IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SEIU HEALTHCARE 775NW,	)	
	)	
Petitioner,	)	No. 82551-3
	)	
v.	)	En Banc
	)	
GOVERNOR CHRISTINE GREGOIRE	)	Filed April 8, 2010
	)	
Respondent.	)	
	)	
________________________________	)	

J.M. JOHNSON, J.—SEIU Healthcare 775NW (SEIU) filed a petition for a writ of mandamus to compel Governor Christine Gregoire to revise the budget she submitted to the legislature pursuant to RCW 74.39A.300 so as to include funds to implement pay increases for 25,000 in-home personal care providers awarded by an arbitrator. Such budget revision would necessarily require the governor to reduce or remove other budgetary items to balance the

petitioner's demands. These redistributive budgetary decisions require that the governor exercise discretion and judgment as an independent constitutional officer. Since the budget revision sought by SEIU is discretionary rather than a ministerial duty, issuance of a writ of mandamus is inappropriate and we accordingly dismiss the petition.

Moreover, even if mandamus were an appropriate remedy in this case, we could not fully grant the relief sought by the petitioner—a change in the 2009-2011 biennial budget already adopted by the legislature and signed by the governor. We therefore alternatively dismiss the petition on mootness grounds.

Facts

An agreed statement of facts (hereinafter ASF775) and appendices thereto (JSF775) were submitted to this court by the parties on January 27, 2009.[1] In summary, the facts and events that led to the controversy are as follows:

SEIU acts as the exclusive bargaining representative for approximately

[1] These documents are on file and available for public viewing at the Washington State Supreme Court. For the sake of thoroughness, this opinion provides parallel citations to both the agreed statement of facts and its appendices in the form "ASF775 (JSF775)" whenever exhibits from the appendices are cited.

25,000 individual providers who independently contract with the state government to provide in-home personal care services to Medicaid-eligible clients. ASF775 ¶ 1. These providers are considered state employees solely for the purpose of collective bargaining under chapter 41.56 RCW. *Id.*; *see also* RCW 74.39A.270(1).[2] SEIU and the Washington State Labor Relations Office (LRO), a division of the Washington State Office of Financial Management (OFM), began bargaining for SEIU's 2009-2011 labor contract in April 2008. ASF775 ¶ 4. Although the parties were able to agree on many contractual issues, ASF775 ¶ 4, Ex. 3 (JSF775, at 0008-25), they certified others for interest arbitration after reaching an impasse on those issues, *id.* Ex. 1 (JSF775, at 0002-03). Among the disputed issues were the compensation and fringe benefits provisions of the collective bargaining agreement. *Id.* Ex. 1 (JSF775, at 0002).

An interest arbitration hearing occurred over several days in August and September 2008. *Id.* Ex. 2, at 2 (JSF775, at 0006). During the hearing, the deputy director of OFM, Wolfgang Opitz, testified to the worsening

[2] RCW 74.39.A.270(1) reads, in relevant part: "Solely for the purposes of collective bargaining . . . , the governor is the public employer, as defined in chapter 41.56 RCW, of individual providers, who, solely for the purposes of collective bargaining, are public employees as defined in chapter 41.56 RCW."

revenue outlook for the state, which he described as "disconcerting" at best, even without the relevant collective bargaining agreement and arbitration award expenditure increases. *Id.* Ex. 4, at 607 (JSF775, at 0037).[3] The arbitrator issued his opinion and award on October 1, 2008. *Id.* ¶ 8, Ex. 10 (JSF775, at 0287-386). Despite acknowledging concerns regarding the government's ability to fund the burden of any further cost increases, *id.* Ex. 10, at 18 (JSF775, at 0304), the arbitrator awarded wage increases and benefit expansions, *id.* Ex. 10, at 32-37 (JSF775, at 0318-23), 39 (JSF775, at 0325), 50-53 (JSF775, at 0336-39), 83-84 (JSF775, at 0369-70). The membership of SEIU voted on November 14, 2008 to approve the labor agreement reflecting the arbitrator's award. *Id.* ¶ 11.

However, on December 17, 2008—the day before the governor submitted her proposed budget to the legislature, *id.* ¶ 15—the director of

[3] "[W]hat we're seeing is not only disconcerting from a forecaster's point of view, but because we're [seeing] below 0 percent year-over-year growth, we're concerned about the drop in collections relative to a fresh forecast that, itself, had already gone down by $167 million." ASF775 Ex. 4, at 607-08 (JSF775, at 0037-38). To be exact, "our revenue is not performing nearly as well as our economy." *Id.* at 610 (JSF775, at 0040). Opitz summarized the outlook: "[L]ooking forward in time, we're seeing much worse news," *id.* at 613 (JSF775, at 0043), with "a bottom line in which . . . we're $2.7 billion short . . . . If we were to spend the entire rainy day fund, we would knock that down to $1.956 billion short," *id.* at 615 (JSF775, at 0045). This budget scenario "doesn't capture any collectively bargained wage increases [or] arbitration awards." *Id.* at 615 (JSF775, at 0045). *See generally id.* Ex. 4 (JSF775, at 0027-108) (complete testimony).

OFM submitted a memorandum explaining that the SEIU agreement was not financially feasible for the state and informing the governor that she therefore was prohibited from including it in her budget proposal. *Id.* Ex. 14 (JSF775, at 0531-32).[4] Accordingly, the governor's budget proposal did not include a request for funding to implement compensation and benefit increases for the members of SEIU, neither those awarded by the arbitrator nor those that had been agreed during negotiations. *Id.* ¶ 16. The director of LRO informed SEIU of the results of the feasibility assessment on the same day that the governor submitted her biennial budget to the legislature. *Id.* ¶ 14.

On December 29, 2008, SEIU filed an original action in this court requesting a writ of mandamus compelling the governor to withdraw the budget submitted to the legislature and revise it to include funding for all compensation and benefit increases under the SEIU arbitration award and agreement. Br. of Pet'r at 2. In its briefing, the petitioner argued that RCW

[4] The director's review of the financial feasibility of the collective bargaining agreement and the arbitration award was based on ever-deteriorating revenue forecasts. *See, e.g.*, ASF775 Ex. 12, at 4 (downward revision of 2009-2011 revenue forecasts by over $1.4 billion in November 2008) (JSF775, at 0406), Ex. 13, at 2 (reporting an additional $400 million downward revision in December 2008) (JSF775, at 0514). These forecasts were even gloomier than those that led the deputy director of OFM to report during the arbitration hearing that the state faced a staggering budget shortfall of $2.7 billion for the 2009-2011 biennium. *Id.* Ex. 4, at 615 (JSF775, at 0045).

74.39A.300(1) creates a mandatory and nondiscretionary duty on the part of the governor to request such funding in her biennial budget proposal to the legislature. *Id.* at 1-2.[5]

In response, the State (on behalf of the governor) argued that, since the creation of the budget required the exercise of discretion on the part of the governor, the duty was neither mandatory nor ministerial, and therefore the constitutional remedy of mandamus was inappropriate. Br. of Resp't at 22-23. The State also reasoned that the duty was not compulsory because the director of OFM had not certified the collective bargaining agreement as financially feasible and the arbitration decision was not binding. *Id.* at 22.

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[5] The relevant text of RCW 74.39A.300 reads:

> (1) Upon meeting the requirements of subsection (2) of this section, the governor must submit, as a part of the proposed biennial or supplemental operating budget . . . , a request for funds necessary . . . to implement the compensation and fringe benefits provisions of a collective bargaining agreement entered into under RCW 74.39A.270 . . . .
>
> (2) A request for funds necessary to implement the compensation and fringe benefits provisions of a collective bargaining agreement entered into under RCW 74.39A.270 shall not be submitted by the governor to the legislature unless such request:
>
> (a) Has been submitted to the director of financial management by October 1st prior to the legislative session at which the request is to be considered; and
>
> (b) Has been certified by the director of financial management as being feasible financially for the state or reflects the binding decision of an arbitration panel reached under RCW 74.39A.270(2)(c).

The parties submitted an agreed statement of facts to this court, *see supra* p. 2, and it is on the basis of its content and the briefing of the parties that we enter judgment denying the writ and dismissing the petition.

Analysis

I. The Writ of Mandamus

This court has express constitutional authority to issue mandamus directed to state officers as provided by article IV, section 4 of the state constitution. However, such a court order must be justified as an extraordinary remedy. *Walker v. Munro*, 124 Wn.2d 402, 424, 879 P.2d 920 (1994). Accordingly, we have placed strict limits on the circumstances under which we will issue the writ to public officers and held that "mandamus may not be used to compel the performance of acts or duties which involve discretion on the part of a public official." *Id.* at 410.

An early case in this court held that acts of public officers must be "ministerial" to be subject to mandamus, clarifying the term:

> "[W]here the law prescribes and defines the duty to be performed with such precision and certainty *as to leave nothing* to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial."

State v. City of Seattle, 137 Wash. 455, 461, 242 P. 966 (1926) (emphasis added) (quoting 18 Ruling Case Law (Mandamus) at 116). It follows that even a mandatory duty is not subject to mandamus unless it is also ministerial, or nondiscretionary, in nature.[6] *See* R.E. Heinselman, Annotation, *Mandamus to Governor*, 105 A.L.R. 1124, 1128 (1936) ("it does not necessarily follow that, because a duty imposed is mandatory, it is also ministerial"); *accord Brown v. Owen*, 165 Wn.2d 706, 725, 206 P.3d 310 (2009) ("Where we find a mandatory duty, we must *further* determine whether that duty is ministerial or discretionary in nature." (emphasis added)).

The inclusion of substantive spending items in the governor's budget is clearly not a ministerial act. The governor is required by the constitution and by state law to submit a balanced budget to the legislature. *See* RCW 43.88.030(2) (requiring revenues plus existing surplus to equal or exceed proposed expenditures). The legislation underlying the contract at issue contains no funding source to implement the compensation or benefits

[6] The petitioner incorrectly equates a mandatory duty with a ministerial one and urges us to issue the writ because the language of RCW 74.39A.300(1) states that the governor "must" include the funding request in her budget proposal. *See supra* note 5; Br. of Pet'r at 12, 16-17 (arguing that mandamus is appropriate because the governor had no choice but to request the necessary funding after the dual statutory prerequisites of RCW 74.39A.300(2) were satisfied).

provisions of any collective bargaining agreement negotiated by the parties or imposed in the course of arbitration. *See* Laws of 2002, ch. 3, § 9 (Initiative Measure No. 775, approved Nov. 6, 2001). Thus, the allocation of funds for obligations in the governor's budget necessarily requires a decision by the governor to remove funding from other priorities in the budget.[7]

Deciding the allocation of limited state funds in order to achieve the statutorily required balanced budget necessarily involves the exercise of the governor's discretion. We have held that a discretionary act "involves the exercise of discretion or judgment . . . ." *State ex rel. Linden v. Bunge*, 192 Wash. 245, 249, 73 P.2d 516 (1937); *accord Brown*, 165 Wn.2d at 725 n.10; *see also Burg v. City of Seattle*, 32 Wn. App. 286, 291, 647 P.2d 517 (1982) (a discretionary act is one that "'is essential to realization of the policy . . . of the officer'" (quoting *Moloney v. Tribune Pub'g Co.*, 26 Wn. App. 357, 360, 613 P.2d 1179 (1980))). It is difficult to imagine an act more essentially a policy decision for the governor than the submission to the legislature of a

[7] The governor could avoid this zero-sum-game dilemma by proposing new taxes. Such taxes could be calibrated and permanently dedicated to finance the contract at issue in this case and others like it, thereby eliminating the risk that such contracts would crowd out other budgetary priorities. But this solution would require the governor to exercise her judgment regarding competing fiscal and policy objectives, a requirement similarly at odds with the principles of mandamus.

budget during an economic downturn. The creation and submission of a budget proposal is clearly one of those discretionary acts that are "in their nature political, or which are, by the constitution and laws, submitted to the executive," and inappropriate for mandamus. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L. Ed. 60 (1803).[8]

Even if mandamus were a suitable remedy, we would necessarily exercise judicial discretion and refuse to issue the writ here. A mandamus action lies in equity, and the court may refuse to grant relief where private rights would be unwisely advanced at the expense of public interests. *See* R.T.K., Annotation, *Court's Control Over Mandamus as Means of Avoiding the Enforcement of Strict Legal Right to the Detriment of the Public*, 113 A.L.R. 209 (1938) (surveying cases from 28 states recognizing this principle). The recent severe economic difficulties faced by our state present circumstances dictating such judicial restraint.[9]

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[8] Because we hold that the duty identified by the petitioner is not ministerial, we need not reach a decision as to whether it is mandatory. To clarify, even if the duty *is* mandatory as the petitioner contends, its nonministerial nature precludes the application of mandamus, and any inquiry into the degree to which RCW 74.39A.300 obligates the governor to include funding for compensation and fringe benefits in her proposed biennial budget document would be purely academic. *See Brown*, *supra* p. 8 and accompanying text.

[9] *Cf. City of Seattle*, 137 Wash. at 460-61 (denying mandamus and noting that the city had no funds available for the expenditure sought to be compelled).

The writ requested would require the governor to include in her biennial budget pay raises that most state workers neither receive nor support, and that the legislature chose not to fund in the adopted budget. *See* ASF775 Ex. 17 (JSF775, at 0569-717). Such pay increases will almost certainly go unfunded again. Indeed, our ever-worsening economy may ultimately require some pay reductions rather than pay raises. The time and money likely expended to respond to a writ issued by the court would be wasteful of public resources at a time when our state government is struggling to maintain the basic public services upon which all state residents rely, and when the costs of our increasingly needed social safety net programs are rising dramatically.[1] Equity thus strongly counsels against issuing the writ even were mandamus an appropriate remedy.

II. Justiciability Requirement

There is an additional ground requiring that we refrain from issuing the

[1] *See generally* Wash. State Caseload Forecast Council, Caseload Forecasts (2007), *available at* www.cfc.wa.gov (last visited Apr. 1. 2010) (forecasting substantial increases in health and human services, public education, and corrections caseloads); *see also* Curt Woodward, *Another $250 Million Caseload Hit to Wash. Budget*, Seattle Times, July 1, 2009, *available at* http://seattletimes.nwsource.com/html/localnews/2009408239_apwacaseloadforecast1stldwritethru.html) (last visited Apr. 1, 2010) (citing July 2009 state caseload forecasts and noting that "the recession-hammered economy" has driven more people to seek public assistance).

writ sought by the petitioner in this case. We have previously declined to entertain a mandamus action against the governor that did not meet our justiciability requirements. *See, e.g.*, *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 94, 273 P.2d 464 (1954) (dismissing mandamus action against governor for lack of a genuine controversy). Similarly, because the relief sought by the petitioner here—a change in a budget proposal long since submitted for a budget already adopted by the legislature—is no longer available, this case runs afoul of our mootness doctrine. Leaving aside important constitutional problems with respect to the separation of powers raised by the application of mandamus to this case, we also decline to issue the writ requested by SEIU for this alternative reason.

A case is moot if a court can no longer provide effective relief. *In re Recall Charges Against Seattle Sch. Dist. No. 1 Dirs.*, 162 Wn.2d 501, 505, 173 P.3d 265 (2007) (action challenging recall petition moot because school board members to be recalled would no longer be in office when petition put to vote); *see also City of Sequim v. Malkasian*, 157 Wn.2d 251, 259, 138 P.3d 943 (2006) ("'The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have

forestalled any occasion for meaningful relief.'" (quoting 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice And Procedure § 3533.3, at 261 (2d ed. 1984))).

The petitioner in this case specifically requested that we enter a writ ordering the governor "to submit within five days of this Order a revised balanced budget to the Legislature that includes funding . . . for the 2009-11 collective bargaining agreement . . . ." Br. of Pet'r at 24. But "[t]his court has uniformly held that it will not compel by mandamus the doing of an act that would serve no useful purpose, nor should a writ issue when . . . compliance with the mandate could have no operative effect." *City of Tacoma v. Rogers*, 32 Wn.2d 729, 733, 203 P.2d 325 (1949). That is, our "[c]ourts should . . . refrain from requiring the performance of useless or vain acts." *Vashon Island Comm. for Self-Government v. Wash. State Boundary Review Bd.*, 127 Wn.2d 759, 765, 903 P.2d 953 (1995) (citing *Neilson v. Vashon Island Sch. Dist. 402*, 87 Wn.2d 955, 960, 558 P.2d 167 (1976)).

The relief sought by the petitioner is no longer available because the legislature has adopted and the governor has signed the 2009-11 biennial budget and the 2009 legislature has adjourned.[11] This lapse of time has

foreclosed the opportunity for meaningful relief and rendered the writ sought by SEIU ineffective. 55 C.J.S. *Mandamus* § 15, at 32-33 (2009). The petitioner did not request alternative relief such as an order calling the legislature into a special session to decide the issue of funding for its contract—which would itself be unconstitutional, given that only the governor and the legislature have that power, Wash. Const. art. II, § 12; art. III, § 7. Nor did the petitioner request the issuance of a writ applicable to the next biennial budget or supplemental budget should our decision come after the legislature adjourned.[12] Accordingly, it would be unavailing for this court to grant the writ as requested.

Only if we were to sua sponte modify the relief sought by SEIU from a mandamus order affecting the 2009-2011 budget to a prospective order could we achieve the result that the petitioner desires. However, as noted above, SEIU did not seek this prospective relief. "We have held that the writ cannot be any more specific than the petition." *Walker*, 124 Wn.2d at 423 (citing

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[11] Candidly, the petitioner conceded that effective relief could not be granted after the legislature adjourned. Br. of Pet'r at 22 (" [a]bsent an immediate writ, Petitioner will be denied its rights under the statute . . . .").

[12] Even if SEIU had asked for such a writ, it would be improper to grant it. We will not issue a writ in anticipation of a supposed omission of a duty. *See Walker*, 124 Wn.2d at 409.

State ex rel. Pacific Am. Fisheries v. Darwin, 81 Wash. 1, 12, 142 P. 441 (1914)). Hence, "[w]ithout a request in the petition for a specific writ . . . we will not, on our own, craft such a remedy," *id.*, and in keeping with this precedent we will not here order the governor to include the relevant funding request in time for future legislative sessions.

The most recent state budget forecasts show continued revenue declines.[13] Ordering that the governor include a request for more funding in her proposed supplemental budget, in addition to exceeding the scope of the relief requested by the petitioner, would also likely be a meaningless exercise. Thus, even if we were to craft a remedy in contravention of the well-established principle that a writ of mandamus cannot be more specific than the petition, it is not likely that a court-enforced budgetary request would actually be funded by the legislature. Since we do not issue writs of

[13] The budget situation has worsened since oral arguments were heard in this case and since the legislature adjourned. *See* Econ. & Revenue Forecast Council, Washington State Economic and Revenue Forecast 56 (Sept. 2009), *available at* www.erfc.wa.gov/publications/documents/sep09pub.pdf (last visited Apr. 1, 2010) (projecting a $185 million shortfall at the end of the 2009-11 biennium); Woodward, *supra* note 10 (noting that the latest caseload forecast estimates increased demand for state services will cost $250 million). On these grim facts, it seems highly unlikely that the legislature will be able to allocate sufficient funding to finance outdated and financially unfeasible compensation and fringe benefit increases for SEIU's members, regardless of whether a request for such funding appears in the governor's proposed budget.

mandamus to compel useless or vain acts or acts that have no operative effect, *see supra* pp. 12-13, rewriting the writ so as to grant prospective relief—relief that is both premature and unrequested—is improper.

We therefore alternately conclude that the petition for the writ as requested is moot and deny the petition on this ground.

Conclusion

We hold that amending a budget submitted by the governor in order to increase compensation and benefits for one group of state employees necessarily requires the exercise of discretion by the executive and consequently is not subject to the constitutional remedy of a writ of mandamus. This conclusion is inescapable when one recognizes that other budget allocations must be cut or eliminated in order to accommodate such an amendment. Furthermore, by the date of today's decision, the petition will be moot because we can neither grant the relief that SEIU requests nor sua sponte amend that request to a prospective order in the face of even greater budget deficits—a remedy which, in any case, has no place in our mandamus jurisprudence. We therefore dismiss the petition.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Charles W. Johnson

Justice Gerry L. Alexander

Justice Debra L. Stephens

Justice Tom Chambers