

No. 98633-9

SUPREME COURT OF THE STATE OF WASHINGTON

UNEMPLOYMENT LAW PROJECT,
MCKEEZI TAYLOR BARRAZA,
and MARIANNE WHITE,

Petitioners,

v.

SUZAN LEVINE,
COMMISSIONER FOR THE WASHINGTON STATE
EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

PETITIONERS' REPLY IN SUPPORT OF
MOTION FOR ACCELERATED REVIEW
AND IMMEDIATE RELIEF

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INTRODUCTION

When the Employment Security Department (ESD) suspends benefits beyond the period allowed by law, it irreparably harms many of Washington’s unemployed workers by depriving them of their only means of paying their bills and feeding their families. The extraordinary suffering forced upon many of Washington’s unemployed workers calls for an extraordinary remedy. ESD Commissioner Suzan LeVine’s overlength answer disturbingly dives head-first into the Petition’s merits, disingenuously argues accelerated review should be denied, and distorts petitioners’ request for immediate relief. It should also concern the Court that Commissioner LeVine does not bother to acknowledge petitioner Unemployment Law Project (ULP)’s participation in this matter.¹ The facts and circumstances presented by the petitioners call for the Court’s immediate attention and action.

¹ Tirpak Reply Dec. at ¶ 2. There should be no doubt about ULP’s special interest here. Even in federal court, where Article III restricts standing, legal-aid organizations assert a cognizable injury arising from diversion of resources. *See Zynda v. Arwood*, 175 F. Supp. 3d 791, 804-05 (E.D. Mich. 2016) (a legal-aid organization providing services to unemployed workers had standing because its resources were depleted after the Michigan unemployment insurance program implemented a computer fraud detection system); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982) (a real estate corporation’s “racial steering” in violation of the Fair Housing Act caused a drain on a non-profit organization that helped with housing). *See Tirpak Reply Dec.*, at ¶ 3 (ULP diverted its resources in response to ESD’s actions).

ANALYSIS

Prompt payment of unemployment compensation is essential, especially during times like these. Commissioner LeVine's answer turns a blind eye to the many lives that her failure to perform her duty ruins, while seeking to further delay the performance of her duty and to have the Court abdicate its constitutional role in overseeing the performance of her duty. Her answer does not consider the "ends of justice" under RAP 1.2(c). People starve in the short term, not the long term. When the moratorium on evictions is lifted, it will be even more crucial for the legions of unemployed workers to have money on hand.

This Court can mitigate the economic emergency created by Commissioner LeVine's failure to do her duty. The Court should reject her bald assertion that petitioners' request for accelerated review is "insufficient." Ans. at 16 (listing alleged criteria without citation). RAP 18.12 provides the Clerk of the Court with discretion. Commissioner LeVine's claims that judicial oversight invades her discretion and that judicial intervention will not speed up payment are disingenuous. *See* Tirpak Reply Dec., at ¶¶ 15, 27(f).

Petitioners brought the instant motion both diligently and prudently. In the wake of the Petition being filed on June 5, Commissioner LeVine took further action relevant to the issues presented. Among other things, the

following week, ESD announced emergency rulemaking with stakeholder input by the end of the month and provided a new dispositive date for pending claims: June 19.² Petitioners filed the instant motion once it became evident that ESD had over promised and underdelivered. *See* Tirpak Reply Dec. at ¶¶ 22, 27.

Beyond the economic emergency, Commissioner LeVine’s decision to go beyond the scope of the instant motion—into the merits of the Petition—provides the Commissioner of the Court adequate justification to retain the action and for the Court to come to a decision earlier. *See also, e.g., Ball v. Wyman*, 435 P.3d 842 (Wash. 2018) (filing decision within two days of briefing). The Court should reject any attempt to blame the victims whose benefits were withheld for Commissioner LeVine’s failure to do her duty.³ *See*, Tirpak Reply Dec., at ¶¶ 16(c), 21. If mandamus lies here, as the case law supports, failing to grant it soon will result in countless preventable tragedies.⁴ Accelerated review and immediate relief serve the ends of justice.

² Commissioner LeVine explains that the National Guard was also called upon to support ESD. Ans. at 5, 9. When the National Guard is called “by the governor, it shall be deemed that local law and order and the enforcement thereof has failed and that the militia shall become an additional police power ... for the protection of life and property.” *See* RCW 38.08.060. The decision to call the National Guard supports mandamus relief.

³ Daniel Zeitlin’s declaration paints a contradictory picture of ESD as the victim of the claimants’ poor ability to follow directions. *See, e.g., Zeitlin Dec.*, at ¶¶ 11-12, 45.

⁴ Upon close examination, all the mandamus cases Commissioner LeVine relies on are distinguishable. *See, e.g., SEIU Healthcare 775 NW v. Gregoire*, 168 Wn.2d 593, 600, 229 P.3d 774 (2010) (Governor’s creation of budget proposal is a discretionary act). Here, our

Petitioners' preliminary arguments in the instant motion served the narrow purpose of showing that the action should be retained for a decision on the merits.⁵ Petitioners sought *limited* immediate relief because of ESD's lack of transparency. Respondent's answer and supporting declarations do not provide a complete picture of ESD's actions, but the record is now complete enough to render a decision in favor of petitioners. The Court must treat the agency's existing regulations with the force of law and order compliance with the same. *See, e.g., Mills v. W. Washington Univ.*, 170 Wn.2d 903, 910, 246 P.3d 1254 (2011) (a "rule has the force and effect of law, if promulgated in accordance with a legislative delegation."). The regulations to be enforced include ESD's May 20 emergency regulation, WAC 192-140-096(4), and other regulations guaranteeing due process. Tirpak Reply Dec., at ¶ 14. If necessary, upon full briefing, petitioners can more clearly show the relief sought in the Petition is specific and warranted.

A. This Court Should Order Prompt Payment

Petitioners' specific requests for relief honor Commissioner LeVine's obligation to balance promptness and accuracy. Commissioner

legislature assigned Commissioner LeVine duties and powers, RCW 50.12.010, and she cannot exercise her discretion to disregard specific requirements of state and federal law. *See also Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 401, 932 P.2d 139 (1997) (finding issues of rulemaking to set priorities for applications and create an order to the application process could be compelled).

⁵ Petitioners could not bring a motion on the merits. *See also* RAP 17.1(b).

LeVine was required to *timely* weigh both obligations in determining how best to respond to the hundreds of thousands of claims.⁶ When ESD has “not issued a determination denying benefits prior to the end of the following week, the department *will pay* the suspended weekly benefits by a payment method of the department's choosing.” WAC 192-140-096(4) (emphasis added). This emergency rule—which the agency adopted *after* the pandemic and the subsequent economic fallout and the fraud at issue—does not provide Commissioner Levine any discretion to deviate.

Commissioner LeVine justifies her arbitrary suspension by citing the average length of the suspension being “less than it would be if claimants had to immediately request and proceed to full evidentiary hearings.” Ans. at 28. Like so many of her other claims, this is no excuse. *See*, Tirpak Reply Dec., at ¶ 15. This argument overlooks the pertinent

⁶ Commissioner LeVine rightly says she owes no duty to pay claimants who are not eligible. But the Court should closely scrutinize the sources cited in Commissioner LeVine’s answer, and the citations omitted. *See* Ans. at 35 (“CITE”). Commissioner LeVine does not show cause that her actions are based on any express authority of law.

In many cases, Commissioner LeVine suspended payments to continued claim recipients, denied claimants an opportunity to be heard, and then created an incomprehensible and inefficient system for claimants to submit requested documents (leading to bank accounts being frozen). *See, e.g.*, Swanner Dec., ¶ 10; Altona Dec., ¶ 9. These actions offend state and federal regulations. *See Jenkins v. Bowling*, 691 F.2d 1225, 1229-30 (7th Cir. 1982) (finding the timeliness requirements of the federal regulations are not limited to prompt payment after actual determination of eligibility but also apply to delays involved in the determination process itself).

Further, petitioners agree that the appeals process provided would be an adequate remedy at law for claimants denied benefits if it were functioning properly; ESD must refrain from arbitrarily denying claims en masse for it to work. Many of the problems at ESD pre-date the pandemic and the massive fraud, but ESD’s response to these events arbitrarily magnified the problems without legal authority.

question: whether to timely pay or not—not whether to arbitrarily deny or pay. *Id.* at ¶ 27(f). Cases out of California have thoroughly analyzed the pertinent issue. *See L.A. Unified Sch. Dist. v. Livingston*, 125 Cal. App. 3d 942, 178 Cal. Rptr. 680 (1981) (finding withholding payments while the employer engages in an appeal defeats “the fundamental purposes of the act.” (citing *California Human Resources Dept. v. Java*, 402 U.S. 121, 133, 91 S. Ct. 1347, 1352-1356, 28 L. Ed. 2d 666 (1971))); *see also Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 300, 109 P.2d 942 (1941). This Court should follow *Java* and reject Commissioner LeVine’s misleading interpretation.⁷

To support her interpretation, Commissioner LeVine points to *Graves v. Meystrik*’s discussion of *Java*. 425 F. Supp. 40, 48 (E.D. Mo. 1977). *Graves*’s interpretation of *Java* is an outlier. Commissioner LeVine argues that there are no continued claim recipients in this case because each week constitutes a new and separate evaluation of the eligibility standards of each claimant. Federal courts disagree with that interpretation. *See, e.g., Jenkins v. Bowling*, 691 F.2d 1225, 1229-30 (7th Cir. 1982).⁸ Notably, in

⁷ Commissioner LeVine cannot show the federal government will take away our certification or that inaction thus far by the Secretary of Labor supports an inference that she is complying with her legal duties. *See Dunn v. New York State Dep’t of Labor*, 474 F. Supp. 269, 275 n.6 (S.D.N.Y. 1979) (“[B]ecause decertification is a drastic remedy which benefits no one, I am unconvinced that inaction by the Secretary necessarily means that defendants are not violating the federal statute.”).

⁸ *See Hiatt v. Indiana Employment Sec. Div.*, 347 F. Supp. 218 (N.D. Ind. 1971).

Graves, the court determined the termination of benefits while waiting for a post-termination hearing would not deprive the claimant of the “. . . very means by which to live while he waits.” 425 F. Supp. at 48 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S. Ct. 1011, 1017, 25 L. Ed. 2d 287 (1970)). The Missouri unemployment department’s fast interview process, providing an immediate opportunity for claimants to correct an erroneous denial, proved determinative. *Id.*

B. This Court Should Protect Due Process

Petitioners seek the bare minimum of due process protections. This Court previously recognized mandamus as the appropriate remedy in the context of a due process violation concerning access to the courts. *See Whitney v. Buckner*, 107 Wn.2d 861, 865, 734 P.2d 485 (1987). Commissioner Levine has a duty to administer the Employment Security Act “justly and fairly, for the benefit of all concerned, in accordance with law, and unless [her] powers are so exercised [her] acts are of no effect.” *In re Jullin*, 23 Wn.2d 1, 15, 158 P.2d 319 (1945). Petitioners would be satisfied if the due process protections codified in ESD’s regulations were

Even though defendants review on a weekly basis the eligibility of a claimant, the court finds that the concept of when benefits are “due” under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of ineligibility.

Id. at 223.

followed. The agency's rules are "effective upon publication," yet Commissioner Levine admits the agency has not been complying with its rules. *See, e.g.*, Ans. at 12 (discussing WAC 192-140-096); RCW 50.12.010. Commissioner Levine has no "discretion" to disregard the agency's published rules. *See State v. Listman*, 156 Wash. 562, 566, 287 P. 663 (1930) (holding "mandamus was the proper remedy" where the agency was disregarding its rules, which is "not exercising a discretion"); Tirpak Reply Dec., at ¶ 14.

Here, under Commissioner Levine's direction, ESD's fraud-prevention measures deprived claimants of their property in violation of the Due Process Clause. Tirpak Reply Dec., at ¶ 16. Government officials cannot deny or halt unemployment benefits arbitrarily: rather, the Unemployment Compensation Act sets out detailed criteria for eligibility, denial of benefits, and recovery of benefit payments. RCW 50.20.010; RCW 50.20.180; RCW 50.20.190.⁹ ESD claims that they are acting

⁹ An individual has a property interest in a benefit where they have a legitimate claim of entitlement to it. *Town of Castile Rock v. Gonzales*, 545 U.S. 748, 756, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005). State law creates such an entitlement where government officials cannot use discretion to grant or deny it. *See id.* at 756. Due process requires notice to be reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 13, 18, 98 S. Ct. 1554, 1562, 56 L. Ed. 2d 30 (1978) (reasoning that "the discontinuance of water or heating for even short periods of time may threaten health and safety."). Here, we have eligible claimants becoming homeless during a pandemic, which can prove fatal and like in *Memphis Light*, ESD relies on computerized systems. *Id.*

according to the law, but the reality for many Washington workers tells a vastly different story.

Commissioner LeVine sets forth no grounds, and elucidated none of the criteria used to prevent fraud. The same thing occurred in *O'Brien*. Commissioner LeVine is not willing to share the imposter fraud indicators used by ESD with the Court because it could be used by criminals to their advantage. *Compare* Tirpak Reply Dec., at ¶¶ 16-18, 25, *with* Trevino Dec., at ¶ 10. This is disturbing because it may be as arbitrary as pausing all claims with Social Security Numbers ending in an odd number. ESD should have at least provided the error rate, which is what ESD did in *O'Brien*. Tirpak Reply Dec., at ¶ 17(f). As it stands, it appears ESD is repeating the errors that lead to *O'Brien* and suspended way more people than necessary.

The answer claims, “If ESD were required to pay claims while authenticating recipients’ identities or provide evidentiary hearings in order to verify the identities of continued claimants whose identities were called into question, the loss of funds could be catastrophic and unrecoverable.” *Id.* at 27. This is the exact argument rejected in *O'Brien* in favor of protecting the claimants’ rights to due process. Notwithstanding the technological advances that no one anticipated in 1988, many have relied on statements made on ESD’s website (*see* <https://esd.wa.gov/newsroom/consent-agreements>), and thus understand *O'Brien* to reflect the governing

law. Commissioner LeVine should be estopped from now claiming *O'Brien* no longer applies or can be disregarded. Tirpak Dec., Ex. 5.

CONCLUSION

While petitioners appreciate that ESD is handling unprecedented strains on its operations, Commissioner LeVine must meet her duty to follow the law. The law does not allow the agency to adopt rules with dispositive deadlines that track the requirements of federal law, and then disregard the adopted rules with ever-changing public statements about when it will resolve pending claims for benefits. Unemployment compensation is vitally important to minimize the burden on the unemployed worker. Washington's unemployed workers are irreparably harmed by Commissioner Levine's failure to comply with the law.

For such reasons, the Court should grant the motion.

DATED this 2nd day of July, 2020.

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CERTIFICATE OF SERVICE

I, Tony Dondero, certify under penalty of perjury under the laws of the State of Washington and the United States that, on July 2, 2020, I served the document to which this Certificate is attached to the party listed below in the manner shown.

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Dated this 2nd day of July 2020.

s/ Tony Dondero
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