

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

Jayson Nicewarner, (Lieutenant), Individually,  
Robert Wolfe, (Firefighter First Class), Individually,  
Gary Freshour, (Captain), Individually,  
Rick Sovastion, (Firefighter First Class), Individually,  
Timothy P. Trentini, (Firefighter First Class), Individually,  
Andrew Laskody, (Captain), Individually,  
Derek Porter, (Firefighter First Class), Individually,  
Ken Tennant, (Captain), Individually,  
Mark Cravastos, (Chief), Individually,  
Tanner Dalton, (Firefighter), Individually,  
Jason Hatfield, (Firefighter), Individually,  
Matt Peery, (Firefighter), Individually,  
John Borzik, (Firefighter), Individually,  
Klint Connery, (Firefighter), Individually,  
Joshua Morgan, (Firefighter First Class), Individually,  
Bailey McClain, (Firefighter), Individually,  
Bryan Davis, (Firefighter), Individually,  
Joseph A. Guido, (Firefighter First Class), Individually,  
John D. Lemley, (Lieutenant), Individually,  
Jimmy W. Lipscomb, (Firefighter First Class), Individually,  
Jason Gano, (Firefighter First Class), Individually,  
David Ross, (Firefighter First Class), Individually,  
Charles D. Campbell, (Lieutenant), Individually,  
Nicholas L. Morris, (Firefighter First Class), Individually,  
Sean R. Whiten, (Firefighter), Individually,  
Devon J. Zaroda, (Firefighter First Class), Individually,  
Mitchell Beall, (Firefighter First Class), Individually,  
Brian Izzo, (Lieutenant), Individually,  
Patrick Pickenpaugh, (Lieutenant), Individually,  
William Murphy, (Lieutenant), Individually,  
Joseph R. Bragg, (Firefighter First Class), Individually,  
Larry Hagedorn, (Firefighter), Individually,  
Keith Watson, (Firefighter First Class), Individually,  
Douglas A. Daniels Jr., (Firefighter), Individually,  
Matthew Chisler, (Firefighter), Individually,  
Christopher DeBerry, (Firefighter First Class), Individually,  
Chad Laskody, (Firefighter First Class), Individually,  
William Lyons, (Firefighter), Individually,  
Eric Nickelson, (Firefighter First Class), Individually,  
Mark Blaker, (Firefighter First Class), Individually,  
Mark Thalman, (Lieutenant), Individually,  
David Dzurnak, (Captain), Individually,  
Andrew Dotson, (Firefighter First Class), Individually,  
Brian Jones, (Lieutenant), Individually,

JUDGE: \_\_\_\_\_

CIVIL ACTION NO.: 19-C-167

ORIGINAL DOCUMENT FILED  
WITH CIRCUIT CLERK  
6-7-19

**Thadius Dalton, (Firefighter First Class), Individually,  
Shaine Morris, (Firefighter), Individually,  
John Moore, (Firefighter First Class), Individually,  
Roman Olszewski, (Firefighter), Individually,  
Jason Quinn, (Lieutenant), Individually,  
Aaron Brandstelter, (Firefighter First Class), Individually,  
Eugene Deem, (Captain), Individually,  
Frank Mellie, (Lieutenant), Individually,  
Ashley Jenkins, (Firefighter First Class), Individually,  
Brent Mergenthaler, (Firefighter), Individually,  
William Rinehart, (Captain), Individually,  
Douglas Sharpe, (Lieutenant), Individually,  
Jeff Kennison, (Firefighter First Class), Individually,  
Nicholas Wright, (Firefighter First Class), Individually,**

**Plaintiffs,**

**v.**

**The City of Morgantown,  
a municipal corporation**

**Defendant.**

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**COMPLAINT FOR DECLARATORY RELIEF AND COMPENSATORY  
DAMAGES GENERAL RECITALS TO ALL COUNTS**

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Prefatory Comment

All of the plaintiffs herein, as members of the City of Morgantown Fire Department, are similarly situated employees of the defendant and each is asserting rights arising out of the same transaction, occurrence, or series of transactions or occurrences and the questions of law or fact are common to all plaintiffs in this action. Pursuant to applicable West Virginia statute and West Virginia case law they are permitted and are filing their case jointly in one action. “Specifically, and the Supreme Court of Appeals of West Virginia so holds, Rule 20(a) provides that all persons may join in one action as plaintiffs if they assert any right to relief (1) arising out of the same transaction or occurrence, and (2) if any question of law or fact common to all these persons will arise in the action. Under Rule 20(a), joinder is proper only if both of these requirements are satisfied.” *State ex rel. J.C. v. Mazzone*, 233 W. Va. 457, 459, 759 S.E.2d 200, 202 (2014). See Exhibit 1.

1. Plaintiff, Jayson Nicewarner is a Lieutenant in the Morgantown Fire Department and is the President of the local IAFF Local 313, and is employed as a professional firefighter

with the defendant/respondent, the City of Morgantown. Jayson Nicewarner is a West Virginia resident.

2. In addition, the other named-plaintiffs are also are current Morgantown Firefighters and they are as follows:

- 1) Robert Wolfe, (Firefighter First Class), Individually,
- 2) Gary Freshour, (Captain), Individually,
- 3) Rick Sovastion, (Firefighter First Class), Individually,
- 4) Timothy P. Trentini, (Firefighter First Class), Individually,
- 5) Andrew Laskody, (Captain), Individually,
- 6) Derek Porter, (Firefighter First Class), Individually,
- 7) Ken Tennant, (Captain), Individually,
- 8) Mark Cravazos, (Chief), Individually,
- 9) Tanner Dalton, (Firefighter), Individually,
- 10) Jason Hatfield. (Firefighter), Individually,
- 11) Matt Peery, (Firefighter), Individually,
- 12) John Borzik, (Firefighter), Individually,
- 13) Klint Connery, (Firefighter), Individually,
- 14) Joshua Morgan, (Firefighter First Class), Individually,
- 15) Bailey McClain, (Firefighter), Individually,
- 16) Bryan Davis, (Firefighter), Individually,
- 17) Joseph A. Guido, (Firefighter First Class), Individually,
- 18) John D. Lemley, (Lieutenant), Individually,
- 19) Jimmy W. Lipscomb, (Firefighter First Class), Individually,
- 20) Jason Ganoë, (Firefighter First Class), Individually,
- 21) David Ross, (Firefighter First Class), Individually,
- 22) Charles D. Campbell. (Lieutenant), Individually,
- 23) Nicholas L. Morris, (Firefighter First Class), Individually,
- 24) Sean R. Whiten, (Firefighter), Individually,
- 25) Devon J. Zaroda, (Firefighter First Class), Individually,
- 26) Mitchell Beall, (Firefighter First Class), Individually,
- 27) Brian Izzo, (Lieutenant), Individually,
- 28) Patrick Pickenpough, (Lieutenant), Individually,
- 29) William Murphy, (Lieutenant), Individually,
- 30) Joseph R. Bragg, (Firefighter First Class), Individually,
- 31) Larry Hagedorn, (Firefighter), Individually,
- 32) Keith Watson, (Firefighter First Class), Individually,
- 33) Douglas A. Daniels Jr., (Firefighter), Individually,
- 34) Matthew Chisler, (Firefighter), Individually,
- 35) Christopher DeBerry, (Firefighter First Class), Individually,
- 36) Chad Laskody, (Firefighter First Class), Individually,
- 37) William Lyons, (Firefighter), Individually,
- 38) Eric Nickelson, (Firefighter First Class), Individually,
- 39) Mark Blaker, (Firefighter First Class), Individually,
- 40) Mark Thalman, (Lieutenant), Individually,

- 41) David Dzurnak, (Captain), Individually,
- 42) Andrew Dotson, (Firefighter First Class), Individually,
- 43) Brian Jones, (Lieutenant), Individually,
- 44) Thadius Dalton, (Firefighter First Class), Individually,
- 45) Shaine Morris, (Firefighter), Individually,
- 46) John Moore, (Firefighter First Class), Individually,
- 47) Roman Olszewski, (Firefighter), Individually,
- 48) Jason Quinn, (Lieutenant), Individually,
- 49) Aaron Brandstelter, (Firefighter First Class), Individually,
- 50) Eugene Deem, (Captain), Individually,
- 51) Frank Mellie, (Lieutenant), Individually,
- 52) Ashley Jenkins, (Firefighter First Class), Individually,
- 53) Brent Mergenthaler, (Firefighter), Individually,
- 54) William Rinehart, (Captain), Individually,
- 55) Douglas Sharpe, (Lieutenant), Individually,
- 56) Jeff Kennison, (Firefighter First Class), Individually,
- 57) Nicholas Wright, (Firefighter First Class), Individually,

3. The City of Morgantown is a municipal corporation created pursuant to the laws of the State of West Virginia with its city building (“situs”) located in Monongalia County, West Virginia, thus venue is proper in Monongalia County per W.Va. Code §29-12A-13, and there is no applicable statutory immunity from this lawsuit for the City of Morgantown.

4. West Virginia Code §8-15-10a states as follows:

**Fireman who are required to work during holiday;  
how compensated.**

From the effective date of this section, if any member of a paid fire department is required to work during a legal holiday as is specified in subsection (a), section one [§2-2-1], article two, chapter two of this code, or if a legal holiday falls on the member’s regular scheduled day off, he or she shall be allowed equal time off at such time as may be approved by the chief executive officer of the department under whom he or she serves or, in the alternative, shall be paid at a rate not less than one and one-half times his or her regular rate of pay: Provided, That if a special election of a political subdivision other than a municipality falls on a Saturday or Sunday, the municipality may choose not to recognize the day of the election as a holiday if a majority of the municipality’s city council votes not to recognize the day of the election as a holiday.

5. The aforesaid W.Va. Code §2-2-1 sets forth the following “holidays” which are subject to the “one and one-half times” regular pay requirement of West Virginia Code §8-15-10a:

**§2-2-1. Legal holidays; official acts or court proceedings.**

(a) The following days are legal holidays:

- 1) The first day of January is "New Year's Day";
- 2) The third Monday of January is "Martin Luther King's Birthday";
- 3) The third Monday of February is "Presidents' Day";
- 4) The last Monday of May is "Memorial Day";
- 5) The twentieth of June is "West Virginia Day";
- 6) The fourth day of July is "Independence Day";
- 7) The first Monday of September is "Labor Day";
- 8) The second Monday of October is "Columbus Day";
- 9) The eleventh day of November is "Veterans Day";
- 10) The fourth Thursday of November is "Thanksgiving Day";
- 11) The day after Thanksgiving Day is "Lincoln's Day";
- 12) The twenty-fifth day of December is "Christmas Day";
- 13) Any day on which a general, primary, or special election is held is a holiday throughout the state, a political subdivision of the state, a district or an incorporated city, town or village in which the election is conducted;
- 14) General election day on even years shall be designated Susan B. Anthony Day in accordance with the provisions of subsection (b), section one-a of this article; and
- 15) Any day proclaimed or ordered by the Governor or the President of the United States as a day of special observance or Thanksgiving, or a day for the general cessation of business, is a holiday.

(b) If a holiday otherwise described in subsection (a) of this section falls on a Sunday, then the following Monday is the legal holiday. If a holiday otherwise described in subsection (a) of this section falls on a Saturday, then the preceding Friday is a legal holiday: Provided, That this subsection (b) shall not apply to subdivisions (13), (14) and (15), subsection (a) of this section.

(c) Any day or part thereof designated by the Governor as time off, without charge against accrued annual leave, for state employees statewide may also be time off for county employees if the county commission elects to designate the day or part thereof as time off, without charge against accrued annual leave for county employees. Any entire or part statewide day off designated by the Governor may, for all courts, be treated as if it were a legal holiday.

(d) In computing any period of time prescribed by any applicable provision of this code or any legislative rule or other administrative rule or regulation promulgated pursuant to the provisions of this code, the day of the act, event, default or omission from which the applicable period begins to run is not included. The last day of the period so computed is included, unless it is a Saturday, a Sunday, a legal holiday or a designated day off in which event the

prescribed period of time runs until the end of the next day that is not a Saturday, Sunday, legal holiday or designated day off.

- (e) If any applicable provision of this code or any legislative rule or other administrative rule or regulation promulgated pursuant to the provisions of this code designates a particular date on, before or after which an act, event, default or omission is required or allowed to occur, and if the particular date designated falls on a Saturday, Sunday, legal holiday or designated day off, then the date on which the act, event, default, or omission is required or allowed to occur is the next day that is not a Saturday, Sunday, legal holiday or designated day off.
  - (f) With regard to the courts of this state, the computation of periods of time, the specific dates or days when an act, event, default, or omission is required or allowed to occur and relationship of those time periods and dates to Saturdays, Sundays, legal holidays, or days designated as weather or other emergency days pursuant to section two of this article are governed by rules promulgated by the Supreme Court of Appeals.
  - (g) The provisions of this section do not increase or diminish the legal school holidays provided in section two, article five, chapter eighteen-a of this code.
6. The members of the City of Morgantown Fire Department, each of whom is a member of the International Association of Firefighters Local #313, did not waive nor could they lawfully waive any statutory holiday pay requirements for firefighters who actually worked the subject holiday.
  7. In a case decided under W.Va. Code §8-15-10a, where there was no written contract between that city and the firefighters, the court specifically noted that "...holiday pay statutes are designed to provide enhanced benefits to those employees who are required to work on a holiday when most employees are off." *Pullano v. City of Bluefield*, 176 W. Va. 198, 204-05, 342 S.E.2d 164, 171 (1986). See Exhibit 2.
  8. Although the plaintiff/firefighters - whether they worked a holiday or not - may have been paid additional pay for each holiday, such pay was "in addition to their regular pay" for such holiday pay statutorily required by W.Va Code §8-15-10a. Such "regular pay" for holidays for firefighters under state law is to be "at a rate not less than one and one-half times his or her regular rate of pay", but plaintiffs were not so paid by the City of Morgantown in direct violation of the statute.
  9. Additionally, because plaintiff firefighters work a Fifty Six (56) hour work week, there is an established "regular rate of pay". As such under W.Va. Code §8-15-10a, Morgantown firefighters should be compensated at a rate of one and one-half times their normal pay for a holiday whether on duty or not and such compensation should factor in that firefighters work a 24 hour shift.

10. The plaintiff/firefighters named herein are owed wages for numerous holidays as set forth in W.Va. Code §2-2-1, some over a period of many years, but were not paid by the City of Morgantown at a rate of not less than one and one-half times the regular rate of pay in direct violation of W.Va. Code §8-15-10a.
11. Some or all of those holidays worked constituted overtime situations for the firefighters on duty, and as such, “when firefighters work overtime on a legal holiday, they [are] entitled to two times their regular rate of pay for the overtime hours worked.” *Pullano* at 211.
12. Prior to filing this suit, the plaintiffs, through undersigned counsel attempted to resolve the matter through pre-suit mediation with a qualified mediator.
13. That mediation was unsuccessful as the City did not grasp the severity and seriousness of the improper wage payment.
14. Upon information and belief, necessary decision makers regarding these issues are not fully informed about the issues preventing proper assessment of seriousness of these claims.

**COUNT ONE: NEGLIGENT FAILURE TO PROPERLY  
PAY STATUTORY HOLIDAY PREMIUM**

15. Plaintiffs incorporate by reference in this count all other material allegations set forth elsewhere in this complaint.
16. The City of Morgantown and its employees in charge of payroll negligently failed to pay plaintiffs the proper amount of holiday pay due them pursuant to W.Va. Code §8-15-10a and a demand is hereby made for all sums due each plaintiff, plus statutory interest.

WHEREFORE, Plaintiffs pray for the relief requested herein below.

**COUNT TWO: CLAIMS MADE PURSUANT TO  
W.VA. CODE §21-5-1 et. seq. [the WEST VIRGINIA WAGE PAYMENT AND  
COLLECTION ACT] and DEMAND FOR INTEREST AND ATTORNEYS' FEES**

17. Plaintiffs incorporate by reference in this count all other material allegations set forth elsewhere in this complaint.
18. The City of Morgantown is an employer subject to W.Va. Code §21-5-1 et seq., also known as the West Virginia Wage Payment Collection Act (WPCA) and plaintiffs are employees within the meaning of the WPCA. The West Virginia Supreme Court of Appeals has held that “...the Legislature intended its statutory wage payment and

collection guidelines to apply to both governmental and nongovernmental employers alike” *Ingram v. City of Princeton*, 208 W.Va. 352, 356, 540 S.E.2d 569, 573 (2000). See Exhibit 3.

19. W.Va. Code §21-5-3 requires that employers settle with its employees at least twice every month and pay them their wages due, less authorized deductions and authorized wage assignments, for their work or services.
20. By failing to properly and promptly pay the aforesaid holiday pay to plaintiffs, the City of Morgantown has violated W.Va. Code §21-5-3, by not paying plaintiffs “wages due” them.
21. By virtue of violating W.Va. Code §21-5-3, the City of Morgantown is liable to pay for the costs of this action including interest and reasonable attorney fees of the plaintiffs pursuant to W.Va. Code §21-5-12 (b).

WHEREFORE, Plaintiffs pray for the relief requested herein below, including reasonable attorney fees and costs in this matter.

**COUNT THREE: DECLARATORY JUDGMENT ACTION PURSUANT TO  
W.VA. CODE §55-13-1 et seq. and MOTION FOR APPOINTMENT OF SPECIAL  
COMMISSIONER TO CALCULATE INDIVIDUAL DAMAGES**

22. Plaintiffs incorporate by reference in this count all other material allegations set forth elsewhere in this complaint.
23. West Virginia Code §55-13-2 states as follows:

“Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.”
24. Plaintiffs are “persons” as described above and pray that this court declare that as a firefighter working on state-designated holidays they are and have in the past been entitled to be paid at a rate as stated in West Virginia Code §8-15-2a, that is a payment at a rate not less than one and one-half times his regular rate of pay.
25. Plaintiffs further pray for this court to appoint a special commissioner to calculate the holiday pay wages due each of the firefighters from their date of hire with the City of Morgantown and to assess the costs for the same against the City of Morgantown. In addition, it is requested that the Special Commissioner be ordered to calculate the



additional benefits (such as retirement contributions; etc.) due each firefighter as a result of the additional wage demand be awarded.  
WHEREFORE, Plaintiffs pray for relief as set forth herein below.

**PRAYER FOR DAMAGES**

Plaintiffs pray for compensatory damages, statutory interest, and attorney fees and costs, as well as declaratory relief.

**PLAINTIFFS DEMAND A BENCH TRIAL ON ALL COUNTS.**

JAYSON NICEWARNER, et al.  
BY COUNSEL

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