

Acknowledged Receipt This
29th day of Dec 20
Rob McKenna
Attorney General
By [Signature]
Assistant Attorney General

**SUPREME COURT OF THE STATE
OF WASHINGTON**

Case No.

SEIU HEALTHCARE 775NW,

Petitioner,

v.

**GOVERNOR CHRISTINE
GREGOIRE,**

Respondent.

**PETITION BY SEIU
HEALTHCARE 775NW
AGAINST STATE OFFICER
GOVERNOR CHRISTINE
GREGOIRE
FOR PEREMPTORY WRIT
OF MANDAMUS**

Petitioner SEIU Healthcare 775NW hereby alleges as follows:

INTRODUCTION

1. RCW 74.39A.300(1), which was enacted into law via an Initiative to the People, the Home Care Quality Initiative (“Initiative 775”), and strengthened in 2004 by Engrossed Substitute House Bill 2933, provides that the Governor must submit, as part of the proposed biennial operating budget she submits to the legislature, “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 or for legislation necessary to implement such agreement.”

2. On October 1, 2008, the Governor and SEIU Healthcare 775NW entered into a collective bargaining agreement under RCW 74.39A.270, by virtue of the October 1, 2008, interest arbitration award issued by Arbitrator Timothy Williams.

3. Pursuant to RCW 74.39A.300(1), Governor Christine Gregoire had a mandatory, non-discretionary legal duty to submit, as part of the proposed biennial operating budget she submitted to the legislature, a request for funds necessary to implement the collective bargaining agreement.

4. On December 18, 2008, Governor Gregoire submitted a proposed biennial operating budget to the legislature, pursuant to RCW 43.88.030. This budget did not contain a request for funds necessary implement the compensation and fringe benefits provisions of Arbitrator Williams' interest arbitration decision, nor did it contain legislation necessary to implement that arbitrator-imposed collective bargaining agreement.

5. By so acting, Governor Gregoire violated the plain language of RCW 74.39A.300(1). For that reason, a writ of peremptory mandamus should issue.

PARTIES AND JURISDICTION

6. Petitioner SEIU Healthcare 775NW represents approximately 34,000 long-term care workers in Washington State and Montana.

Approximately 25,000 of the workers Petitioner represents are employed in the State of Washington as home care workers, or “individual providers” (“IPs”). Petitioner and its members are beneficially interested in the Governor’s performance of her mandatory, non-discretionary duty, as further described herein.

7. Respondent Christine Gregoire is Governor of the State of Washington, and is subject to the laws and Constitution thereof.

8. Pursuant to Washington State Constitution art. IV, § 4, RCW 7.16.160, the Supreme Court of the State of Washington has original jurisdiction over a petition seeking a writ of mandamus against a state officer, including but not limited to the Governor.

STATUTORY FRAMEWORK OF RCW 74.39A

9. The State, as an alternative to institutional care, has developed a program by which qualifying individuals can receive personal care assistance in a residential setting. This program is highly dependent upon services provided by a cadre of home care workers known as IPs. The State uses the services of more than 25,000 IPs to help provide residential care for elderly and disabled persons.

10. RCW 74.39A was passed into law via Initiative 775, after its approval on November 6, 2001. *See* Exhibit A to Declaration of David Rolf (hereinafter, “Rolf Decl.”). Pursuant to RCW 74.39A.220 *et. seq.*,

the workers covered by this statute, the IPs are considered public employees solely for the purposes of collective bargaining under RCW 41.56.

11. Under the provisions of RCW 74.39A.270, for collective bargaining purposes only, the IPs were combined into a single statewide bargaining unit. The IPs were entitled, if they so chose, to select a labor organization to represent them for the purposes of engaging in collective bargaining.

12. The Legislature directed that “the wages, hours, and working conditions of individual providers,” as defined by RCW 74.39A.240(4), be determined through collective bargaining. RCW 74.39A.270(6). Under RCW 74.39A.270, the Governor is designated as the “employer,” and she is represented at the bargaining table by the State of Washington Office of Financial Management.

13. RCW 74.39A.270 provides for interest arbitration in the event the parties are unable to successfully negotiate a labor agreement.

14. RCW 74.39A.300(1) provides that the Governor **must submit**, as part of the proposed biennial operating budget she submits to the legislature, “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 or for legislation necessary to implement such agreement.” The provision reads, in full:

(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 submitted to the legislature under RCW 43.88.030, a request for funds necessary to administer chapter 3, Laws of 2002 and to implement the compensation and fringe benefits provisions of a collective bargaining agreement entered into under RCW 74.39A.270 or for legislation necessary to implement such agreement.

15. Subsection (2) of RCW 74.39A.300, referenced in RCW 74.39A.300(1), identifies only two preconditions for the mandatory submission by the Governor of a request for funds necessary to implement the compensation and fringe benefits provisions of the collective bargaining agreement entered into under RCW 74.39A.270.

16. First, the request must previously have been submitted to the director of the Office of Financial Management (“OFM”) by October 1st prior to the legislative session at which the request is to be considered.

17. Second, the request must have either been certified by the director of financial management as being feasible financially for the state or must reflect the binding decision of an arbitration panel reached under RCW 74.39A.270(2)(c). RCW 74.39A.300(2).

FACTUAL BACKGROUND

18. In August of 2002, the bargaining unit of IPs voted overwhelmingly to form a union and designated SEIU Healthcare 775NW as their exclusive bargaining representative. Rolf Decl., ¶ 4. By virtue of this vote, the IPs were subsequently exclusively represented for the purposes of collective bargaining by the Petitioner.

19. The first labor agreement between the Governor and Petitioner was completed through collective bargaining without the use of the arbitration process set forth in RCW 74.39A.270. Rolf Decl., ¶ 9.

20. Arbitrator Timothy Williams issued an interest arbitration award in 2004 for the second labor agreement, covering the 2005-07 biennium. Rolf Decl., ¶ 17.

21. The third contract was fully implemented by the Washington State Legislature for the 2007-09 biennium after a decision by Arbitrator Michael Cavanaugh. Rolf Decl., ¶ 17.

22. The parties subsequently engaged in collective bargaining for an agreement which would cover the biennium of July 1, 2009, through June 30, 2011. When that bargaining did not lead to an agreement, the parties proceeded to have that labor agreement contract resolved through interest arbitration. Rolf Decl., ¶¶ 19-22.

23. The interest arbitration hearing occurred on August 18, 22, 25, 26, 28, 29, and September 5, 2008, and resulted in a decision from interest arbitrator Timothy Williams on October 1, 2008. *See* Rolf Decl., Ex. H. This interest arbitration decision reflected the binding decision of an arbitration panel reached under RCW 74.39A.270(2)(c).

24. At the interest arbitration, the State put on substantial testimony relating to the State's precarious financial situation. Wolfgang Opitz, Deputy Director of OFM, testified that "the Senate Ways and Means staff have said we're \$2.7 billion short going into the 2009/'11 biennium. If we were to spend the entire rainy day fund, we would knock that down to \$1.956 billion short." Rolf Decl., Ex. I (pg. 614:9-12). Mr. Opitz went on to say:

Generally speaking, we're not looking forward in time to good times, we're looking forward in time to some very, very difficult budget choices, very difficult prioritizations. We're looking at an outlook by the Senate Way and Means that is likely to get worse within weeks and then get worse again within a couple of months."

Rolf Decl., Ex. I (pg. 626:2-8).

25. In reaching his interest arbitration decision, Arbitrator Williams gave proper attention to "[t]he financial ability of the state to pay for the compensation and fringe benefit provisions of a collective bargaining agreement," which is one of the factors he was obligated to consider under

the interest arbitration statute, RCW 41.56.465(5)(a)(ii). His opinion reflects this consideration, stating, in pertinent part:

[C]learly the most significant problem faced by both the State and the Union with regard to completing the 09-11 collective bargaining agreement is the concern with the State's ability to pay for any increased costs. The State provided evidence that it is looking at a 2.6 billion dollar shortfall for the 09-11 biennium (Tr. 31). Worse, the Arbitrator takes note of the fact that this award is being written at a time when the front page of every newspaper carries the message that we are in the midst of one of the darkest times in the history of American financial markets. This cannot bode well for the financial well being of the State of Washington or any other State.

To put it bluntly, the award is not a rich one; it would not be professionally responsible for the Arbitrator to be anything other than extremely conservative with regard to the expenditure of funds. The Arbitrator would have liked it to be otherwise because he found merit in many of the Union's proposals but ultimately he determined not to award the provision solely on the basis of cost. Throughout the award, the Arbitrator's thinking was around limiting the total amount of increased dollars and prioritizing how those dollars were to be spent.

Exhibit H to Rolf Decl., page 18.

26. Notwithstanding Arbitrator Williams' consideration of these economic realities, his award, which differs from both parties' proposals, includes certain monetary benefits to IPs, including a 2.5% increase in the hourly wage in July 2009 and a 2.0% increase in July 2010, and an extra 50 cents an hour for individuals certified as Home Care aides or who possess a Certified Nursing Assistant license (or an equivalent or greater medical licenses). Rolf Decl., ¶ 27 and Ex. H.

27. Subsequent to Arbitrator Williams' decision, that decision was submitted, along with a request for funds necessary to implement the compensation and fringe benefits provisions of his decision, to the director of OFM, by October 1, 2008, prior to the legislative session that will be commencing in January 12 of 2009. See <http://www.ofm.wa.gov/labor/> ("The statutory completion date of October 1, 2008 for negotiating the 2009-2011 collective bargaining agreements has passed. The Labor Relations Office submitted the financial projections and funding requests for the agreements completed by that date to the Director of the Office of Financial Management"). Rolf Decl., Ex. K.

28. This request for funds reflected the binding decision of the interest arbitrator reached under RCW 74.39A.270(2)(c).

**THE GOVERNOR'S FAILURE TO COMPLY
WITH RCW 74.39A.300(1)**

29. On December 18, 2008, Governor Gregoire submitted a proposed biennial operating budget to the legislature, pursuant to RCW 43.88.030.

30. Governor Gregoire's proposed balanced budget did not contain a request for funds necessary to implement the compensation and fringe benefits provisions of the interest arbitration decision previously submitted to the director of OFM, nor did it contain legislation necessary to

implement the collective bargaining agreement created by that decision.

See Rolf Decl., Ex. J.

31. The rationale provided by the Governor for this failure is found at <http://www.ofm.wa.gov/labor/>, which states:

The Director [of the Office of Financial Management] determined that it was not feasible financially for the state to fund the agreements. Therefore, the requests for funds to implement the 2009-2011 agreements are not included in the Governor's proposed 2009-2011 biennial budgets.

Rolf Decl., Ex. K.

32. RCW 74.39A.300(2), however, as was noted above, creates only two necessary preconditions to the Governor's mandatory obligation to submit a request for funds to implement the compensation and fringe benefit provisions of a contract obtained under that Title. The first is that the request must previously have been submitted to the director of OFM by October 1st prior to the legislative session at which the request is to be considered. The second is that the request either was "certified by the director of the office 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)." (Emphasis added.)

33. Because the request with request for funds necessary to implement the compensation and fringe benefits provisions of Arbitrator Williams' decision "reflect[ed] the binding decision of an arbitration panel reached

under RCW 74.39A.270(2)(c),” as specified in RCW 74.39A.300(2), no certification of financial feasibility from the director of OFM was required. Thus, the Governor was legally mandated to include such a request for funds in her proposed biennial operating budget.

34. OFM implicitly conceded that under RCW 74.39A.300(2), no certification of financial feasibility from the director of OFM is required or authorized with regard to the binding decisions of an arbitration panel, in a letter it wrote on December 18, 2008. In that letter, OFM stated, inter alia, that “[l]egislation will be submitted along with the Governor’s 2009-2011 proposed budget that subjects arbitration awards to be certified as feasible financially for the state by the director, Office of Financial Management,” Rolf Decl., Ex. L, thereby acknowledging that absent such legislation, arbitration awards need not be so certified.

35. The OFM’s representative at the interest arbitration hearing in front of Arbitrator Williams, Mr. Opitz, also conceded, in his testimony at that hearing, that the results reached through interest arbitration would inevitably be included in the Governor’s 2009-2011 proposed budget.

Mr. Opitz testified:

So the policy choice is going to be made in this room to place a legal mandate in front of the Governor and Legislature to pay for something that then crowds out something else, and the rest of the policy choices are about what’s crowded out.... [I]n balancing our budget in

December [2008], we incorporate what the award is, and it goes to the top of the -- top of the list. It -- it -- it's funded as if it were a contractual obligation within our budget deliberations and crowds out something else.”

Rolf Decl., Ex. I.

36. By failing to include a request for funds or the legislation necessary to implement the collective bargaining agreement reached through the statutorily-prescribed interest arbitration process, Governor Gregoire failed to perform an act which the law especially enjoined and enjoins her to perform as a duty resulting from her office.

**THE GOVERNOR’S FAILURE TO COMPLY WITH
RCW 74.39A.300(1) MUST BE REMEDIED QUICKLY, BEFORE
THE LEGISLATURE TAKES UP THE BUDGET**

37. By acting and failing to act, as set forth above, Governor Gregoire has prejudiced the interests of the Petitioner and the long-term care workers it represents. Petitioner enjoys a statutory right to have its collectively bargained agreement with the State presented to the Legislature through a properly submitted request for funds and authorization legislation. That right has been denied.

38. The failure to include funding for the individual provider contract in the Governor’s balanced budget proposal to the legislature, as required by law, unravels the entire statutory IP collective bargaining process. The arbitrator’s award has absolutely no legal effect on the legislature if it is

not included in Governor's budget. Indeed, nothing prevents the legislature from ignoring the interest arbitration award entirely once it is not in the Governor's budget. This is not only inconsistent with, but is diametrically opposed to, both the plain language of the statute and the clear intent of that language.

39. Moreover, the Legislature affords the Governor's budget great weight, and it is the starting – and frequently the ending -- point for specific expenditures. In any given year, the vast majority of what the Governor proposes is adopted by the legislature. The legislature generally tinkers at the margins but does not make wholesale changes to the budget. Rolf Decl., ¶ 35.

40. In fact, since collective bargaining was established for home care workers in 2001, contracts have only been funded when included in the Governor's budget. The one time the contract was not fully funded – 2003 – funding for the contract was not included in the Governor's balanced budget proposal. Rolf Decl., ¶ 37.

41. The consequences of permitting the Governor's unlawful action to go unchecked are serious not only for the Petitioner, which will thereby be deprived of its statutory rights, but also for the workers Petitioner represents, who will likely be deprived of the important benefits which were set forth in Arbitrator Williams' interest arbitration

decision. *See* Declarations of Cheryl Johnston-Carr, Denese Garcia, and Charlotte Marie Rux filed in support of Plaintiff's Petition.

42. No plain, speedy and adequate remedy in the ordinary course of law is available to Petitioner.

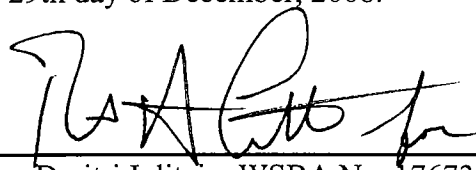
DEMAND FOR JUDGMENT

43. Petitioner therefore requests this Court to issue a peremptory writ of mandamus requiring Governor Gregoire to withdraw her previously submitted proposed budget and to submit a revised proposed budget that includes a request for funds and the legislation necessary to implement the collective bargaining agreement reached through the statutorily-prescribed interest arbitration process.

44. Petitioner requests, moreover, that this Court do so either before the Legislature reconvenes for its session commencing January 12, 2009, or as shortly thereafter as possible, as the prejudice and injury which Petitioner will suffer will commence immediately upon the Legislature convening to consider, *inter alia*, the Governor's budget proposal.

44. Petitioner further requests, as a means of obtaining that end, that the Clerk of the Court rule, per RAP 16.2(d), that this petition should be decided by the Supreme Court, and that the Clerk also determine the schedule for the remaining steps in the proceedings, including time for filing briefs, and that such steps be set on an accelerated basis.

Respectfully submitted this 29th day of December, 2008.



WSBA 27758

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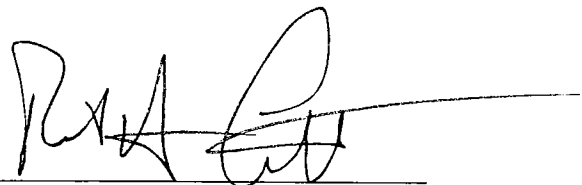
*Attorneys for SEIU Healthcare
775NW*

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2008, I caused the originals of Petition By SEIU Healthcare 775NW Against State Officer Governor Christine Gregoire For Peremptory Writ Of Mandamus, Declaration Of David Rolf In Support Of Petition For A Peremptory Writ Of Mandamus, Declaration Of Denese Garcia In Support Of Plaintiff's Motion For A Writ Of Mandate, Declaration Of Charlotte "Marie" Rux In Support Of Plaintiff's Motion For A Writ Of Mandate, Declaration Of Cheryl Johnston-Carr In Support Of Plaintiff's Motion For A Writ Of Mandate, Proposed Writ Of Mandamus Against Governor Christine Gregoire and Motion For Accelerated Review Of Petition to be filed with the Washington State Supreme Court Clerk via legal messenger, with true and correct copies of the same delivered via legal messenger to:

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A handwritten signature in black ink, appearing to read 'Robert H. Lavitt', written over a horizontal line.

Robert H. Lavitt