STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Air Evac EMS, Inc.,
Petitioner

v.) **No. 24-452** (ICA No. 23-ICA-127 & 23-ICA-135)

Brent Wolfinbarger, in his capacity as Director of the Public Employees Insurance Agency, and Jared Robertson, Jason Myers, Michael Cook, William Milam, Michael T. Smith, Eric Householder, James Cava, Jr., Doug Coffman, John Frankovitch, and Hugh Murray, in their capacities as Members of the Public Employees Insurance Agency Finance Board,
Respondents.

MEMORANDUM DECISION

The petitioner, Air Evac EMS, Inc. ("Air Evac"), appeals the June 13, 2024, decision of the Intermediate Court of Appeals ("ICA"), which concluded that the Public Employees Insurance Agency ("PEIA") is entitled to sovereign immunity from claims asserted by Air Evac. *See Cunningham v. Air Evac*, 250 W. Va. 200, 902 S.E.2d 532 (Ct. App. 2024). Air Evac argues that the ICA erred by applying sovereign immunity and ordering the dismissal of its case. PEIA argues in support of the ICA's decision.[1]

This Court has carefully considered the briefs and oral arguments of the parties, the submitted record, and the pertinent authorities. For reasons that will be discussed more fully *infra*, we conclude that the doctrine of sovereign immunity is inapplicable, and we reverse the ICA's decision and remand this case for entry of an order requiring PEIA to hold a contested case hearing on the claims asserted by Air Evac. Because this appeal presents no substantial question of law, a memorandum decision is appropriate pursuant to the "limited circumstances" requirement of Rule 21(d) of the West Virginia Rules of Appellate Procedure.

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[1] Air Evac appears by counsel Carte P. Goodwin and Alex J. Zurbuch. PEIA appears by counsel Attorney General John B. McCuskey, Solicitor General Michael R. Williams, Assistant Solicitor General Frankie A. Dame, and Deputy Solicitor General and Special Counsel Caleb B. David.

Air Evac is a federally regulated air ambulance carrier that is required under state law to provide service in West Virginia.[2] PEIA provides medical and other insurance coverage to eligible employees and establishes and promulgates rules "for the administration of these plans." W. Va. Code § 5-16-7(a). Prior to 2011, PEIA reimbursed Air Evac's billed charges for services provided to its insureds, but in 2011, PEIA implemented fee schedules that capped the reimbursement rate for providers such as Air Evac at the federal Medicare Rural Rate. In 2016, the West Virginia Legislature passed a statute that (1) limited air ambulance charges to the federal Centers for Medicare and Medicaid Services rate and (2) prohibited "balance-billing" for anything above that rate. *See* W. Va. Code § 5-16-8a(a) (2016).[3] After the passage of these laws, Air Evac filed a Complaint for Declaratory and Injunctive Relief in the United States District Court for the Southern District of West Virginia. *See Air Evac EMS, Inc. v. Cheatham*, No. 2:16-cv-5224, 2017 WL 4765966 (S.D. W. Va. October 20, 2017). In its complaint, Air Evac argued that PEIA's reimbursement cap was preempted by the Airline Deregulation Act of 1978 ("ADA"), which mandates that "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under [49 U.S.C. § 41101 *et. seq.*]." 49 U.S.C. § 41713(b)(1). The federal district court agreed that the "challenged laws—including the mandatory fee schedules and the prohibition of balance-billing—ha[d] the 'force and effect of law[]'" and were preempted by the ADA. *Cheatham*, 2017 WL 4765966, at *8.

PEIA appealed, but the district court's decision was ultimately affirmed by the Fourth Circuit Court of Appeals in 2018. *See Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751 (4th Cir. 2018). While PEIA's appeal was pending, Air Evac demanded that PEIA pay the full cost of its transports beginning on the date it filed its complaint in federal court, June 9, 2016. PEIA disputed that it was required to pay Air Evac's full costs. In 2019, the Legislature enacted a new statute that required PEIA to pay air ambulance providers at the Medicare Rural Rate, but it removed the prohibition on balance-billing. 2019 W. Va. Acts 1213–1214, *codified in* W. Va. Code § 5-16-8a. According to PEIA, Air Evac accepted the Medicare Rural Rate going forward. Air Evac, however, did not abandon its claim for full payment on one hundred fifteen transports that it provided to PEIA insureds between the date that it filed its complaint in federal court, June 9, 2016, and the date that the removal of the prohibition on balance-billing became effective, June 4, 2019. In mid-2019, former PEIA Director Cheatham reimbursed Air Evac at the Medicare Rural Rate.[4] Air Evac's total charges for the transports at issue were $4,773,034; after PEIA's payments at the Medicare Rural Rate, Air Evac asserts that it was left with $4,018,046 in unpaid fees for

[2] "West Virginia law forbids Air Evac from refusing service to any patient, regardless of insured status." *Air Evac EMS, Inc. v. Cheatham*, No. 2:16-cv-5224, 2017 WL 4765966, at *1 (S.D. W. Va. October 20, 2017) (citing W. Va. Code R. § 64-48-4.15).

[3] In this context, the practice of balance-billing refers to attempts by air ambulance companies to seek payment directly from PEIA insureds when PEIA refused to pay the full reimbursement costs charged by the air ambulance company.

[4] Before the circuit court, former Director Cheatham testified via affidavit that the reimbursement amount paid to Air Evac was the same amount paid to other providers within the same category.

transports. These unpaid fees for one hundred fifteen transports form the basis of the dispute in this matter.

On October 24, 2019, Air Evac sent a written demand to PEIA for a "contested case hearing," requesting that PEIA "determine its legal rights, and the legal duties of [Air Evac], 'with regard to payments on certain air ambulance transports[.]'" Air Evac's demand was made pursuant to PEIA's Rules of Procedure for Contested Case Hearings ("contested case hearing rules") found at West Virginia Code of State Rules §§ 151-3-1 to -14. Twenty days later, on November 13, 2019, PEIA replied, contending that Air Evac's reimbursement dispute was expressly exempted from the Administrative Procedures Act ("APA") and therefore, did not qualify for a "contested case hearing." Although PEIA acknowledged its contested case hearing rules, it indicated that the "procedures outlined [in its contested case hearing rules] are inapplicable to Air Evac's *Demand*." PEIA explained its position by informing Air Evac that subsequently enacted statutes exempt its "decision-making regarding the 'establishment of reasonable and customary expenses' incurred by its insurance plans from the APA." Because PEIA maintained that Air Evac's demand related to "provider payments, expenses, and reimbursements," PEIA claimed that the "Legislature's directives" prevented it from granting Air Evac a contested case hearing. PEIA also informed Air Evac that it "may pursue available remedies in the Circuit Court of Kanawha County" if it believed that PEIA improperly exercised its discretion regarding Air Evac's reimbursement claims.

Thereafter, Air Evac filed the underlying "Petition for Appeal," which was docketed as an administrative appeal in the Circuit Court of Kanawha County. The petition states that the appeal was based on PEIA's "summar[y] deni[al] [of] Air Evac's demand for proceedings pursuant to PEIA's Legislative Rules for Contested Case Hearings, W. Va. Code R. § 151-3-1 *et seq*." The petition recounted PEIA's denial of a hearing and alleged "[t]hat denial is appealable to [the circuit court] in accordance with W. Va. Code § 29A-5-4 and W. Va. Code R. § 151-3-13 [making final orders issued pursuant to PEIA's contested case rules subject to appeal in accordance with the APA]." The petition's assignments of error addressed both PEIA's refusal to grant a hearing and its refusal to reimburse Air Evac for the disputed transports.[5] In response, PEIA contended, among other things, that the circuit court lacked jurisdiction because there was no "contested case" to appeal and that Air Evac's petition was barred by sovereign immunity.

On December 16, 2022, the circuit court entered an order granting Air Evac's petition, in part, and denying the petition, in part. Specifically, the circuit court determined that: (1) PEIA was not entitled to sovereign immunity as it had raised in its briefing; and (2) PEIA's contested case hearing rules were still in effect and required a hearing upon request, save two delineated exceptions, which were not invoked by PEIA. The circuit court remanded for "further administrative proceedings consistent with the APA and PEIA's Contested Case Hearing Rules." Despite remanding the case with specific directions, the circuit court "proceed[ed] to address the pure questions of law presented by Air Evac's *Petition* with regard to payments related to the charges and transports at issue." In that regard, the circuit court: (1) found that Air Evac is not entitled to full payment on the disputed charges; and (2) ordered the parties to negotiate the amount owed for the disputed charges.

[5] In addition to requesting a contested case hearing, Air Evac requested the circuit court to "decide the merits of [its] reimbursement demands[.]"

Both parties appealed the circuit court's decision to the ICA and asserted various assignments of error.[6] The ICA concluded that sovereign immunity barred Air Evac's claim, reversed the circuit court, and remanded the case with directions to dismiss the case with prejudice. *Air Evac*, 250 W. Va. at 200, 902 S.E.2d at 532. Chief Judge Scarr dissented on the ground that the majority's decision "is violative of Air Evac's state and federal due process rights." *Id.* at 216, 902 S.E.2d at 548 (Scarr, C.J., dissenting). Because the ICA disposed of this case on sovereign immunity grounds, it did not address whether the case "is properly subject to judicial review as a contested case pursuant to the Administrative Procedures Act." *Id.* at 204–05 n.10, 902 S.E.2d at 536–37 n.10. Air Evac now appeals the ICA's decision, presenting this Court with questions of law that we consider de novo. *See* Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

Despite the numerous issues, arguments, rulings and competing characterizations of the dispute in this matter, the question presented by Air Evac's appeal is very narrow. The case before us was initiated by Air Evac in response to PEIA's denial of Air Evac's demand for a hearing. After being notified by PEIA that it was "unable" to grant Air Evac a hearing, Air Evac filed a "Petition for Appeal" from a "final" PEIA order, and the petition was docketed as an administrative appeal. Although Air Evac characterized its request for relief as a "Petition for Appeal," "the question to be determined by this Court is whether such request is properly considered an appeal of an administrative decision or a request for extraordinary relief." *Williams v. W. Va. Div. of Motor Vehicles*, 226 W. Va. 562, 566, 703 S.E.2d 533, 537 (2010). Upon our review, we determine that Air Evac's request should properly be considered a request for extraordinary relief.

According to the petition, Air Evac sought, among other things, "review and reversal" of PEIA's decision summarily denying its demand for a hearing.[7] This Court has previously recognized that where a complainant files suit seeking a hearing that an agency has refused to provide, the request is not an appeal of a "contested case" that does not yet exist, but rather sounds in mandamus:

> The underlying action of the DMV['s license revocation] . . . [contained] no requirement for an administrative hearing. . . . [T]he Appellee essentially argued that the entry of the revocation order [without a hearing] was beyond the scope of the DMV's authority and statutorily prohibited. *That assertion, although addressed by the circuit court as an administrative appeal, was effectively in the nature of a request for extraordinary relief. It was not premised upon any hearing or "contested case" within the meaning of the*

[6] The parties initially filed their notices of appeal with this Court, but this Court did not docket their appeals. Instead, this Court extended the parties' timeframe for filing an appeal and indicated that they may file their appeals with the ICA. *See* W. Va. Code § 51-11-4(d)(10).

[7] In addition, Air Evac sought to have the circuit court both (1) affirm PEIA's contested case hearing procedures found at West Virginia Code of State Rules § 151-3-1, *et. seq*.; and (2) order that PEIA must promptly issue full payment on the transports at issue.

> *Administrative Procedures Act and consequently cannot be characterized as an appeal. It was an attempt by the Appellee to obtain extraordinary relief.*

Id. at 568, 703 S.E.2d at 539 (emphasis added). In 2020, this Court again found that,

> [i]n this matter there was no hearing on the merits before the OAH so there was no "contested case." Therefore, the circuit court lacked jurisdiction to hear the appeal. We further agree with the DMV that *lack of a contested case, in effect, converted Watts' appeal into a petition for an extraordinary remedy – a writ of mandamus.*

State ex rel. Frazier v. McGraw, 243 W. Va. 721, 724, 850 S.E.2d 720, 723 (2020) (emphasis added).

The event that precipitated Air Evac's petition to the circuit court was PEIA's refusal to grant Air Evac a hearing. The petition acknowledged the need for a hearing, and the circuit court remanded the case for "further administrative proceedings" pursuant to PEIA's contested case hearing rules. For these reasons, we find that the underlying case was not properly characterized as an administrative appeal of a contested case at the circuit court level, but was, instead, Air Evac's attempt to obtain extraordinary relief, which the circuit court granted by remanding for "further administrative proceedings." Under *Williams* and *Frazier*, the absence of a contested case logically dictates that Air Evac had nothing to "appeal," causing the circuit court to effectively treat its request as one for extraordinary relief, even though its order failed to acknowledge the conversion. As such, we follow suit and convert Air Evac's appeal into a petition for a writ of mandamus.[8]

The conversion of Air Evac's appeal into a petition for a writ of mandamus is dispositive on the issue of sovereign immunity. Article VI, section 35 of the West Virginia Constitution provides that "[t]he State of West Virginia shall never be made defendant in any court of law or equity[.]" However, "[t]he facial absoluteness of [s]ection 35 . . . has not prevented this Court from recognizing several contexts in which litigation may go forward even though the State government—and sometimes, even, the State treasury—could be seriously affected by the outcome of the litigation." *Gribben v. Kirk*, 195 W. Va. 488, 493, 466 S.E.2d 147, 152 (1995). Suits for mandamus relief to compel State officers "to perform their lawful duties" is one exception to sovereign immunity. *W. Va. Univ. v. Graf*, 205 W. Va. 118, 123, 516 S.E.2d 741, 746 (1998).

PEIA argues in the alternative that the doctrine of sovereign immunity would still bar Air Evac's cause of action even under mandamus, since it is seeking a retroactive monetary recovery from State funds. We disagree. A writ of mandamus in this scenario compels only a contested hearing—prospective, ministerial relief that does not order any payment from the State's treasury.

[8] Chief Judge Scarr contemplated such conversion in his dissent to the ICA's majority opinion. *See Air Evac*, 250 W. Va. at 216, 902 S.E.2d at 548 (Scarr, C.J. dissenting) ("Air Evac's case is precisely the type of case that should be construed as a mandamus action to satisfy its due process rights by ensuring that they have some remedy for the alleged state wrongdoing.").

This Court has consistently recognized that sovereign immunity is triggered only when compliance with a judicial decree requires the expenditure of money; a decree that merely orders PEIA to hold a contested hearing does not. *See W. Va. Lottery v. A-1 Amusement, Inc.*, 240 W. Va. 89, 807 S.E.2d 760 (2017) ("[I]f the remedy sought against the state does not require the expenditure of state funds, sovereign immunity is not triggered."). For this reason, we reverse the ICA's decision that disposed of this matter on the grounds of sovereign immunity.[9]

The remaining issue is whether PEIA was obligated to provide Air Evac with a hearing. On October 24, 2019, Air Evac sent a written demand for a contested case hearing to PEIA. The demand was made pursuant to PEIA's contested case hearing rules. *See* W. Va. Code R. §§ §§ 151-3-1 to -14. PEIA's contested case hearing rules require a party who demands a hearing to do so in writing. W. Va. Code R. § 151-3-4.1. If PEIA refuses to grant a hearing because it would either "involve an exercise of authority in excess of that available under law; or would serve no useful purpose," it must inform the party requesting the hearing "within twenty days of the receipt of" the demand for a hearing. W. Va. Code R. § 151-3-4.2. In keeping with this timeframe, on the twentieth day after PEIA received Air Evac's demand for a hearing, PEIA responded. However, rather than invoking these grounds for refusal, it simply informed Air Evac that its rules for contested case hearings did not apply to Air Evac's demand, so it was "unable to grant the requested hearing . . . ." PEIA further informed Air Evac that it "may pursue available remedies in the Circuit Court of Kanawha County" or it "may file a claim with the West Virginia Legislative Claims Commission . . . ." In response, Air Evac filed its "Petition for Appeal."

Before the circuit court, Air Evac argued that it properly invoked PEIA's contested case hearing rules when it demanded a contested case hearing because the rules at issue "apply to every

[9] In support of its conclusion that this case triggers sovereign immunity, the ICA relied upon Air Evac's prayer for relief before the circuit court and its briefing before the ICA. However, the applicability of sovereign immunity depends on the nature of the action. By focusing on Air Evac's request for monetary relief, the ICA failed to consider what actionable conduct gave rise to the petition for appeal: PEIA's denial of Air Evac's request for a contested hearing. The lower courts were not bound by Air Evac's request for monetary relief. Instead, they were obligated to first consider the nature of the action and the associated jurisdictional issues surrounding Air Evac's petition.

This Court held long ago that a prayer for relief cannot alter the nature of the claim alleged in the complaint:

> [U]pon the allegations of the amended bill of complaint and under its prayer for general relief the circuit court was without jurisdiction to grant the relief awarded the plaintiff by the decree. Many decisions of this Court hold that under the prayer for general relief the court should grant such relief as the cause of the plaintiff entitles him to receive when such relief is not inconsistent with his prayer for specific relief. . . . *A prayer for general relief will not support a decree unless the facts alleged and the nature of the case warrant it.*

Mullins v. Green, 145 W. Va. 469, 475–76, 115 S.E.2d 320, 324–25 (1960) (emphasis added).

person, partnership, association, corporation, public corporation or governmental agency affected by any rules, regulations or statutes enforceable by the Public Employees Insurance Board." W. Va. Code R. § 151-3-2.1. PEIA asserted that following the adoption of its contested case hearing rules, the Legislature later exempted portions of its rules and regulatory activities from the APA so that its contested case hearing rules were inapplicable to the dispute at issue.[10] PEIA characterized the dispute in this matter as a "provider dispute" and asserted that it should have been pursued through a multi-step benefits review process that is provided under its Plan document. According to PEIA, this multi-step benefits review process *never* provides for a hearing.

The circuit court disagreed with PEIA's assertions and found that irrespective of certain carve-outs in the Code for PEIA matters from the APA's reach, PEIA's contested case hearing rules "remain in force, and that PEIA is obligated to follow them." The circuit court based its decision, in part, upon West Virginia Code § 5-16-24, which provides that "[a]ny rules promulgated by the [PEIA or its director] *shall remain in full force and effect until they are amended or replaced by the director.*" (Emphasis added.) As the circuit court found, PEIA's contested case hearing rules were not "amended or replaced" following the subsequently enacted statutes upon which PEIA relies. We agree that PEIA's contested case hearing rules remain in effect, and they specifically provide a mechanism for parties to demand hearings.

In fact, when Air Evac demanded a hearing pursuant to PEIA's contested case hearing rules, PEIA responded to the demand in the timeframe prescribed by the very rules at issue while simultaneously asserting that the rules were not applicable to the dispute in this case. We are not persuaded by PEIA's argument that subsequently enacted statutes, which provide certain carve-outs for PEIA, render its contested case hearing rules ineffective. The Rules "remain in full force and effect." W. Va. Code § 5-16-24. And while the Rules contemplate a refusal to grant a hearing, they limit such refusals to instances in which a hearing "would involve an exercise of authority in excess of that available under law; or would serve no useful purpose . . . ." W. Va. Code R. § 151-3-4.2. PEIA did not invoke either of these reasons for refusing Air Evac's demand for a hearing.[11] Therefore, we conclude that Air Evac is entitled to a contested case hearing, and we grant

[10] The subsequent enactments relied upon by PEIA relate to: (1) the "establishment of reasonable and customary expenses," West Virginia Code §§ 5-16-8(1) and 5-16-24; (2) utilization of "recognized healthcare quality and cost management tools" for determining providers' reimbursement," *id.* § 5-16-7(a)(6)(C); (3) discretion in negotiating providers' payments, *id.* § 5-16-9(a) and (e); and (4) selecting how much its plans will pay for a covered service. *Id.* § 5-16-3(c) and (e).

[11] Likewise, PEIA did not inform Air Evac that its more specific "Plan" should take precedence over its general contested hearing rules. While PEIA advanced that argument below, the ICA did not address the issue because it decided this case on sovereign immunity grounds. The circuit court disagreed with PEIA's assertion that Air Evac should have pursued relief under the "Plan" and concluded that: (1) PEIA waived this ground by not articulating it when it denied the hearing; and (2) the appeals process in the Plan is not applicable to Air Evac's claim in this matter.

mandamus relief in the form of a hearing to be held pursuant to PEIA's contested case hearing rules.[12]

Accordingly, we grant a writ of mandamus, reverse the decision of the ICA, and remand this matter with directions that the circuit court enter an order compelling PEIA to hold a contested case hearing pursuant to its Rules.

Writ Granted; Reversed and
Remanded with Instructions.

ISSUED: November 10, 2026

CONCURRED IN BY:

Chief Justice C. Haley Bunn
Justice William R. Wooton
Justice Charles S. Trump IV
Justice H.L. Kirkpatrick
Justice James W. Flanigan

[12] "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." Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969).