

---

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. \_\_\_\_\_

---

SCA EFiled: Mar 24 2023  
03:40PM EDT  
Transaction ID 69639718

STATE OF WEST VIRGINIA ex rel.  
WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,

*Petitioner,*

v.

THE HONORABLE STEVEN L. SHAFFER,  
Judge, Circuit Court of Preston County,

*Respondent.*

---

PETITION FOR WRIT OF PROHIBITION

---

From the Circuit Court of Preston County

Lou Ann S. Cyrus, Esq. (WVSB # 6558)  
[lcyrus@shumanlaw.com](mailto:lcyrus@shumanlaw.com)  
Natalie C. Schaefer, Esq. (WVSB # 9103)  
[nschaefer@shumanlaw.com](mailto:nschaefer@shumanlaw.com)  
Shannon M. Rogers, Esq. (WVSB # 13920)  
[srogers@shumanlaw.com](mailto:srogers@shumanlaw.com)  
SHUMAN MCCUSKEY SLICER PLLC  
1411 Virginia Street East, Suite 200  
Charleston, West Virginia 25301

Steven R. Compton, Esq. (WVSB # 6562)  
[Steven.R.Compton@wvago.gov](mailto:Steven.R.Compton@wvago.gov)  
Deputy Attorney General  
Director, Health & Human Resources Division  
812 Quarrier Street, Sixth Floor  
Charleston, West Virginia 25301  
*Counsel for Petitioner*

## TABLE OF CONTENTS

Table of Contents .....	i
Table of Authorities .....	ii
Questions Presented .....	1
Statement of the Case.....	1
Summary of Argument .....	3
Statement Regarding Oral Argument.....	4
Argument .....	4
I.    Standard .....	4
II.   Discussion.....	7
A. The Circuit Court committed clear legal error and exceeded its judicial authority by entered an Administrative Order requiring the DHHR to pay its service providers within an arbitrary time frame set by the Court.	
Conclusion .....	18

## TABLE OF AUTHORITIES

### Cases

<i>Delardas v. Cnty. Ct. of Monongalia Cnty.</i> , 155 W. Va. 776, 186 S.E.2d 847 (1972).....	8
<i>Frymier-Halloran v. Paige</i> , 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995).....	14
<i>Hewitt v. State of West Virginia Department of Health and Human Resources</i> , 212 W.Va. 698, 575 S.E.2d 308 (2002).....	15
<i>Hickman v. Epstein</i> , 192 W. Va. 42, 44, 450 S.E.2d 406, 408 (1994).....	9
<i>In re Brandon Lee H.S.</i> , 218 W. Va. 724, 730, 629 S.E.2d 783, 789 (2006) .....	14
<i>Monongalia Improvement Co. v. Morris</i> , 106 W. Va. 243, 145 S.E.2d 387 (1928).....	9
<i>Nobles v. Duncil</i> , 202 W. Va. 523, 534-535, 505 S.E.2d 442, 453-454 (1998) .....	9
<i>State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist.</i> , 151 W. Va. 207, 151 S.E.2d 102 (1966).....	9
<i>State ex rel. Artimez v. Recht</i> , 216 W. Va. 709, 711, 613 S.E.2d 76, 78 (2005).....	15
<i>State ex rel. Billings v. City of Point Pleasant</i> , 194 W. Va. 301, 303, 460 S.E.2d 436, 438 (1995).....	8
<i>State ex rel. Beckley Newspapers Corp. v. Hunter</i> , 127 W. Va. 738, 34 S.E.2d 468 (1945).....	9
<i>State ex rel. Blake v. Hatcher</i> , 218 W. Va. 407, 624 S.E.2d 844 (2005).....	5
<i>State ex rel. Board of Education v. Johnson</i> , 156 W. Va. 39, 43, 190 S.E.2d 483, 486 (1972).....	6, 10
<i>State ex rel. W. Va. Dep't of Health &amp; Human Res. v. Bloom</i> , No. 22-0027, 2022 W. Va. LEXIS 701 (Nov. 17, 2022) .....	10, 11
<i>State ex rel. Buxton v. O'Brien</i> , 97 W. Va. 343, 125 S.E. 154 (1924).....	9
<i>State ex rel. Canterbury v. County Court</i> , 151 W.Va. 1013, 1019, 158 S.E.2d 151, 156 (1967).....	14
<i>State ex rel. Charleston Bldg. Comm'n v. Dial</i> , 198 W. Va. 185, 191, 479 S.E.2d 695, 701 (1996).....	8

<i>State ex rel. Cosenza v. Hill</i> , 216 W. Va. 482, 607 S.E.2d 811 (2004) .....	5
<i>State ex rel. Farber v. Mazzone</i> , 213 W. Va. 661, 664, 584 S.E.2d 517, 520 (2003) .....	4
<i>State ex rel. Farley v. Spaulding</i> , 1998, 507 S.E.2d 376, 203 W.Va. 275.....	15
<i>State ex rel. Greenbrier County Airport Authority v. Hanna</i> , 151 W. Va. 479, 153 S.E.2d 284 (1967).....	9
<i>State ex rel. Hall v. County Court of Mercer County</i> , 100 W. Va. 11, 129 S.E.2d 712 (1925).....	10
<i>State ex rel. Hedrick v. Board of Commissioners of the County of Ohio</i> , 146 W. Va. 79, 118 S.E.2d 73 (1961).....	9
<i>State ex rel. Hoover v. Berger</i> , 199 W. Va. 12, 483 S.E.2d 12 (1996).....	5
<i>State ex rel. Isferding v. Canady</i> , 199 W. Va. 209, 483 S.E.2d 555 (1997) .....	5
<i>State ex rel. Kucera v. City of Wheeling</i> , 153 W. Va. 538, 170 S.E.2d 367 (1969) .....	9
<i>State ex rel. Nelson v. Ritchie</i> , 154 W. Va. 644, 651, 177 S.E.2d 791, 795 (1970).....	6, 10
<i>State ex rel. Public Serv. Comm'n v. Indian Creek Gas Co.</i> , 154 W. Va. 835, 839, 179 S.E.2d 574, 576 (1971).....	9
<i>State ex rel. W. Va. Dep't of Health &amp; Human Res. v. Bloom</i> , No. 22-0027, 2022 W. Va. LEXIS 701, 29 (Nov. 17, 2022).....	8, 10
<i>State ex rel. W. Va. Nat'l Auto Ins. Co. v. Bedell</i> , 223 W.Va. 222, 672 S.E.2d 358 (2008).....	5
<i>Walter v. Ritchie</i> , 156 W. Va. 98, 191 S.E.2d 275 (1972).....	9
<b>Constitutions and Statutes</b>	
Constitution of the State of West Virginia, Article V.....	13, 14
West Virginia Code § 49-2-101, <i>et seq.</i> .....	16
West Virginia Code § 49-4-108.....	15
West Virginia Code § 49-4-601 .....	3

West Virginia Code § 53-1-1 ..... 4

**Other Authorities**

52 Am. Jur. 2d, *Mandamus*, Section 36 ..... 9

52 Am. Jur. 2d, *Mandamus*, Section 89 ..... 9

55 C.J.S. *Mandamus*, Section 10b ..... 9, 10

**Rules**

W. Va. R. App. P. 16 ..... 3

W. Va. R. App. P. 19(a)(1) and (4) ..... 4

## **QUESTIONS PRESENTED**

1. Whether the Circuit Court committed clear legal error and exceeded its legitimate powers in entering an Administrative Order directing the West Virginia Department of Health and Human Resources to make direct payments to socially necessary service providers within a prescribed time frame.

## **STATEMENT OF THE CASE**

Petitioner, West Virginia Department of Health and Human Resources (“DHHR”), files this Petition for Writ of Prohibition seeking to prohibit the enforcement of an Administrative Order entered on February 10, 2023, by the Circuit Court of Preston County, West Virginia, requiring that the DHHR make direct payments to any socially necessary service providers involved in current or future abuse and neglect proceedings in Preston County, West Virginia, within fifteen (15) business days of the entry of such Order. App. 000001-000003. Because Petitioner has been placed in the untenable position of possibly violating the Circuit Court’s Order if payment cannot always be made within this arbitrary, narrow timeframe, Petitioners feel they have no choice but to seek relief on an emergent basis pursuant to the Writ of Prohibition sought herein.

Specifically, the Circuit Court found that, due to a technical issue derived from the DHHR’s transitioning to new billing software, certain service providers who contract with the DHHR were not being “timely” paid and were “stating they cannot provide services if their invoices are not timely paid” by the DHHR. App. 000001. As a result, despite recognizing that the error was technological and temporary in nature, the Circuit Court ordered the DHHR to make direct payments to any socially necessary service provider involved in current abuse and neglect proceedings, as well as any future abuse and neglect proceedings in Preston County, West Virginia, within fifteen (15) business days of receipt of invoices for the aforementioned services. App. 000002-000003. The Court further ordered that the DHHR make payment in full to any service provider in ongoing abuse and neglect proceedings in Preston County for services rendered from

January 1, 2023, to present within fifteen (15) business days after entry of the Order. App. 000002-000003. This Order has no expiration date and appears to restrict the DHHR into perpetuity.

On February 28, 2023, less than fifteen (15) business days after entry of the Court's Administrative Order, Petitioner filed its Motion to Vacate and to Stay, requesting that the Court vacate its Administrative Order on the grounds that it exceeds the Court's judicial authority, violates the West Virginia Constitution's Separation of Powers Doctrine, and improperly attempts to modify the terms of the contracts the DHHR maintains with its service providers. App. 000004-000019. The DHHR also advised the Court of the exhaustive efforts it had already been making to resolve the technological issues which initially caused delays in payment. App. 000017-000018. The Court was further informed of the DHHR's decision to contravene its own process for processing payment to ensure that its service providers were timely paid, and, as a result, that all invoices from January and February 2023 had been satisfied. App. 000017-000018.

In addition to its Motion seeking that the Circuit Court vacate its Administrative Order, Petitioner requested that the Court stay the Administrative Order while the Petitioner's Motion to Vacate is pending. To date, the Circuit Court has not ruled on the motion. Thus, the Petitioner has been unable to obtain relief from the Administrative Order from the Circuit Court. As a result of the Circuit Court's failure to vacate its Administrative Order, the DHHR has been placed in an impossible position because it cannot guarantee compliance with the Court's Order regarding future payments, risking the DHHR being in contempt of the Order. Petitioner therefore seeks relief on an emergent basis pursuant to the Writ of Prohibition sought herein and the separate Motion for Expedited and/or Emergency Relief being filed contemporaneously herewith.

Pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure, Petitioner requests that this Court issue a Writ of Prohibition, vacating the Administrative Order of the Respondent,

the Honorable Steven L. Shaffer, and further prohibiting Respondent from enforcing the Administrative Order requiring the DHHR to make full payment to its service providers within a time frame set unilaterally by the Circuit Court. W. Va. R. App. P. 16.

### **SUMMARY OF ARGUMENT**

The Circuit Court committed clear error and exceeded its legitimate powers when it entered a procedurally improper Administrative Order compelling the DHHR to make past and future payments to its socially necessary service providers within a fifteen (15) business day period, based on a technological delay in payments which, at most, only existed for six weeks prior to the Court entering its Administrative Order. The Circuit Court erred in failing to grant the Petitioner relief from the Administrative Order based on its overstep of authority in entering an Administrative Order directing functions of the executive branch.

The Circuit Court further exceeded its legitimate powers by finding that West Virginia Code § 49-4-601 granted it the authority to direct the DHHR's time frame for payment to its vendors, in an Order which violates the Separation of Powers doctrine of the West Virginia Constitution in that the Order attempts to exercise administrative duties of the executive branch.

Further, the Circuit Court committed clear error and exceeded its powers by failing to vacate an Order which attempts to modify terms of previously existing contracts to which the Circuit Court is not a party.

Accordingly, this Court should immediately stay the Circuit Court's Administrative Order, schedule this matter for oral argument, enter an order granting the Writ of Prohibition, prohibiting the lower court from enforcing the Administrative Order, and direct the Circuit Court to reverse its Administrative Order entered on February 10, 2023.

## STATEMENT REGARDING ORAL ARGUMENT

Although this case involves issues of settled law that are narrow in scope and concerns the circuit court's clear legal error in applying that settled law, oral argument in this matter under Rule 19 likely would aid this Court in its decision process, W. Va. R. App. P. 19(a)(1) and (4).

### ARGUMENT

#### I. Standard

This Court's original jurisdiction is recognized in West Virginia Code § 53-1-1, *et seq.*, and Rule 16 of the West Virginia Rules of Appellate Procedure. "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1. A writ of prohibition is proper whenever an inferior court does not have jurisdiction or has jurisdiction but exceeds its legitimate powers. *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 664, 584 S.E.2d 517, 520 (2003).

Petitioners seek a writ of prohibition because the Circuit Court exceeded its legitimate powers and committed clear legal error when it entered an Administrative Order directing the DHHR to make payments to its service providers within a prescribed time period for all current and future invoices received in Preston County, West Virginia. In such instances, this Court has established the following standard of review for issuing a writ of prohibition:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are

general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996); *see also* Syl. Pt. 2, *State ex rel. West Virginia Nat'l Auto Ins. Co. v. Bedell*, 223 W.Va. 222, 672 S.E.2d 358 (2008); Syl. Pt. 1, *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 624 S.E.2d 844 (2005); Syl. Pt. 1, *State ex rel. Cosenza v. Hill*, 216 W. Va. 482, 607 S.E.2d 811 (2004); Syl. Pt. 2, *State ex rel. Isferding v. Canady*, 199 W. Va. 209, 483 S.E.2d 555 (1997).

The first two factors--whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief and whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal--unquestionably are present here. The subject Administrative Order was entered without formal advance notice to Petitioner. Indeed, the Administrative Order was not entered in any specific case action, and therefore, procedurally, it is unclear in what manner relief may be sought aside from the motions filed. In response, Petitioner filed a Motion to Dismiss and a Motion to Stay, yet has received no ruling from the Circuit Court on those motions. To that point, the undersigned's office was informally advised by Judge Shaffer's law clerk to file a miscellaneous action to be heard on Petitioner's Motion. It is unheard of that a party against whom an Order is issued has no formal docketed mechanism to seek relief, which underscores the fact that the Administrative Order was procedurally improper. The Circuit Court's imposition on such operational processes of the DHHR is violative of the separation of powers doctrine.

Moreover, Petitioner explained in the Motion that it was taking immediate actions to address the payment issues that only recently arose due to a change in software. This indicated not only that the issue was being addressed, but that it was temporary in nature, such that the

Administrative Order was unnecessary. Still, the Circuit Court has not acted on the motion or taken any action to rescind the Administrative Order.

The third and most important factor – that the Circuit Court’s Administrative Order is clearly erroneous as a matter of law – exists here. The evidence indisputably demonstrated that Petitioner was taking steps to address the temporary payment issues. Due to the scope of services provided by Petitioner, it is impossible to *guarantee payment of all invoices* within the prescribed time frame required by the Circuit Court.

The law surrounding writs of mandamus is well settled that mandamus is unavailable to compel the performance of official duties which are being performed and that mandamus is similarly unavailable where compliance with the mandate of the writ is impossible. *See State ex rel. Nelson v. Ritchie*, 154 W. Va. 644, 651, 177 S.E.2d at 795 (mandamus “will not issue if the duty sought to be enforced has already been done or is being performed,”); *State ex rel. Board of Education v. Johnson*, 156 W. Va. 39, 43, 190 S.E.2d 483, 486 (1972) ([m]andamus will not be granted where compliance with the mandate of the writ is impossible”). Likewise, the foregoing demonstrates a persistent disregard for procedural and substantive law.

With regard to the Circuit Court’s Administrative Order compelling the payment of provider invoices within a short, prescribed time frame, the third and fourth factors are present as well. Notably, Petitioner was deprived of the opportunity to present evidence on the issue of temporarily delayed payments because it was not made aware of the pending issues before the Administrative Order was entered. Additionally, the time frame for payment is arbitrary and capricious.

With regard to the fifth factor-- whether the lower tribunal’s order raises new and important problems or issues of law of first impression--the Circuit Court’s Order regarding payment of

socially necessary services creates the potential for conflicting directives from other circuit court courts, who may order Petitioner to handle provider invoices differently. The Order itself further directly contradicts Petitioner's own internal "checks and balances" system in which invoices are reviewed and confirmed accurate prior to payment.

As such, Petitioner seeks a Writ of Prohibition prohibiting the Circuit Court's enforcement of its Administrative Order, removing the time constraint and allowing the Petitioner to continue performing its executive duties without continued interference and oversight by the Circuit Court. Accordingly, Petitioner seeks a Writ of Prohibition prohibiting the Circuit Court from enforcing its Administrative Order and reversing the Administrative Order as it exceeds the Circuit Court's scope of authority and constitutes clear legal error.

## **II. Discussion**

### **A. The Circuit Court committed clear legal error and exceeded the scope of its judicial authority by entering an Administrative Order requiring the DHHR to pay its service providers within an arbitrary time frame set by the Court.**

The Circuit Court's Administrative Order should be reversed as it constitutes clear legal error and is outside the scope of judicial authority in that it operates as mandamus relief which is inappropriate under the circumstances, violates the Separation of Powers Doctrine of the West Virginia Constitution, and attempts to modify terms of a previously existing contract. The DHHR has made exhaustive efforts to remedy what was a temporary and unforeseen delay in payments due to a software malfunction, and the Court's Order regarding the DHHR's operation should be reversed.

- i. **Though Petitioner does not dispute that the underlying concern regarding its payment to socially necessary service providers is significant to its operation, an Administrative Order providing a broad sweeping mandate by requiring payment within fifteen (15) business days is outside the scope of the Circuit Court’s authority. The Circuit Court’s February 10, 2023 Administrative Order operates as an order of “mandamus” and exceeds the scope of its authority because the DHHR has not refused to act.**

A Circuit Court’s remedy of mandamus relief is an extraordinary one that is “available only in limited and exceptional circumstances,” *State ex rel. Charleston Bldg. Comm’n v. Dial*, 198 W. Va. 185, 191, 479 S.E.2d 695, 701 (1996), which should be “invoked sparingly.” *State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 303, 460 S.E.2d 436, 438 (1995). In those exceptional circumstances, a writ of mandamus may be a “proper proceeding by which to compel a public officer to perform a mandatory, nondiscretionary legal duty.” Syl. Pt. 3, *Delardas v. Cnty. Ct. of Monongalia Cnty.*, 155 W. Va. 776, 186 S.E.2d 847 (1972). However, such a power of a circuit court is also limited to be used only to “compel tribunals and officers exercising discretionary and judicial powers to act, *when they refuse to do so*, in violation of their duty...” Syl. Pt. 2, *State ex rel. W. Va. Dep’t of Health & Human Res. v. Bloom*, No. 22-0027, 2022 W. Va. LEXIS 701 (Nov. 17, 2022) (internal quotations omitted) (emphasis added).

“Attempting to further limit the extraordinary remedy of mandamus, [the West Virginia Supreme Court of Appeals has] established additional guidelines which a party<sup>1</sup> requesting mandamus must satisfy before [the Supreme Court] will grant such relief[:]” “A writ of mandamus will not issue unless three elements coexist – (1) The existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of respondent to do the thing which petitioner seeks to compel; and (3) the absence of another adequate remedy at law.” *Dial*, 198

---

<sup>1</sup> It is salient to once again note that, upon information and belief, no “party” sought mandamus relief. The subject Administrative Order was apparently entered *sua sponte* by the Circuit Court absent a motion and without prior notice to Petitioner.

W. Va. at 191, 479 S.E.2d at 701 (quoting Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969)).

Mandamus “will not be employed ‘to require acts which are being performed or have been performed, or will be performed without coercion.’” *State ex rel. Public Serv. Comm’n v. Indian Creek Gas Co.*, 154 W. Va. 835, 839, 179 S.E.2d 574, 576 (1971) (quoting 52 Am. Jur. 2d, *Mandamus*, Section 36, and citing *State ex rel. Hedrick v. Board of Commissioners of the County of Ohio*, 146 W. Va. 79, 118 S.E.2d 73 (1961); *State ex rel. Beckley Newspapers Corp. v. Hunter*, 127 W. Va. 738, 34 S.E.2d 468 (1945); *Monongalia Improvement Co. v. Morris*, 106 W. Va. 243, 145 S.E.2d 387 (1928); 52 Am. Jur. 2d, *Mandamus*, Section 89, 55 C.J.S. *Mandamus*, Section 10(b).

The purpose of a mandamus action is to compel a public office or officer to discharge a legal duty that the public office or officer has *refused* to discharge:

It is well settled that “mandamus lies to require the discharge by a public officer of a nondiscretionary [sic] duty.” Syllabus Point 3, *State ex rel. Greenbrier County Airport Authority v. Hanna*, 151 W. Va. 479, 153 S.E.2d 284 (1967). A non-discretionary or ministerial duty in the context of a mandamus action is one that “is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance[.]” Syllabus Point 3, in part, *Walter v. Ritchie*, 156 W. Va. 98, 191 S.E.2d 275 (1972). Also, “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).

*Nobles v. Duncil*, 202 W. Va. 523, 534-535, 505 S.E.2d 442, 453-454 (1998)(Emphasis added.)

Further, “[t]he function of a writ of mandamus is to enforce the performance of official duties arising from the discharge of some public function, or imposed by statute.” *Hickman v. Epstein*, 192 W. Va. 42, 44, 450 S.E.2d 406, 408 (1994); Syl. pt. 1, *State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist.*, 151 W. Va. 207, 151 S.E.2d 102 (1966) (“Mandamus is a proper remedy

to require the performance of a nondiscretionary duty by various governmental agencies or bodies.”).

In 55 C.J.S., *Mandamus*, Section 10b, the text contains these statements: “As a rule, mandamus will not issue if the duty sought to be enforced has already been done or is being performed. The office of the writ is *only to compel action by the unwilling*, and if the act has already been done the writ would be fruitless. Also *the writ will not lie to compel performance of an act which respondent shows a willingness to perform without coercion.*” [Likewise,] “[m]andamus will not issue to compel a party to perform an act which he has already begun to do, and it is apparent that he will in good faith perform.”

*Nelson*, 154 W. Va. at 651, 177 S.E.2d at 795 (citing Syl. pt. 2, *State ex rel. Hall v. County Court of Mercer County*, 100 W. Va. 11, 129 S.E.2d 712 (1925))(Emphasis added.)

Similarly, “[m]andamus will not issue to compel a party to perform an act which he already begun to do, and it is apparent that he will in good faith perform.” *Id.* at Syl. Pt. 3. Further, such an Order cannot be used to compel an act which one is not capable of performing or where ensuring compliance is impossible. *See State ex rel. Bd. of Educ. of Kanawha Cnty. v. Johnson*, 156 W. Va. 39, 43, 190 S.E.2d 483, 486 (1972).

Recently, this Court reviewed a similar mandamus action concerning a Circuit Court’s mandates regarding the DHHR’s day-to-day operation of its child protective services staffing and housing for children in emergency removal situations. In *State ex rel. DHHR v. Bloom*, the Supreme Court of Appeals of West Virginia recognized that the Circuit Court exceeded its scope of judicial authority by not granting the DHHR relief from a writ of mandamus which mandated certain CPS staffing benchmarks in the Kanawha County, West Virginia CPS office. No. 22-0027, 2022 W. Va. LEXIS 701 (Nov. 17, 2022). Specifically, the Court stated:

[T]he circuit court clearly erred when it refused to grant the DHHR relief from the original mandamus action after its good faith efforts to fix the Kanawha County staffing issues became apparent... The DHHR is entitled to a writ of prohibition to prevent the circuit court

from continuing to enforce the original writ of mandamus concerning staffing issues in the Kanawha County CPS Office.

*State ex rel. W. Va. Dep't of Health & Human Res. v. Bloom*, No. 22-0027, 2022 W. Va. LEXIS 701, 29 (Nov. 17, 2022). In the *Bloom* case, this Court granted a Writ of Prohibition after the circuit court issued, and later expanded, the scope of a writ of mandamus which required, in part, that certain staffing percentages of the Kanawha County CPS office be met and eventually expanded its scope to staffing of CPS, foster care, and adoption units statewide. In that case, the parties entered into a Stipulation Agreement regarding the DHHR's efforts to increase staffing and retention in the Kanawha County CPS office and outlined the DHHR's expansive efforts to increase staffing. In recognizing the efforts of the DHHR to address these staffing problems, the Supreme Court noted, "[w]hile we recognize that the DHHR's amelioration of the Kanawha County CPS Office's staffing issues has not completely eradicated the problems identified, progress towards that end is required by our mandamus standards, but perfection is not." *Id.* at 28.

In light of this precedent, the Circuit Court's broad and unilateral undocketed Administrative Order directing an arbitrary time period of fifteen (15) business days for payment by DHHR of invoices to its vendors exceeds the scope of judicial authority and should be reversed, as the DHHR has addressed the issues the Order attempts to resolve and was doing so prior to the Circuit Court's intervention.

As noted in the Order itself, the DHHR began using a new software, WV PATH, in January of 2023 to manage its functions related to its handling of social services, leading to growing pains in making the new software compatible with the software utilized to manage the authorization and payment of the DHHR's vendors. *See* Affidavit of Jeffrey Pack, Commissioner of the Bureau for Social Services of the DHHR, App. 000017-000018. This system change compounded an already existing issue with the administrative services organization's recent system change. As a result of

this interruption, invoices submitted by vendors to the accounting software could not be processed immediately by WV PATH as had been the standard in the past. To address this problem, the DHHR, contravening its own internal check and balance system to quickly issue payments of invoices, has worked to pay these invoices directly, outside of the software, while its employees work tirelessly to resolve the technological malfunction. *Id.* As a result, any delays in payment caused by this change occurred within the first six weeks of the calendar year. *Id.*

During this time, the DHHR has worked to apprise its service providers of the status of this temporary delay. *Id.* Further, public announcements regarding payments are posted on the DHHR website and the DHHR's social media platforms. *Id.* These ongoing efforts underscore the DHHR's work to resolve these problems appropriately within the executive branch of government and are anticipated to be resolved within the next month. *Id.* The DHHR also has dedicated staff to resolve the payment issues. *Id.*

In a good faith effort to continue to address these issues as quickly and efficiently as possible, the DHHR directed payment to its providers and made payments to socially necessary service providers for any past due invoices in January 2023. Subsequent payments for January 2023 invoices have been made in February. *Id.*

Summarily, the DHHR has engaged in exhaustive efforts to address a recent and temporary issue caused by new software. The Court's Administrative Order is inappropriate because it has no expiration date and mandates the manner in which the DHHR manages and internally administers its payment protocols. As a result, the Circuit Court's Administrative Order, which essentially provides unrequested mandamus relief, exceeds the scope of its authority as mandamus relief is not proper in cases such as this, where the entity has worked tirelessly to resolve the very problem the Order seeks to address. More importantly, the relief provided in the Court's Order is

impetuous as the DHHR has diligently worked to address these issues, internally, since it first became aware of any problems. Timely payment of services for the DHHR was a new and recent challenge caused by a change in software technology. The vested authority of the DHHR to manage and administer its efforts to solve internal problems (like its payment processes) has been recognized by the West Virginia Supreme Court of Appeals.

Further, the Circuit Court's Administrative Order presents a potentially impossible mandate, as Petitioner cannot guarantee that payments to its providers will be made within fifteen (15) business days of receipt of all invoices. While the DHHR can and does make every effort to pay all invoices in a reasonable time frame, the DHHR cannot require invoices be submitted on a certain timetable and cannot ensure all invoices do not require a review and confirmation of authorization, lest it be subject to contempt of court. A fifteen (15) business day payment time frame for all providers is untenable and unreasonable. This plain fact makes it impossible for the DHHR to guarantee that this time frame can be satisfied. Therefore, the Court's Administrative Order must be reversed as it exceeds the scope of the Court's judicial authority.

**ii. The Court's February 10, 2023 Administrative Order Violates the Separation of Powers Doctrine Guaranteed Under the West Virginia Constitution.**

The Administrative Order mandating that the DHHR pay its vendors within fifteen (15) business days is antithetical to our State Constitution's well-established Separation of Powers doctrine, which affords the distinct branches of our State's government the authority to exercise and manage their own functions and responsibilities. "The separation of powers doctrine requires that the specific functions of the legislative, executive, and judicial branches of government are to be kept distinct." *In re Brandon Lee H.S.*, 218 W. Va. 724, 730, 629 S.E.2d 783, 789 (2006). Article V, Section I of the West Virginia Constitution affords WVDHHR, as a state agency and

part of the executive branch of government, the ability to make discretionary choices with regard to its day-to-day operations, including how it manages its services.

This Court has recognized that separation of powers precludes courts from exercising administrative duties relating to the executive branch. See *In re Brandon Lee H.S.* 218 W. Va. at 731, 629 S.E.2d at 790; *State ex rel. Canterbury v. County Court*, 151 W.Va. 1013, 1019, 158 S.E.2d 151, 156 (1967). “Administrative agencies are active players in the division of powers, while always subjected to properly enacted and valid laws and constitutional constraints, their actions are entitled to respect from both the legislature and the courts.” *Frymier-Halloran v. Paige*, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995).

“The separation of powers doctrine requires that the specific functions of the legislative, executive, and judicial branches of government are to be kept distinct.” *In re Brandon Lee H.S.*, 218 W. Va. 724, 730, 629 S.E.2d 783, 789 (2006). Payment of vendor services is a discretionary function of the DHHR, and it takes place within the parameters of the DHHR’s applicable contracts. Article V, Section I of the West Virginia Constitution affords the DHHR, as a state agency and part of the executive branch of government, the ability to make choices with regard to the process in which it makes payments to its providers.

The use of what is, in essence, a mandamus order disguised as an Administrative Order, requiring the DHHR to pay all invoices by a certain deadline, improperly encroaches upon the executive functions of the DHHR. Additionally, the Court’s use of an “Administrative Order” to impose certain time frames for the DHHR to pay its vendors is an inappropriate use of such judicial authority and likewise impedes on the DHHR’s authority as an agency within the executive branch.

Rather, an Administrative Order’s purpose is a procedural mechanism designed for an officer of the judicial branch in its *own* operation, rather than the administration and management

of an entity of government beyond the judicial branch. The Supreme Court of Appeals of West Virginia has reiterated this notion, stating:

In order for a court to invoke use of its inherent power to require resources, the court must demonstrate that such resources are reasonably necessary for the performance of its responsibilities in the administration of justice; although *courts must be cautious not to reach beyond the power of the judicial branch*, it is crucial for the judiciary to be able to invoke such power as is reasonably necessary to maintain itself as an independent and *equal* branch of government.

*State ex rel. Farley v. Spaulding*, 1998, 507 S.E.2d 376, 203 W.Va. 275, (internal citation omitted, emphasis added and in original).

Further, the Circuit Court's reliance upon W. Va. Code § 49-4-108 is misplaced, as that section does not authorize the Court to mandate payment by DHHR within a certain time frame. Rather, W. Va. Code § 49-4-108, enacted following the Supreme Court of Appeal's decisions in *Hewitt v. State of West Virginia Department of Health and Human Resources*, 212 W.Va. 698, 575 S.E.2d 308 (2002), and *State ex rel. Artimez v. Recht*, 216 W. Va. 709, 711, 613 S.E.2d 76, 78 (2005), addressed the DHHR's authority to establish fees for services in abuse and neglect matters and interpreted state law at the time to allow the Court to order the DHHR to pay for professional services at a certain rate. Likely, in part as a result from *Artimez*, the legislature passed W. Va. Code § 49-4-108, which establishes that a Circuit Court may order the DHHR to pay the *Medicaid rates* for professional services in these cases, and further provides the Court with authority to take additional measures should *the services* not be provided within 30 days. A plain reading of the statute shows no authority granted to a Circuit Court to dictate the time frame in which the DHHR must pay its vendors providing those professional services. The requirement imposed on the DHHR by the Court's order unnecessarily intersects the judicial and executive branches of our

State's government and improperly usurps the DHHR's authority in its administration and management of its contractual vendor relationships.

Therefore, in accordance with the West Virginia Constitution and West Virginia law, the Court's Order is improper because it necessarily conflicts with the vested authority of the DHHR as a state agency within the executive branch of our State's government authorized to administer social and human services. W. Va. Code § 49-2-101. Accordingly, the DHHR respectfully requests that the Court reverse the Circuit Court's February 10, 2023 Administrative Order because it unquestionably violates the Separation of Powers doctrine of the West Virginia Constitution.

**iii. The Court's Order Impermissibly Attempts to Modify The Terms of Contractual Obligations of Providers.**

The Circuit Court's Administrative Order regarding the DHHR's timing for paying its service providers after experiencing a technical delay related to the launching of a new billing software is clear legal error in that it improperly attempts to modify terms of the DHHR's contractual relationships with its providers.

Petitioner engages its service providers via private contracts in accordance with the DHHR's statutory duties for operation in compliance with West Virginia Code. As a result, it is noteworthy that socially necessary service providers are contractually obligated to provide their services to the DHHR's clients in accordance with those contracts. Generally, those contracts include terms regarding the submission of invoices and payment for providing those services; however, they do not generally prescribe a time frame for *payment* of any invoices. App. 000017-18. Similarly, these contracts do not require a certain time frame for issuing invoices by services providers (i.e., some providers invoice weekly or monthly).

The Court's Administrative Order unnecessarily interferes with the DHHR's contractual relationships with its services providers, which operate independently from the DHHR, by adding

terms to the contract which do not exist. Certainly, these contractual relationships are no different than the relationship between any two parties to a contract, wherein the terms of the agreement have full force and effect, and no Court can modify the terms on its own motion. The Court's Administrative Order does just that: attempts to interfere with private contractual relationships. Such an interference operates contrary to our State's laws regarding contract formation and basic breach of contract principles.

Should any vendor allege that a breach of a contract has occurred, there are, of course, remedies for handling such claims, none of which exist here. Instead, the Circuit Court, *sua sponte*, inserted terms into the DHHR's contracts with its vendors, which do not prescribe the time frames for payment mandated by the Court in its Administrative Order. Because it seeks to modify previously agreed upon terms of the DHHR and its service providers, the Order is therefore improper and should be reversed.

The DHHR recognizes and understands the hardships of this temporary delay in payment; however, it has worked diligently to correct the problems and issue payments as quickly as possible. Unfortunately, despite its best efforts, the DHHR cannot *guarantee* that payment can be made within fifteen (15) business days at any time, and certainly, not into perpetuity, due to the system processes the DHHR currently has in place that all providers have agreed upon.

Petitioner respectfully requests that this Court issue a Writ of Prohibition prohibiting the execution of the Circuit Court's Administrative Order entered on February 10, 2023, in light of its encroachment into private contractual relationships of the Petitioner.

## CONCLUSION

Petitioner West Virginia Department of Health and Human Resources requests that this Court issue a Writ of Prohibition, prohibiting the Circuit Court from enforcing its Administrative Order regarding the DHHR's payments to its service providers.

*/s/Natalie C. Schaefer*

Lou Ann S. Cyrus, Esq. (WVSB # 6558)

[lcyrus@shumanlaw.com](mailto:lcyrus@shumanlaw.com)

Natalie C. Schaefer, Esq. (WVSB # 9103)

[nschaefer@shumanlaw.com](mailto:nschaefer@shumanlaw.com)

Shannon M. Rogers, Esq. (WVSB #13920)

[srogers@shumanlaw.com](mailto:srogers@shumanlaw.com)

SHUMAN MCCUSKEY SLICER PLLC

1411 Virginia Street East, Suite 200

Charleston, West Virginia 25301

and

Steven R. Compton, Esq. (WVSB # 6562)

[Steven.R.Compton@wvago.gov](mailto:Steven.R.Compton@wvago.gov)

Deputy Attorney General

Director, Health & Human Resources Division

812 Quarrier Street, Sixth Floor

Charleston, West Virginia 25301

*Counsel for Petitioner*

---

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. \_\_\_\_\_

---

STATE OF WEST VIRGINIA ex rel.  
WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,

*Petitioner,*

v.

THE HONORABLE STEVEN L. SHAFFER,  
Judge, Circuit Court of Preston County,

*Respondent.*

**VERIFICATION**

I, Natalie C. Schaefer, after first being duly sworn upon oath, respectfully state that I am counsel for the Petitioner named in the foregoing Petition for Writ of Prohibition; that I am familiar with the contents of the related Appendix; and that the facts and allegations set forth in the Petition are true and accurate to the best of my knowledge and belief.



\_\_\_\_\_  
Natalie C. Schaefer, Esq. (WVSB #9103)

Taken, sworn to and subscribed before me this 24<sup>th</sup> day of March, 2023.

My commissions expires: May 30, 2027.



Tina M. Harrison  
Notary Public

---

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. \_\_\_\_\_

---

STATE OF WEST VIRGINIA ex rel.  
WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,

*Petitioner,*

v.

THE HONORABLE STEVEN L. SHAFFER,  
Judge, Circuit Court of Preston County,

*Respondent.*

**CERTIFICATE OF SERVICE**

I, Natalie C. Schaefer, counsel for Petitioner, hereby certify that I filed the foregoing “Petition for Writ of Prohibition” via File & ServeXpress and mailed a true copy thereof in the United States mail, with first-class postage prepaid, on this day, March 24, 2023, addressed as follows:

Hon. Steven L. Shaffer, Circuit Judge  
Eighteenth Judicial Circuit  
Preston County Courthouse  
101 West Main Street, Room 303  
Kingwood, WV 26537

*/s/Natalie C. Schaefer*

Lou Ann S. Cyrus, Esq. (WVSB #6558)  
Natalie C. Schaefer, Esq. (WVSB #9103)  
Shannon M. Rogers, Esq. (WVSB #13920)  
*Counsel for Petitioner*