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STATE OF WASHINGTON

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CLERK

No.

82577-7

SUPREME COURT OF THE STATE OF WASHINGTON

SEIU LOCAL 925, a labor
organization

Petitioner,

v.

CHRISTINE O. GREGOIRE,
Governor of the State of Washington,

Respondent.

**PETITION BY SEIU
LOCAL 925 FOR A
PEREMPTORY WRIT OF
MANDAMUS AGAINST
GOVERNOR CHRISTINE
GREGOIRE**

Petitioner SEIU Local 925 hereby alleges as follows:

INTRODUCTION

1. The Access to Quality Family Child Care Act established collective bargaining rights for approximately 10,000 family child care providers ("FCCPs" or "providers") throughout the State. Codified at RCW 41.56.028 and signed by the Governor in May 2006, Engrossed Second Substitute House Bill 2353, *see* Exhibit A to Declaration of Karen Hart (hereinafter "Hart Decl."), requires the Governor to 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 this section or for legislation necessary to implement such agreement.” RCW 41.56.028(5).

2. The Governor and SEIU Local 925 entered into a two-year collective bargaining agreement (CBA) under RCW 41.56.028 by virtue of the interest arbitration award issued by Arbitrator Michael Cavanaugh on August 25, 2008. Exhibit E to Hart Decl. The CBA is for the two-year period that runs concurrently with the 2009-2011 Biennium.

3. Pursuant to RCW 41.56.028, 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 2009-2011 CBA her office entered into with SEIU Local 925.

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 to implement the compensation and fringe benefits provisions of Arbitrator Cavanaugh’s 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 41.56.028(5) and caused harm to the Union and the 10,000 family child care providers it represents. For these reasons, a writ of peremptory mandamus should issue.

PARTIES AND JURISDICTION

6. Petitioner SEIU Local 925 (“Union” or “Local 925”) represents approximately 24,000 employees in the state of Washington, mostly public sector, including workers in local government, non-profits, higher-education, K-12, and early learning. Within its Early Learning Division, the Family Child Care Provider bargaining unit numbers approximately 10,000 Licensed and License-Exempt providers. Hart Decl. ¶ 2. 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 Article IV, § 4, and 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 41.56.028

9. The Legislature enacted the Access to Quality Family Child Care Act (“Family Child Care Act”) in 2006, which is now codified at RCW 41.56.028. This established a statewide collective bargaining system for FCCPs. Providers covered by this law are considered public employees solely for collective bargaining purposes. RCW 41.56.028(1). The Governor is considered the public employer of FCCPs only for purposes of collective bargaining.

10. The Family Child Care Act authorized a statewide bargaining unit as the only appropriate unit for purposes of union representation.

11. By enacting the Family Child Care Act the Legislature directed that “[e]conomic compensation, such as manner and rate of subsidy and reimbursement, including tiered reimbursements; [and] health and welfare benefits” for child care providers are determined through collective bargaining. RCW 41.56.028(2)(c).

12. RCW 41.56.028(2)(d) provides for interest arbitration in the event the parties are unable to successfully negotiate a labor agreement. In an interest arbitration, a neutral third party determines substantive terms of the new labor agreement. Hart Decl. ¶ 7.

13. RCW 41.56.028(5) 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 benefit provisions of a collective bargaining agreement entered into under this section or for legislation necessary to implement such agreement.” The provision reads, in full:

Upon meeting the requirements of subsection (6) 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 implement the compensation and benefit provisions of a collective bargaining agreement entered into under this section or for legislation necessary to implement such agreement.

14. Subsection (6) of RCW 41.56.028, referenced in the previous paragraph, 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 41.56.028.

15. 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. RCW 41.56.028(6)(a).

16. 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 this section. RCW 41.56.028(6)(b).

FACTUAL BACKGROUND

17. To support working parents, the State has developed various programs that assist qualifying families in paying for child care services. Like private pay families, many parents receiving child care assistance from the state choose family child care providers as an alternative to a child care center. Although regulated by the Department of Early Learning, FCCPs typically operate small child care businesses out of their own home. Hart Decl. ¶ 2.

18. ~~Local 925 represents both Licensed and License-Exempt~~ providers. The Union contract with the State covers those FCCPs providing care to children whose families are eligible to receive state support for the costs of child care, i.e., state-paid children. Hart Decl. ¶ 3.

19. In 2006, providers organized and elected SEIU Local 925 as their collective bargaining representative. Over 90% of the ballots cast were in favor of union representation. The results were certified on June 23, 2006 by the Public Employment Relations Commission (PERC). Ex.,

B to Hart Decl. Consequently, the Union is the exclusive certified collective bargaining representative for the providers.

20. Following the FCCP election of Local 925, the Union and State commenced negotiations for a first labor agreement. The Governor's Office of Financial Management (OFM) oversees all collective bargaining for state employees. Specifically, OFM's Labor Relations Office represents the Governor at the bargaining table. When the parties were unable to reach final agreement they resorted to the interest arbitration procedure under the statute to resolve the outstanding issues in their 2007-2009 CBA. *See* Hart Decl. ¶ 7. Throughout their negotiation and interest arbitration process, the Union and the State were aware of the deadline imposed by the Family Child Care Act. Hart Decl. ¶ 11.

21. Interest Arbitrator Tim Williams issued his award on November 10, 2006, several days in advance of the statutory deadline under the Family Child Care Act for the initial negotiations and contract. RCW 41.56.028(6)(a); Hart Decl. ¶ 9 & Ex. C. The Governor included the Williams award in her balanced budget submission to the Legislature, which in turn appropriated funding for the FCCP labor agreement in the State 2007-2009 Biennial budget. Hart Decl. ¶ 12.

22. Beginning in 2008, the parties 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 interest arbitration. Hart Decl., ¶ 15. Interest arbitrator Michael Cavanaugh presided over a hearing that ran August 4 – 8, 2008. Id.

23. The State and Local 925 were explicit in their understanding of the Family Child Care Act's statutory deadline of October 1, 2008. Arbitrator Cavanaugh noted in his award at p. 4, Hart Decl., Ex. E,

Although the statute provides a deadline of October 1, 2008 for submitting the financial aspects of the Award to the Director of the Office of Financial Management for inclusion in budget requests for the 2009-11 biennium, RCW 41.56.028(6)(a), the parties requested an early decision in order to present the Arbitrator's findings to the Union membership and to State officials in advance of the statutory deadline.

24. Arbitrator Cavanaugh's award issued on August 25, 2008. Hart Decl. ¶ 15 & Ex. E. This award constitutes a binding decision within the meaning of RCW 41.56.028(6)(b).

25. RCW 41.56.465(4)(a)(ii) requires the arbitrator to consider the state's ability to pay for the compensation and benefit provisions of a labor agreement. At the interest arbitration, the State presented evidence

regarding the State's financial situation. In his award, Arbitrator Cavanaugh paid substantial attention to the state's projected fiscal condition.

Turning to ability to pay, then, I must take into account the projected financial condition of the State... At the same time, I must also keep in mind the priority the State has placed on early childhood care and learning, while not forgetting that many other worthy programs and workers will be clamoring for their "fair share" of a pot of revenue that will very likely turn out to be much smaller than might have been anticipated a year or so ago.

...it would be foolish of the State (and of an interest arbitrator) to award expensive contract improvements based on little more than a hope that actual future revenue will, in fact, turn out to be substantially greater than forecast. Moreover, the Governor and the Legislature are required by law to present a budget in balance with a forecast of revenues that will be produced later in the year, and while it is possible that economic conditions will change sufficiently between now and then to reduce the current projection of a \$2.7 Billion shortfall, ... the forecast in June 2008 was lower than the forecast in February 2008,...and recent monthly collections of revenue seem to confirm a trend that is worsening, not yet getting better.

Hart Decl., Ex. E at 28-29.

26. Arbitrator Cavanaugh rejected the Union's proposed subsidy rates because of the State's fiscal circumstances.

Facing a revenue shortfall approaching \$3 Billion during the next biennium, the State simply cannot afford the increased subsidy rates proposed by the Union.

Hart Decl., Ex. E at 30.

27. Notwithstanding Arbitrator Cavanaugh's careful consideration of the statutory criteria, including the state's ability to pay, his award included modest economic improvements and benefits for the FCCPs. Although rejecting the Union's proposals regarding rates, Arbitrator Cavanaugh awarded a 1.6% across the board subsidy rate increases for the first year of the 2009-2011 CBA for both Licensed and License-Exempt providers. He awarded a 2% increase for the second year. He also adopted a revised version of the Union's enhanced toddler rate proposal. Hart Decl. ¶ 16, Ex. E at 22.

28. The Cavanaugh award, along with a request for funds necessary to implement the compensation and fringe benefits provisions of his decision, was submitted to the director of OFM, in advance of the October 1, 2008, prior to the legislative session that will be commencing in January 12 of 2009. Hart Decl. ¶ 18.

29. This request for funds reflected the binding decision of the interest arbitrator reached under RCW 41.56.028(6)(b).

**THE GOVERNOR'S FAILURE TO COMPLY
WITH RCW 41.56.028(5)**

30. On December 18, 2008, Governor Gregoire submitted to the legislature a proposed operating budget for the 2009-2011 Biennium, pursuant to RCW 43.88.030.

31. 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 resulting from that decision. Hart Decl. ¶ 18.

32. The Labor Relations Office at OFM sent a memorandum to officials of unions representing state employees dated December 18, 2008. Hart Decl., Ex. F. This memorandum states that the Director of OFM determined that "the interest arbitration awards are not feasible financially for the state." A second memorandum, dated December 17, 2008 from Victor Moore, the Director of OFM, to the Governor, states that as a result "funds necessary to implement the compensation and fringe benefits provisions in the collective bargaining agreements and arbitration awards cannot be included in the proposed budget submitted to the Legislature." Hart Decl, Ex. G.

33. RCW 41.56.028(5) 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 section. 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 this section." RCW 41.56.028(6)(b). (Emphasis added.)

34. Because the request for funds necessary to implement the compensation and fringe benefits provisions of the Cavanaugh award "reflect[ed] the binding decision of an arbitration panel reached under this section," as specified in RCW 41.56.028(6)(b), 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.

35. OFM implicitly conceded in its December 18 memorandum that under RCW 41.56.028(6), no certification of financial feasibility from the director of OFM is required or authorized with regard to the binding

decisions of an arbitration panel. Hart Decl., Ex. F. In that memo, 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,” thereby acknowledging that absent such legislation, arbitration awards need not be so certified.

36. Mr. Wolfgang Opitz, an economist and deputy director of OFM testified on behalf of the State in the interest arbitration hearing between SEIU Healthcare 775NW and the State. 775NW represents a statewide group of Individual Provider home care workers for collective bargaining purposes. RCW 74.39A affords IP home care workers the right to invoke interest arbitration, and like the Family Child Care Act, requires the Governor to include the arbitration award in her budget submission. Declaration of Robert Lavitt, ¶ 2.

37. In his sworn testimony before the arbitrator, Mr. Opitz, conceded 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.

Declaration of Robert Lavitt, Ex. A.

38. 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 enjoins" her to perform "as a duty resulting from [her] office." RCW 7.16.160.

**THE GOVERNOR'S FAILURE TO COMPLY WITH
RCW 41.56.028(5) MUST BE REMEDIED QUICKLY, BEFORE
THE LEGISLATURE TAKES UP THE BUDGET**

39. By acting and failing to act, as set forth above, Governor Gregoire has prejudiced the interests of, and harmed, the Petitioner and the family child care providers it represents. Hart Decl. ¶ 20; Declaration of Adair Dammann, ¶¶ 8, 9. 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 authorizing legislation. That right has been denied.

40. The failure to include funding for the FCCP contract in the Governor's balanced budget proposal to the Legislature, as required by law, unravels the entire statutory collective bargaining process. Hart Decl.

¶ 20; Dammann Decl. ¶ 9. The Governor is the only official who is mandated to act upon the award. Unless she includes funding for the award in her initial budget, the Legislature is under no obligation to pay any attention to the Union's interest arbitration award for 2009-2011 CBA issued by Arbitrator Cavanaugh. Dammann Decl. ¶ 7. 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.

41. The Legislature affords the Governor's budget great weight, and it is the starting point for debate around policy priorities and the specific expenditures to implement them. In any given year, the vast majority of what the Governor proposes is adopted by the Legislature. Dammann Decl. ¶ 5.

42. This is particularly true because the Governor has a line-item veto. Under the Washington State Constitution, Article III, sec. 12 (amend. 62), the Governor may veto "less than an entire section...if the section contain one or more appropriation items" by vetoing "any such appropriation item or items." By not including funding for the contract in her budget, in contravention of state law, the Governor has thereby sent a powerful message to the Legislature that the contract is not a funding priority. Legislators are hesitant to include any significant items in the final budget that were not included in the Governor's original budget,

fearing that the Governor would veto such additions to the original proposed budget. Dammann Decl. ¶ 6.

43. 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 family child care providers Petitioner represents, who will likely be deprived of the important benefits which were set forth in Arbitrator Cavanaugh's interest arbitration decision. Dammann Decl. ¶ 10.

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

DEMAND FOR JUDGMENT

45. 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 biennial budget that includes a request for funds and the legislation necessary to implement the FCCP collective bargaining agreement reached through the statutorily-prescribed interest arbitration process.

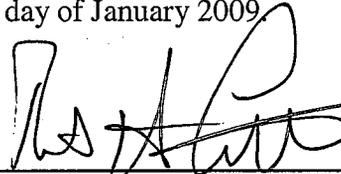
46. Petitioner requests, moreover, that this Court do so either before the Legislature reconvenes for its session commencing January 12,

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.

47. 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.

48. Petitioner also seeks an award of all costs and fees, and all further relief this Court deems just and proper.

Respectfully submitted this 6th day of January 2009



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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2009, I caused the originals of Petition By SEIU Local 925 Against State Officer Governor Christine Gregoire For Peremptory Writ Of Mandamus, Declaration Of Karen Hart In Support Of Petition For A Peremptory Writ Of Mandamus, Declaration Of Adair Dammann In Support Of Petition For A Peremptory Writ Of Mandamus, Declaration of Robert H. Lavitt In Support Of Petition For A Peremptory Writ Of Mandamus, 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:

Rob McKenna
Attorney General of Washington
7141 Cleanwater Drive SW
PO Box 40145
Olympia, WA 98504-0145

Governor Christine Gregoire
1143 Capitol Way S.
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P. O. Box 40002
Olympia, WA 98504-0002

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

Robert H. Lavitt