IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1999 Term

No. 26364

STATE OF WEST VIRGINIA EX REL.
THE AFFILIATED CONSTRUCTION TRADES FOUNDATION,
A DIVISION OF THE WEST VIRGINIA BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO, AND ALL THOSE SIMILARLY SITUATED,
Petitioner

v.

WILLIAM F. VIEWEG, COMMISSIONER,
BUREAU OF EMPLOYMENT PROGRAMS, AND
COMPENSATION PROGRAMS PERFORMANCE COUNCIL,
Respondents

Petition for Writ of Prohibition/Mandamus

WRIT DENIED

Submitted: June 29, 1999
Filed: July 14, 1999

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The Opinion of the Court was delivered PER CURIAM.
JUSTICE WORKMAN, JUSTICE DAVIS and JUSTICE MAYNARD concur and reserve the right to file concurring opinions.
CHIEF JUSTICE STARCHER and JUSTICE McGRAW dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. ""A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va. Code,* 53-1-1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver,* 160 W.Va. 314, 233 S.E.2d 425 (1977).' Syllabus point 3, *State ex rel. McDowell County Sheriff's Dept. v. Stephens,* 192 W.Va. 341, 452 S.E.2d 432 (1994)." Syllabus Point 1, *State ex rel. Charleston Area Medical Center, Inc. v. Kaufman,* 197 W.Va. 282, 475 S.E.2d 374 (1996).

2. "Prohibition lies only in case of the unlawful exercise of judicial functions. Acts of a mere ministerial, administrative, or executive character do not fall within it province." Syllabus Point 4, *Fleming v. Kanawha County Com'rs,* 31 W.Va. 608, 8 S.E. 267 (1888).

3, "A writ of mandamus will not issue unless three elements coexist -- (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus

Point 2, *State ex rel. Kucera v. City of Wheeling,* 153 W.Va. 538, 170 S.E.2d 367 (1969).

4. "Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies." Syllabus Point 1, *State ex rel. Allstate Insurance Co. v. Union Public Service District,* 151 W.Va. 207, 151 S.E.2d 102 (1966).

5. "Mandamus lies to control the action of an administrative officer in the exercise of his discretion when such action is arbitrary or capricious." Syllabus, *Beverly Grill, Inc. v. Crow,* 133 W.Va. 214, 57 S.E.2d 244 (1949).

6. "Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made." Syllabus Point 1, *State ex rel. Buxton v. O'Brien,* 97 W.Va. 343, 125 S.E. 154 (1924).

Per Curiam:

This case is before the Court upon a petition for writ of prohibition filed by the petitioner, The Affiliated Construction Trades Foundation, a division of the West Virginia Building and Construction Trades Council, AFL-CIO, and all those similarly situated, against the respondents, William F. Vieweg, Commissioner, Bureau of Employment Programs, and the Compensation Programs Performance Council. The petitioner seeks a writ prohibiting Commissioner Vieweg from dismissing civil actions instituted by the Workers' Compensation Division against certain corporate entities under theories of imputed liability for delinquent workers' compensation premiums, penalties and interest; prohibiting the Commissioner from having any further involvement in these actions; and directing the Commissioner and the Compensation Programs Performance Council to promulgate rules and regulations governing the conduct of litigation commenced by the Commissioner. We issued a rule to show cause and now deny the petitioner the relief which it seeks.

I.

FACTS

In the original proceeding before us, this Court has the pleadings, affidavits and exhibits of the parties as well as several briefs of amicus curiae.[1] From these we glean the following facts.

[1]In addition to pleadings of the parties, we also received solicited responses from the West Virginia Chamber of Commerce and the West Virginia Manufacturers Association on behalf of the respondents, and the AFL-CIO West Virginia Labor Federation and the United Mine Workers of America on behalf of the petitioner. Also, we received amicus curiae briefs from Attorney General Darrell V. McGraw, Jr., the West Virginia Trial Lawyers Association and the West Virginia Citizen Action Group on behalf of the petitioner, and the West Virginia Coal Association & West Virginia Mining & Reclamation Association and the West Virginia Business & Industrial Council on behalf of the respondents. Also, the West Virginia Department of Administration, the West Virginia Department of Education and the Arts, the West Virginia Department of Health and Human Resources, the West Virginia Department of Military Affairs and Public Safety, the West Virginia Department of Tax and Revenue, the West Virginia Department of Transportation and the West Virginia Bureau of Environment filed an amici brief with this

Court urging us to refuse the extraordinary relief requested. The brief also asks that we address the separation of powers issue raised herein. Because this issue is not necessary to the disposition of this case, we decline to review it. We appreciate the participation of the above-listed parties in this case. Their arguments were considered in our decision.

In 1996 and 1998, the Workers' Compensation Division ["the Division"] instituted civil actions against several coal companies asserting theories of imputed liability for workers' compensation premiums that had not been paid by entities with whom those companies had contracted.[2] Because of concerns about the progress of these civil actions, the Commissioner recently sought advice from the Compensation Programs Performance Council ("the council") concerning the continued prosecution of these actions.[3]

[2] In the pleadings filed herein, the nature of these contracts is characterized as ones in which the party which owns the economic interest in the coal pays another company to actually mine the coal or the coal owners subleased the coal properties to third parties. The specific terms of these agreements vary greatly within the coal industry. The third parties who mined the coal are the defendants in the civil actions which are at issue.

[3] The Compensation Programs Performance Council was created pursuant to W.Va. Code § 21A-3-1 *et seq.* Its purpose is to "ensure the effective, efficient and financially stable operation of the unemployment compensation system and the workers' compensation system." W.Va. Code § 21A-3-1 (1993). The council is comprised of nine members, four of whom represent employees, four of whom represent employers, and the Commissioner who serves as chair of the council.

On March 12, 1999, the council adopted Resolution 30 recommending that the Commissioner "take such action as is deemed necessary to terminate, withdraw or otherwise dismiss any party or entity named as a defendant whose liability, if any, for payment of premium is not direct under the workers compensation laws . . . and whose own account with the Division is deemed to be in good standing."[4] The council emphasized that the division "should continue to pursue collection from those parties or entities, including responsible officers, whose accounts remain in default and which parties, entities or officers have direct responsibility for and means of payment of premium, interest and/or penalty under the workers compensation statutes . . . and applicable case law."[5] The council's recommendation was unanimous.

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[4]According to the Commissioner, the claims to be dismissed were against coal owners and lessees who were in good standing with the Division on their own accounts but whose subcontractors failed to meet their workers' compensation premium obligations.

[5]According to W.Va. Code § 23-2-4(a) (1995) in part:

> The commissioner, in conjunction with the compensation programs performance council, is authorized to establish by rule a system for determining the classification and distribution into classes of employers subject to this chapter, [and] a system

The council listed several reasons in support of the recommendation. These included:

> WHEREAS, the Division has in fact initiated civil actions against certain parties, founded upon certain complex theories of law which are without precedence in the field of workers compensation law in West Virginia, and perhaps in other states, claiming liability of such parties for the defaulted premium obligations of other employers and further claiming such parties to be related or affiliated in some manner to the defaulting employers; and
>
> WHEREAS, it appears that the amount of defaulted premium due and owing approximates $95 million and the interest and penalties thereon also approximate $95 million and further accumulating at the rate of $3 million per month; and
>
> WHEREAS, outside litigation expenses to date have totaled $3 million; and
>
> WHEREAS, the Division may expect to incur ongoing outside litigation expenses of $30,000 per month in addition to the ongoing but undetermined administrative and managerial time and other resources committed in support of the litigation; and

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> for determining rates of premium taxes applicable to employers subject to this chapter[.]

WHEREAS, the representation agreement with outside counsel imposes on the Division certain contractual obligations for purchase of a data system at fair market value which may total $700,000; and

WHEREAS, the representation agreement provides for the outside counsel to be compensated on a contingent fee basis in accord with Ch. 21A-2-6(17)(B), which basis has been an obstacle to settlement of certain of the pending actions; and

WHEREAS, due to the nature of the complex theories of law upon which the claims against parties deemed only to be liable on a vicarious basis are founded,[6] any estimate of recovery would be wholly speculative; however, it is anticipated with a high degree of certainty that a favorable trial decision to any of the parties will likely result in appeal by the party adversely affected; and

WHEREAS, claims may still be pursued against those defaulting employers and their responsible officers deemed directly liable for payment of premium, penalty and interest under traditional collection theories recognized under the workers compensation law; and

WHEREAS, current underground coal employers participating in the workers compensation system are paying through

[6]The petitioner and the respondents dispute the viability of the theories upon which the civil actions below are based. We need not address this issue in order to decide the case before us.

> the premium rating mechanism all claims arising from the defaulted employers with direct liability for premium, while all employers in good standing in the workers compensation system are bearing the expenses associated with the litigation; and
>
> WHEREAS, over a long period of time preceding the filing of this litigation, the Division failed to adequately enforce premium payments from those directly responsible therefor under the workers compensation law and due to enhanced data systems, increased staffing, and strengthened statutes, it is unlikely that the environment which permitted such failures would be replicated; and
>
> WHEREAS, it being the conclusion of the Council that further expenditure of Division funds in support of litigation founded upon the complex theories is not justified by the expectation of recovery or the need for precedent to discourage other parties from utilizing subcontractors as a means for workers compensation tax avoidance[.] (Footnote added).

On May 20, 1999, the Commissioner publicly announced his decision to dismiss cases filed against those parties which were claimed to be liable for payment of premium taxes due and owing from their contractors and to

continue to pursue recovery against workers' compensation subscribers and their responsible officers under traditional legal theories.[7] Thereafter, the petitioner filed the writ of prohibition which is the subject of this case.

II.

DISCUSSION

The petitioners herein seek a writ of prohibition. According to W.Va. Code § 53-1-1 (1923), "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." This Court

[7]The Commissioner notes in his response that his decision to dismiss the lawsuits was supported by the Governor, the President of the State Senate, the Speaker of the House of Delegates, the President of the West Virginia AFL-CIO; and the President of the Business and Industry Council. He also states that on the same day, the council approved a new premium rate-making plan that will assure that West Virginia's underground coal mining industry bears the burden of the workers' compensation fund associated with the past failure of underground coal mining subscribers to pay their workers' compensation premiums.

has said that ""[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va. Code,* 53-1-1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver,* 160 W.Va. 314, 233 S.E.2d 425 (1977).' Syllabus point 3, *State ex rel. McDowell County Sheriff's Dept. v. Stephens,* 192 W.Va. 341, 452 S.E.2d 432 (1994)." Syllabus Point 1, *State ex rel. Charleston Area Medical Center, Inc. v. Kaufman,* 197 W.Va. 282, 475 S.E.2d 374 (1996). *See also* Syllabus Point 1, *Crawford v. Taylor,* 138 W.Va. 207, 75 S.E.2d 370 (1953). We have stated that "[p]rohibition lies only in case of the unlawful exercise of judicial functions. Acts of a mere ministerial, administrative, or executive character do not fall within its province." Syllabus Point 4, *Fleming v. Kanawha County Com'rs,* 31 W.Va. 608, 8 S.E. 267 (1888). *See also* Syllabus Point 2, *State ex rel. City of Huntington v. Lombardo,* 149 W.Va. 671, 143 S.E.2d 535 (1965). This Court has determined that prohibition lies not only to judicial tribunals, but to inferior ministerial tribunals possessing incidentally judicial powers and known as quasi-judicial tribunals. *See Wiseman v. Calvert,* 134 W.Va. 303, 59 S.E.2d 445 (1950);

Brazie v. Fayette County Com'rs, 25 W.Va. 213 (1884); *State ex rel. City of Huntington v. Lombardo, supra*. This includes administrative tribunals having quasi-judicial power when acting in a quasi-judicial capacity. *See United States Steel Corp. v. Stokes,* 138 W.Va. 506, 76 S.E.2d 474 (1953). Prohibition will not lie, however, to prevent administrative action. *Wiseman, supra (*prohibition does not lie against county courts in exercising power not judicial or quasi judicial)*; State ex rel. Noce v. Blankenship,* 93 W.Va. 273, 116 S.E. 524 (1923) (prohibition does not lies against county sheriffs); *State ex rel. City of Huntington, supra; Hartigan v. Board of Regents,* 49 W.Va. 14, 38 S.E. 698 (1901) (prohibition does not lie against the Board of Regents in its removal of a professor); *United States Steel Corp. supra.*

In the instant case, a writ of prohibition is sought against the workers' compensation Commissioner who is an administrative official within the executive branch of our state government. W.Va. Code § 23-1-1(a) (1999) provides that the Commissioner "has the sole responsibility for the administration of [the workers' compensation system]. . . . [and] shall

exercise all the powers and duties described in this chapter and in . . . [§ 21A-2-1, et seq.] . . . of this code." W.Va. Code § 21A-2-6 (1996) provides that the Commissioner has the power to, *inter alia,* supervise fiscal affairs and responsibilities of the Bureau of Employment Programs; invoke any legal or special remedy for the enforcement of orders; and exercise any other power necessary to the administration of bureau business. It is clear, and the petitioner does not dispute, that in dismissing the actions at issue the Commissioner was not performing a judicial or quasi-judicial function. Rather, the dismissal of the lawsuits constitutes a purely administrative function. As we noted above, the writ of prohibition never issues against administrative officials performing purely administrative acts. Accordingly, we hold that a remedy by prohibition does not lie in this proceeding and, for that reason, the writ of prohibition will not be issued.

We note that the petitioner sought only a writ of prohibition in its petition filed with this Court. During oral argument, however, it attempted to request relief by a writ of mandamus. This Court has, on

occasion, treated a request for relief in prohibition as a petition for a writ of mandamus, or vice versa, if the facts so warranted. *See State ex rel. Ranger Fuel Corp. v. Lilly,* 165 W.Va. 98, 267 S.E.2d 435 (1980); *Carr v. Lambert,* 179 W.Va. 277, 367 S.E.2d 225 (1988). Accordingly, even though the petitioner did not originally plead in the alternative, we will now proceed to consider the petition as a request for mandamus relief.

The petitioner essentially argues that the Commissioner has violated his fiduciary obligation to the workers' compensation fund set forth in W.Va. Code § 23-2-4(a)(2) (1995).[8] According to the petitioner, the fund currently has "an actuarial determined, discounted deficit of in excess

[8]According to W.Va. Code § 23-2-4(a)(2) (1995):

> The rule [for determining rates of premium taxes applicable to employers] shall be consistent with the duty of the commissioner and the compensation programs performance council to fix and maintain the lowest possible rates of premium taxes consistent with the maintenance of a solvent workers' compensation fund and the reduction of any deficit that may exist in such fund and in keeping with their fiduciary

of $1.9 billion." Because the lawsuits at issue were originally instituted to collect approximately two hundred million dollars owed to the fund, the dismissal of the lawsuits will prove injurious to the solvency of the entire workers' compensation system. Therefore, concludes the petitioner, this Court should compel the Commissioner to fulfill his fiduciary obligation to the fund by mandating that he prosecute the lawsuits for unpaid premiums.

It is axiomatic in the law that,

> A writ of mandamus will not issue unless three elements coexist -- (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling,* 153 W.Va. 538, 170 S.E.2d 367 (1969). We have characterized the purpose of the writ as the enforcement of an established right and the enforcement of a corresponding imperative duty created or imposed by law. *See State ex rel. Bronaugh v. City of Parkersburg,* 148 W.Va. 568, 136 S.E.2d 783 (1964).

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obligations to the fund[.]

"Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies." Syllabus Point 1, *State ex rel. Allstate Insurance Co. v. Union Public Service District,* 151 W.Va. 207, 151 S.E.2d 102 (1966); *See State ex rel. Board of Education v. Miller,* 153 W.Va. 414, 168 S.E.2d 820 (1969); *Delardas v. County Court of Monongalia County,* 155 W.Va. 776, 186 S.E.2d 847 (1972); *State ex rel Anderson v. Bd. of Ed. of Mingo Cty.,* 160 W.Va. 208, 233 S.E.2d 703 (1977). Finally, "[m]andamus lies to control the action of an administrative officer in the exercise of his discretion when such action is arbitrary or capricious." Syllabus, *Beverly Grill, Inc. v. Crow,* 133 W.Va. 214, 57 S.E.2d 244 (1949); *See also* Syllabus Point 1, *State ex rel. Payne v. Board of Education of Jefferson County,* 135 W.Va. 349, 63 S.E.2d 579 (1951)("Mandamus does not lie to control a board of education in the exercise of its discretion, in the absence of caprice, passion, partiality, fraud, arbitrary conduct, some ulterior motive, or misapprehension of law upon the part of such board."); *State ex rel. McLendon v. Morton,* 162 W.Va. 431, 249 S.E.2d 919 (1978); *State ex rel. Withers v. Board of Educ. of Mason County,* 153 W.Va. 867, 172 S.E.2d 796 (1970); *State ex rel. Board of Education v. Miller, supra;*

State ex rel. Waller Chems. v. McNutt, 152 W.Va. 186, 160 S.E.2d 170 (1968). We will now apply these principles to the facts before us.

This Court agrees with the petitioner that the Commissioner has a fiduciary obligation to maintain the workers compensation fund. We have not hesitated on prior occasions to recognize the fiduciary obligation of officers who oversee state funds set up for the benefit of designated classes of individuals. Also, we have exercised this Court's mandamus power to compel executive and legislative officials to maintain the fiscal soundness of state funds in their capacities as fiduciaries. For example, in *Dadisman v. Moore,* 181 W.Va. 779, 384 S.E.2d 816 (1988), we compelled the Governor to include in his appropriation plan for fiscal year 1990-91 the actuarially determined amounts of contributions earned by state employees to the Public Employees Retirement System (PERS) Fund. We further compelled the Senate President and Speaker of the House to introduce in their respective houses proposed budget bills to meet the PERS requirements. More recently, in *State ex rel. Deputy Sheriffs Ass'n v. Sims,* ___ W.Va. ___, 513 S.E.2d 669 (1998), we held in Syllabus Point 2:

> The fiduciary duty of the Consolidated Public Retirement Board . . . with respect to the public employee pension funds and assets entrusted to the Board, includes the affirmative duty to monitor and evaluate the effect of legislative actions that may affect such funds and assets, and to take all necessary actions including initiating court proceedings if necessary to protect the fiscal and actuarial solvency of such funds and assets.

In Syllabus Point 3, however, we stated:

> The speculative possibility that the transfer of funds and assets that is required . . . from the [PERS] trust fund to the deputy sheriffs' retirement fund . . . may impair the fiscal solvency of the PERS trust fund does not bar the transfer of assets where legal mechanisms exist that can detect and correct any impaired solvency in a timely fashion.

Likewise, in the instant case, the possibility that the dismissal of the civil actions at issue will impair the workers' compensation fund and render the fund unable to fulfill its purpose is nothing more than speculation.

The petitioner has not shown that the Commissioner violated his fiduciary duty to maintain the workers' compensation fund. The Commissioner has represented to this Court that a program was implemented in 1997 to reduce the workers' compensation deficit. The Commissioner has also stated in an affidavit that no eligible injured worker or dependent of a fatally injured worker has failed to receive any benefit payable under the worker's compensation system due to any employer's default of its premium obligations. In light of this, as well as the complete lack of evidence to the contrary, we find that the Commissioner has not breached his fiduciary duty to the workers' compensation fund.[9] Also, while this Court can mandate that the

[9]In an affidavit filed with this Court, the Commissioner states:

> That, on May 20, 1997 to be effective July 1, 1997, in accord with its statutory powers and duties and upon recommendation of the Commissioner, the Council unanimously approved a premium rate-making plan and base premium rates designed, among other things, to eliminate a staggering deficit and return the workers' compensation system to a sound financial basis, including elimination of across-class subsidies on a prospective basis for underground coal mining and certain other classes of

business and industry;

That the rate-making plan, adopted by the Council, assures that the underground coal mining industry in West Virginia, as a class, bears the entire burden imposed on the workers' compensation system by the failure of coal subcontractors to meet their premium obligations, as well as the burden caused by the abject failure of past administrators of the workers' compensation system to enforce payment of premium by such defaulting subcontractors under the workers' compensation law;

That the rate-making plan, adopted by the Council, assures that only those employers in the underground coal class bear the cost of claims of employees of the defaulted subcontractors;

That the rate-making plan, adopted by the Council, is accomplishing its objectives, having eliminated any subsidy from other business and industry classes to the benefit of the underground coal class and contributing more than $200 million to reduce the $2.2 billion workers' compensation deficit inherited by the current administration. The deficit reduction program adopted by the Council in 1997 is at least five (5) years ahead of the schedule projected by the

Commissioner fulfill his fiduciary duty, it is powerless to mandate the manner in which this duty is to be performed. "Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made." Syllabus Point 1, *State ex rel. Buxton v. O'Brien and the County Court of Mason County,* 97 W.Va. 343, 125 S.E. 154 (1924). The one area, above all, where a court should exercise caution is when it is deciding its own power. The power of this Court simply does not extend to sitting in judgment on every lawful discretionary act performed by an executive officer pursuant to the execution of his or her responsibilities, regardless of how politically unpopular that act may be. Accordingly, we find no merit to the petitioners' argument concerning the Commissioner's fiduciary obligation.

The petitioner's more specific complaint is that the Commissioner has dismissed certain civil actions. However, we have not been informed

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prior administration[.]

nor are we aware of any statute or regulation that requires the Commissioner to institute and prosecute the kinds of actions involved in this case. The Commissioner's power to commence and discontinue litigation is clearly discretionary. Notably, the great cost of the litigation to date necessitates weighing the potential value of the civil actions against the expense of their continued prosecution. This involves a judgment call that by law must be made by the Commissioner. While this Court may or may not agree with the Commissioner's course of action, it simply is not our decision to make. The discretionary nature of the decision at issue distinguishes this case from *Dadisman* where the duties of the executive and legislative officials mandated by this Court were specifically provided for by constitutional provision and statute. Also, as noted above, the petitioner fails to prove that the dismissal of the actions further impairs the solvency of the fund. Accordingly, we find that the Commissioner has not failed to perform a mandatory, nondiscretionary duty.

Further, we have before us the performance council's and the Commissioner's detailed rationale for dismissing the actions. After

considering this rationale, we are unable to find that the Commissioner acted with caprice, passion, partiality, fraud, arbitrarily, with some ulterior motive or misapprehension of the law.

In addition, we note the petitioner raises the specter of conflict of interest in the dismissal of the civil actions. This charge, however, is wholly unsubstantiated and amounts to nothing more than speculation.[10]

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[10]In an affidavit filed with this Court, the Commissioner states the following:

> That from April, 1976 to February, 1986 the Respondent was employed by the Coal Division of Occidental Petroleum Corporation through initially its subsidiary Island Creek Coal Company and subsequently Occidental's Island Creek Coal Corporation subsidiary (hereinafter collectively "Island Creek");
>
> That among Respondent's duties and responsibilities with Island Creek were management of all insured and self-insured workers' compensation programs for Island Creek employees in the several states where Island Creek operated, including West Virginia;

That at all times during Respondent's tenure of employment with Island Creek and thereafter, Island Creek's account with the Division was fully paid and deemed by the Division to be in good standing;

That Respondent's employment with Island Creek did not include any duties or responsibilities relating to contractors, subcontractors or contract mining operations in West Virginia, or relating to employees of such contractors or subcontractors, if there were any such during Respondent's employment with Island Creek;

That Respondent terminated employment with Island Creek in January, 1986;

That Respondent had vested rights in a pension program with Island Creek that was fully funded at the time of such termination of employment by Island Creek's purchase of an annuity through an unrelated insurance company, the receipt of any payments thereunder being wholly independent of any profit or loss incurred by Island Creek subsequent to such termination;

That at the time of Respondent's appointment to the position of Commissioner and continuing to this date,

he neither had nor has any known financial or other interest in Occidental Petroleum Corporation or Island Creek, including any interest which could be deemed to conflict with his duties and responsibilities as Commissioner[.]

Accordingly, we also reject the petitioner's plea to remove the Commissioner from any further involvement in the civil actions.[11]

Finally, the petitioner also requests that we direct the Commissioner and performance council to promulgate rules governing the conduct of litigation commenced by the Commissioner. Again, we are aware of no legal requirement for the promulgation of rules and regulations governing the lawful exercise of an executive official's discretionary judgment. Therefore, we decline to direct the promulgation of such rules.

[11]The petitioner also argues that W.Va. Code § 23-2-5(f)(1) (1999) prohibits the Commissioner from waiving premium and interest owed to the fund. However, this statute concerns only subscribers to the fund who have defaulted in their payment of premiums. The civil actions in the instant case seek to collect payments from parties who cannot be said to have defaulted on their workers' compensation payments. Therefore, we find that this statute is not applicable.

In summary, we find that the dismissal of lawsuits such as those involved in this case lies within the discretion of the Commissioner. Further, we find that the Commissioner's dismissal of the civil actions was not arbitrary or capricious. Accordingly, because there is no clear legal duty on the part of the respondents to do the things which the petitioner seeks to compel, we deny the writ of mandamus.[12]

III.

CONCLUSION

In light of the foregoing, we deny the writ of prohibition/mandamus.

[12]We note that the attorney general filed a brief in this case in response to an order of this Court directing the attorney general to explain why he has not represented the State of West Virginia in the civil actions below. In this brief, the Attorney General asks us to overrule *Manchin v. Browning*, 170 W.Va. 779, 296 S.E.2d 909 (1982), and/or find W.Va. Code § 21A-2-6(17) unconstitutional. These issues are not properly before this Court and are not necessary to the disposition of this case. Also, these issues affect other executive officers who are not parties in this case. Accordingly, we decline to consider them.

Writ

denied.