally, the petitioners submitted charts showing that the amount of pay they received in calendar year 2017 was less than the amount of their yearly salary. However, the petitioners did *not* submit any evidence, by affidavit or otherwise, to dispute either the facts contained in the Troy affidavit as to how the transition was effected, or the accuracy of the pay records which showed exactly how and when the petitioners received the entirety of their respective 2017 salaries, with every check coming, without exception, one pay cycle in arrears. Rather, the petitioners submitted an affidavit from Daniel L. Selby ("the Selby affidavit"), certified public accountant, in which Mr. Selby stated as a fact, based on a review of nothing more than the text of West Virginia Code § 6-7-1 and "limited data . . . evidencing when the State changed their pay cycle[,]" that "when the State changed their pay cycle to a bi-weekly pay cycle, state employees were paid more than one (1) pay cycle in arrears[,]" and "the second arrearage placed on state employees diminishes the wages of said state employees." Further, Mr. Selby opined that the transition to a new pay cycle violated § 6-7-1 and allowed the State "to borrow millions from state employees and . . . to continuously without limit borrow from employees."

> determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions[.]

Maston v. Wagner, 236 W. Va. 488, 498, 781 S.E.2d 936, 946 (2015).

There is no indication in the Selby affidavit that the affiant had reviewed the pay records which were appended to the respondents' motions for summary judgment. Further, the affidavit contains no specific facts, only a few totally unsupported generalities. Finally, the affidavit is wholly devoid of any reasoning to support the conclusory statements and opinions contained therein. In this regard, the Selby affidavit fails to satisfy the mandate of Rule 56(e) of the West Virginia Rules of Civil Procedure, which provides in relevant part that

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial.

(Emphasis added). *See Jividen v. Law*, 194 W. Va. 705, 716, 461 S.E.2d 451, 462 (1995) ("'Given the perfunctory nature of the affidavit and the absence of any reasoned basis for [the expert's] opinion, we cannot conclude that the circuit court improperly disregarded it.' *M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.,* 981 F.2d 160, 165 (4th Cir.1992) (en banc), *cert. denied,* 508 U.S. 972, 113 S. Ct. 2962, 125 L.Ed.2d 662 (1993) ("An expert's affidavit that is wholly conclusory and devoid of reasoning does not comply with Fed. R. Civ. P. 56(e).'")).")

Based on its review of the parties' submissions, the circuit court concluded that in response to respondents' properly supported motions for summary judgment, the petitioners failed to sustain their burden of production to "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)[.]"[11] Syl. Pt. 3, in part, *Williams v. Precision Coil, Inc*., 194 W. Va. 52, 459 S.E.2d 329 (1995). Accordingly, the court concluded that the material facts relevant to the petitioners' claims are undisputed. Based on our de novo review of the appendix record, our consideration of the parties' briefs and oral arguments, and the applicable law, we agree.

With respect to the first issue of material fact, the pay records and the Troy affidavit conclusively establish that West Virginia state employees did not lose one penny of their 2017 salaries as a result of the transition from a semi-monthly to a bi-weekly pay cycle. To illustrate, we will review the pay records of petitioner Dickerson, who was transitioned to a bi-weekly pay cycle in Wave 3, at a time when her salary was $39,852.00.[12] Prior to 2017, every calendar year (other than her initial year of employment) Ms. Dickerson had received 24 paychecks of $1,660.50 each. The transition occurred as follows: Ms. Dickerson received her final full semi-monthly paycheck in the amount of $1,660.50 on May 15, 2017. As previously noted, because State employees are

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[11] *See* text *infra*, discussing the petitioners' first assignment of error: that the circuit court erred in refusing to permit additional discovery as to the amount of the alleged "second arrearage."

[12] Although each of the petitioners earns a different salary, all other facts concerning Ms. Dickerson's transition to a bi-weekly pay cycle are identical because each petitioner was transitioned in Wave 3.

paid one pay period in arrears per West Virginia Code § 6-7-1, this check represented payment for work performed in the previous pay cycle, April 16-30, 2017. Ms. Dickerson then received a transitional check in the amount of $1,353.95 on May 30, 2017, which represented payment for work performed from May 1-12, 2017, and included an adjustment payment of $306.55. Ms. Dickerson then received her first bi-weekly check in the amount of $1,532.77 on June 9, 2017, which represented payment for work performed in the previous two-week pay cycle, May 13-26, 2017. This was the amount of every bi-weekly check thereafter.

Moving forward to the end of the year, Ms. Dickerson's December 22, 2017, paycheck represented payment for earnings accrued in the previous two-week pay cycle, November 25 - December 8, 2017. Her January 5, 2018, paycheck represented payment for earnings accrued in the previous two-week pay cycle, December 9 - December 22, 2017, and her January 19, 2018, paycheck represented payment for earnings accrued in the previous two-week pay cycle, December 23, 2017 - January 5, 2018. Thus, Ms. Dickerson was paid her entire salary for work performed in 2017,[13] although she did not receive all of it during that calendar year. This is where petitioners' confusion seems to have originated.

[13] Although it is not material to the issues on appeal, the petitioners' evidence in the Troy affidavit indicates that when all was said and done, Ms. Dickerson was actually overpaid $76.65 for work performed in 2017.

To understand the petitioners' belief that they were shortchanged in 2017, it is necessary to understand that in 2016, for instance, under the old semi-monthly pay cycle Ms. Dickerson would have received her last paycheck on December 30, 2016 (the final day of the year falling on a Saturday). That check, together with the twenty-three checks that preceded it in 2016, would have totaled $39,852.00, her yearly salary. Thus, it would have appeared to Ms. Dickerson that she received her full 2016 salary in that calendar year,[14] although in fact she had not; because she was paid one pay cycle in arrears pursuant to West Virginia Code § 6-7-1, the $39,852.00 she received in 2016 represented payment for work performed during the final pay cycle of 2015 and the first twenty-three pay cycles of 2016. Ms. Dickerson would have received payment for work performed between December 16 and December 30, 2016, on January 13, 2017 (January 14 & 15 falling on Saturday and Sunday, respectively), when she received her next semi-monthly paycheck. In short, Ms. Dickerson has *never* received her entire yearly salary during the year in which it was earned, although it appeared that way because of the calendar-based pay cycle.

Under the new system, which as noted is uncoupled from the calendar, the same result obtained, although it *looked* different because the pay cycles were no longer fixed from the 1st to the 15th of the month and the 16th to the final day of the month. Rather, beginning on Friday, June 9, 2017, when the first semi-monthly paycheck was issued,

[14] Indeed, Ms. Dickerson's W-2 for calendar year 2017 would have shown earnings in the exact amount of her yearly salary.

paychecks were issued every other Friday: on June 9 and 23; July 7 and 21; August 4 and 18; September 1, 15 and 29; October 13 and 27; November 10 and 24; and December 8 and 22, 2017. The December 22, 2017, paycheck, which was issued at the conclusion of the December 9 - 22 pay cycle, was payment for work performed during the preceding pay cycle, November 25 - December 8, 2017. The January 5, 2018, paycheck, which was issued at the conclusion of the December 23, 2017 - January 5, 2018, pay cycle, was payment for work performed during the previous pay cycle, December 9 - 22, 2017. The January 19, 2018, paycheck, which was issued at the conclusion of the January 6 - 19, 2018, pay cycle, was payment for work performed during the previous pay cycle, December 23, 2017 - January 5, 2018. In short, by January 19, 2018, Ms. Dickerson had received every penny of her 2017 salary.

Additionally, with respect to the second issue of material fact, the allegation that a "second" arrearage resulted from the changeover, the petitioners' pay records and the Troy affidavit conclusively establish that every paycheck Ms. Dickerson received in 2017 and thereafter was one pay cycle in arrears, as authorized by § 6-7-1. The only difference, post-transition, was that the pay cycles were no longer fixed by the calendar, as they had been prior to the May 13, 2017, changeover. Prior to the changeover, pay cycles were fixed by specific, never-changing dates: the 1st through the 15th of every month, and the 16th through the final day of the month. After the changeover, the pay cycles were fixed by two week, Friday to Friday intervals: the first "new" pay cycle was the two-week period between May 13 and May 26, 2017; the second was the two-week period between

May 27 and June 9, 2017; the third was the two-week period between June 10 and June 23, 2017; and so on, up to the present.

With respect to the third issue of material fact, the allegation that elected officials received a "catch-up" payment denied to the petitioners, we begin by noting that West Virginia Code § 6-7-1 has consistently been interpreted as exempting all elected officials from the requirement "[t]hat after July 1, 2014, all state employees paid on a current basis will be converted to payment in arrears." Therefore, unlike the petitioners, who are paid in arrears and thus did not receive the entirety of their 2017 salary until January 19, 2018, elected officials, who are paid in current status, were required to receive the entirety of their 2017 salaries in calendar year 2017. The mechanism by which this was accomplished was the issuance of an additional check – in March, 2017 (for judicial officials) or May, 2017 (for all other elected officials) – in an amount which, added to the total of the officials' nine semi-monthly checks, May 30 transitional checks, and fifteen bi-weekly checks,[15] fully paid their annual salary for 2017 within the calendar year.

Although the petitioners characterized (and continue to characterize) the additional checks issued to elected officials as "catch-up gap payments" or "bonus payments," they presented not one shred of evidence in the proceedings below to

[15] The last bi-weekly check was issued on December 22, 2017.

substantiate this allegation. Accordingly, the circuit court found that the petitioners' characterization of the one-time payment made to judges in March, 2017, was a "red herring" that was completely belied by respondents' undisputed evidence: a chart showing the flow of pay to a circuit judge in 2017. That chart demonstrated that the payments in March were, in the court's words,

> merely a matter of simple math. For calendar year 2018, the circuit court judges would receive bi-weekly pay checks of $4,846.20. In order to start issuing checks in that amount on June 9, 2017 (and pay the judges their salaries of $126,000), the Court made a payment of $807 to the judges' pay in March 2017.

We agree with the reasoning of the circuit court and conclude that there was no dispute of material fact with respect to the one-time payment to elected officials: they did not receive one penny beyond their statutorily established salaries in 2017, although unlike petitioners, who are paid one pay cycle in arrears, the officials received the entirety of their salaries within the calendar year.

B. The Petitioners' Assigned Errors

We turn now to the three assignments of error raised by the petitioners on appeal,[16] which they frame as follows: first, that the circuit court erred in not permitting

[16] In their brief, the petitioners actually raised a fourth assignment of error: that the circuit court's finding "that the [petitioners] were only due 10 days in wages . . . is erroneous and adversely affects the entire opinion." Because the court made no such finding, and because it is unclear how petitioners are attempting – in a total eleven lines of text – to tie the non-existent finding of fact to "a Wage Payment or Collection Claim, a

discovery on the amount of the alleged "second arrearage" that resulted from the transition to a bi-weekly pay schedule; second, that the court erred in making a factual finding that state employees are paid ten days, rather than fifteen days, in arrears, when this is an issue of disputed material fact; and third, that the court erred in its legal conclusion that the payment of what petitioners call a "bonus" or a "gap payment" to elected officials violated the equal protection guarantee enshrined in article III, section 10 of the West Virginia Constitution. We will address these issues in turn.

1. Discovery on Amount of Second Arrearage

Petitioners devote fewer than thirty lines of text to the argument – their leading argument – that the circuit court erred in not permitting discovery on the amount of the alleged second arrearage. It is also noteworthy that this argument contains neither a single citation of authority nor a pinpoint reference to the voluminous appendix record, in violation of Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure.[17] We

complaint about a second arrearage, an equal Protection claim or a need for a Writ of Mandamus," we decline to address this so-called "argument." *See State v. Grimes*, 226 W. Va. 411, 422 n.5, 701 S.E.2d 449, 460 n.5 (2009) ("Inasmuch as those matters were set forth in the appellant's brief in a cursory or tangential manner, they are not cognizable in this appeal."); *Tiernan v. Charleston Area Med. Ctr., Inc.,* 203 W.Va. 135, 140 n.10, 506 S.E.2d 578, 583 n.10 (1998) ("Issues not raised on appeal or merely mentioned in passing are deemed waived.") (citing Syl. Pt. 6, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981)).

[17] Rule 10(c)(7) provides, in relevant part, that the argument portion of a petitioner's brief "must contain appropriate and specific citations to the record on appeal, including

overlook this deficiency in the petitioners' brief, however, because it is clear that the issue is not properly before this Court in any event. Rule 56(f) of the West Virginia Rules of Civil Procedure provides that

> [s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

In practice, the rule requires that a party's need for discovery must be clearly communicated to the circuit court. In this regard, we have held that

> [w]here a party is unable to resist a motion for summary judgment because of an inadequate opportunity to conduct discovery, that party should file an affidavit pursuant to *W. Va. R. Civ. P.* 56(f) and obtain a ruling thereon by the trial court. Such affidavit and ruling thereon, or other evidence that the question of a premature summary judgment motion was presented to and decided by the trial court, must be included in the appellate record to preserve the error for review by this Court.

Syl. Pt. 3, *Crain v. Lightner*, 178 W. Va. 765, 364 S.E.2d 778 (1987). Although we subsequently held that an affidavit, although preferable, was not always necessary, *Powderidge*, 196 W. Va. at 702, 474 S.E.2d at 882, we made it clear that "substantial compliance" with Rule 56(f) requires a party to detail, "in written form and in a timely

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citations that pinpoint *when and how the issues in the assignments of error were presented to the lower tribunal*." (Emphasis added).

manner," the scope of the discovery sought and its necessity in resisting a motion for summary judgment. *Powderidge*, 196 W. Va. at 702, 474 S.E.2d at 882.

In the instant case, despite our frequent admonition to the bar that "truffle hunting" is not within this Court's remit,[18] we have carefully examined the appendix record to determine how, if at all, this issue was raised below. We first note that the petitioners did not file a written motion for continuance in order to do further discovery, either before or after the respondents filed their motions for summary judgment. We additionally note that in their "Response to Defendants' Motions to Dismiss Plaintiffs' Complaint, or in the Alternative, Summary Judgment," the petitioners made no argument whatsoever as to what discovery they deemed necessary in order to resist the motions; rather, they merely stated – in the second-to-last sentence of their thirty-page Response – that "[f]urther, because no discovery has been developed, the Plaintiffs should have the benefit to complete discovery." Finally, we note that in their oral presentation to the circuit court during the December 4, 2019, hearing on the motions, the petitioners' counsel never made a request for discovery and, indeed, never mentioned the subject at all.

[18] "'[J]udges are not like pigs, hunting for truffles buried in briefs[,]' *State Department of Health v. Robert Morris N.,* 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995), and the same observation may be made with respect to appendix records." *Multiplex, Inc. v. Town of Clay*, 231 W. Va. 728, 731 n.1, 749 S.E.2d 621, 624 n.1 (2013).

In short, the petitioners cannot claim on appeal that the circuit court erred in failing to permit discovery on the amount of the alleged "second arrearage" when no request for such discovery was ever made to the court. *See*, *e.g.*, *Wang-Yu Lin v. Shin Yi Lin*, 224 W. Va. 620, 624, 687 S.E.2d 403, 407 (2009) ("In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken.") (citing Syl. Pt. 1, *Mowery v. Hitt,* 155 W.Va. 103, 181 S.E.2d 334 (1971)); *Whitlow v. Bd. of Educ. of Kanawha Cnty*., 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993) ("[W]hen an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom."). Accordingly, we decline to address the merits of this assignment of error.

2. Number of Days Paid in Arrears

The petitioners' second argument is that the court erred in making a factual finding that state employees are paid ten days in arrears, not fifteen days, when this is an

issue of disputed material fact.[19] We may dispose of this claim without extended discussion, as it is based on a flawed premise: that payment in arrears is measured by days. It is not. West Virginia Code § 6-7-1 does not authorize payment of a state employee's salary ten days, or fifteen days, or any other specific number of days, in arrears; rather, it authorizes payment of the employee's salary *one pay cycle* in arrears.

To explain, we return to Ms. Dickerson's pay records (which, as stated previously, are representative of all petitioners. *See supra* at note 12.). From January 1 - May 12, 2017, when state employees were paid on a semi-monthly cycle, the pay cycle was fixed and immutable: half a month, with paychecks issued on the 15th of the month and the final work day of the month. How many workdays actually fell within those cycles

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[19] Again, petitioners do not provide a pinpoint citation to the record, perhaps because the circuit court made no such factual finding in its February 10, 2020, order granting summary judgment. The court's only finding with respect to the relative lengths of the semi-monthly and bi-weekly arrearages was as follows:

> Again, the pay records speak for themselves. The Court finds that, under the bi-weekly cycle, Plaintiffs are paid *more* frequently. Thus, the arrearage is *less* under the new system than before. The Court concludes Plaintiffs' allegation [as to the existence of a second arrearage] is misplaced and appears to be based on a misunderstanding of how an arrearage operates and, again, on an unsupported assumption that a bi-weekly cycle should end on the fourteenth day of each month. Plaintiffs' theory provides them no relief. When the State converted from semi-monthly to bi-weekly pay, the one-pay-cycle arrearage was maintained. No additional pay-cycle and no additional days were added between the time services were performed and compensated.

– something that varied by month and year – was irrelevant. Thus, Ms. Dickerson's semi-monthly paycheck on January 31, 2017, was payment in arrears for work performed in the preceding pay cycle, January 1 - 15, 2017. Similarly, her final semi-monthly paycheck on May 15, 2017, was payment in arrears for work performed in the preceding pay cycle, April 16 – 30, 2017. Thereafter, beginning on May 13, 2017, when the bi-weekly pay cycle came online, the pay cycle was two weeks, from Saturday to Friday two weeks later. Ms. Dickerson's transitional paycheck, which she received on May 30, 2017, was payment in arrears for work performed from May 1 - 12, a Friday.[20] The "missing" three days from the "old" pay cycle, May 13 - 15, were accounted for in Ms. Dickerson's first bi-weekly paycheck on Friday, June 9, 2017, which was payment in arrears for work performed in the preceding pay cycle, May 13 - 26, 2017. Ms. Dickerson's next bi-weekly paycheck came on Friday, June 23, 2017, and was payment in arrears for work performed in the preceding pay cycle, May 27 – June 9, 2017. This pattern continues, without variation, to the present time. The end point, however, for purposes of the allegations in this case, is Ms. Dickerson's bi-weekly paycheck on January 19, 2018. That check was payment in arrears for work performed in the preceding pay cycle, December 23, 2017 - January 5, 2018.

[20] There was also an adjustment payment, *see* text *supra*, which is not relevant to the issue of payment in arrears.

Thus, it is readily apparent that the circuit court was correct in its conclusion that at all times, both before and after the transition from a semi-monthly to a bi-weekly pay cycle, state employees were paid at least twice a month and one pay cycle in arrears, which is exactly what is authorized by the clear and unambiguous language of West Virginia Code § 6-7-1. The number of days included within the old and new pay cycles – whether ten days, fourteen days, fifteen days, or any other number of days – is wholly immaterial to the issue of whether the new pay system is lawful under the statute.

3. Equal Protection Claim

The petitioners' third argument is that the circuit court erred in its legal conclusion that the payment of one additional check to elected officials did not violate equal protection of the law. In this regard, although the petitioners characterized (and continue to characterize) the additional checks issued to elected officials as "catch-up gap payments" or "bonus payments," they presented not one shred of evidence in the proceedings below to substantiate this allegation. To the contrary, as we have discussed earlier in this opinion, the evidence was undisputed that both elected officials and petitioners were paid every penny of what they earned in 2017. The only difference between the two groups was that the elected officials, who are paid on a current basis, received the entirety of their 2017 salaries within that calendar year, while petitioners, who are paid one pay cycle in arrears, did not receive payment for work performed in the

December 9 - 22, 2017, pay cycle until January 5, 2018, and work performed in the December 23, 2017 - January 5, 2018, pay cycle until January 19, 2018. Petitioners contend that because of that difference, respondents have "treated similarly situated people dissimilarly" and have denied them the right to equal protection of the laws in derogation of article III, section 10 of the West Virginia Constitution.

We begin with a brief overview of our equal protection jurisprudence.[21] Article III, section 10 of the West Virginia Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." It is well established in our jurisprudence that "[i]nherent in the due process clause of the State Constitution are both the concept of substantive due process and the concept of equal protection of the law." *Thorne v. Roush*, 164 W. Va. 165, 168, 261 S.E.2d 72, 74 (1979). In turn, "[e]qual protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner." Syl. Pt. 3, in part, *MacDonald v. City Hosp., Inc*., 227 W. Va. 707, 715 S.E.2d 405 (2011). Further, the character of the classification is critical: "[I]f the challenged classification does not affect a fundamental right or some suspect or quasi-suspect criterion, the governmental classification will be sustained so long as it 'is rationally related to a legitimate state interest.'" *Morgan v. City*

[21] We note that the circuit court's constitutional analysis, contained in its thorough, carefully reasoned opinion, provides an excellent roadmap in this regard.

of Wheeling, 205 W. Va. 34, 43, 516 S.E.2d 48, 57 (1999) (citing *Appalachian Power Co. v. Tax Dep't*, 195 W. Va. 573, 594, 466 S.E.2d 424, 445 (1995)). More specifically, we have held:

> "[W]hen a suspect classification, such as race, or a fundamental, constitutional right, such as speech, is involved, the legislation must survive 'strict scrutiny,' that is, the legislative classification must be necessary to obtain a compelling state interest. *Deeds v. Lindsey,* 179 W.Va. 674, 677, 371 S.E.2d 602, 605 (1988)." 185 W.Va. at 691, 408 S.E.2d at 641. In the second type of analysis, "a so-called intermediate level of protection is accorded certain legislative classifications, such as those which are gender-based, and the classifications must serve an important governmental objective and must be substantially related to the achievement of that objective." *Id.,* 408 S.E.2d at 641. "Third, all other legislative classifications, including those which involve economic rights, are subjected to the least level of scrutiny, the traditional equal protection concept that the legislative classification will be upheld if it is reasonably related to the achievement of a legitimate state purpose." *Id.,* 408 S.E.2d at 641.

Marcus v. Holley, 217 W. Va. 508, 523, 618 S.E.2d 517, 532 (2005). In the instant case, where it cannot reasonably be argued that the classification at issue is anything other than economic,

> ""'we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.' Syllabus Point 7, [as modified,] *Atchinson v. Erwin,* [172] W.Va. [8], 302 S.E.2d 78 (1983)." Syllabus Point 4, as modified, *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.,* [174] W.Va. [538], 328 S.E.2d 144 (1984).' Syllabus

> Point 4, *Gibson v. West Virginia Dep't of Highways,* 185 W.Va. 214, 406 S.E.2d 440 (1991).

MacDonald, 227 W. Va. at 710, 715 S.E.2d at 408, Syl. Pt. 4. Thus, our task is to determine whether paying elected officials on a current basis while paying other state employees one pay cycle in arrears, West Virginia Code § 6-7-1, is supported by a rational basis. This is a "highly deferential standard[,]" *Appalachian Power*, 195 W. Va. at 594, 466 S.E.2d at 445; and further, "[i]f a classification has some 'reasonable basis,' it does not offend the Constitution simply because it is not made with mathematical nicety or because in practice it results in some inequality." *Morgan*, 205 W. Va. at 45-46, 516 S.E.2d at 59-60.

With these principles in mind, we turn to petitioners' claim, which is that West Virginia Code § 6-7-1 is unconstitutional as applied: as a result of the State's transition from a semi-monthly to a bi-weekly pay cycle, elected officials, who are paid on a current basis, received all of their 2017 salary in 2017, while all other state employees, who are paid in arrears, had their pay "dribble over into the next calendar . . . year."[22] We agree with the circuit court that the difference in pay status reflects the very real difference

[22] Although petitioners' argument, if valid, would also apply to the Wave 1 and Wave 2 transitions that took place in 2015 and 2016, petitioners have no standing to make such an argument since all of them were in the Wave 3 transition in 2017 and allege harm resulting only from that transition. *See generally State ex rel. Healthport Technologies, LLC v. Stucky*, 239 W. Va. 239, 242-43, 800 S.E.2d 506, 509-10 (2017) ("Standing refers to one's ability to bring a lawsuit based upon a personal stake in the outcome of the controversy.") (footnote omitted).

in employment status between the two classes, elected officials and other state employees. As the circuit court noted, the salaries of elected officials are set by statute, whereas the salaries of most state employees are set by contract and subject to change depending on various factors, including but not limited to periodic across-the-board raises or performance-based raises. The terms of elected officials are likewise set by statute, usually ending on the 31st day of December, two, four, six, or twelve years after the official is sworn into office. In contrast, state employees hold their jobs on an at-will basis and may retire, transfer, quit, or be terminated at any time. Elected officials do not accrue either annual or sick leave, whereas most state employees, including petitioners, accrue both; and further, most state employees may take leaves of absence, may donate annual leave or, under certain circumstances, may receive donated leave. In short, the salary of an elected official may be paid on a current basis without the need for any accounting, whereas there is a practical need for some time lag to account for the multiple factors affecting state employees' pay and leave status. As the circuit court found, payment in arrears is a practical way to "hav[e] the benefit of a look back at the pay period [which] allows for adjustments and the prevention of errors in accounting or, for that matter, in counting."

In light of the above, we conclude that there is a rational basis for the differing treatment of elected officials and other state employees with respect to the timing of their paychecks. The critical fact here – an undisputed material fact – is that both elected officials and state employees received every penny of salary they earned in 2017. To quote

the circuit court once more, "Everyone is being paid. It is just a question of timing – a few days difference." Because there is a rational basis for paying elected officials on a current basis while paying all other state employees in arrears, and because any inequality of treatment is so minor as to constitute, at best, an annoyance, we find that the petitioners have failed to sustain their equal protection claim.

IV. Conclusion

For the foregoing reasons, the judgment of the Circuit Court of Kanawha County is affirmed.

Affirmed.