

STATE OF WISCONSIN
SUPREME COURT

Case No. 2017AP2278

KRISTI KOSCHKEE, AMY ROSNO, CHRISTOPHER MARTINSON,
and MARY CARNEY

Petitioners,

v.

ANTHONY EVERS and the WISCONSIN DEPARTMENT OF PUBLIC
INSTRUCTION

Respondents.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS ORIGINAL ACTION**

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION

Ryan Nilsestuen, SBN 1091407
Benjamin R. Jones, SBN 1089357

Post Office Box 7841
Madison, Wisconsin 53707-7841
(608) 266-8762
(608) 266-5856 (Fax)

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INTRODUCTION

This case is an original action seeking declaratory relief from the Court. Recently, the Court defined the issue of this case as whether the State Superintendent of Public Instruction (State Superintendent) and the Department of Public Instruction (DPI) must comply with its obligation under Wis. Stat. § 227.135(2) to submit scope statements to the Department of Administration.¹ *Koschkee v. Evers*, 2018 WI 82, ¶ 20, 913 N.W.2d 878, 884. There is no controversy between the parties on this issue, a prerequisite for declaratory relief. The Respondents therefore ask this Court to dismiss this action.

BACKGROUND

On November 20, 2017, the Petitioners filed with this Court a Petition to Supreme Court to Take Jurisdiction of an Original Action (“Petition”). Petitioners sought a declaratory judgment that Respondents Tony Evers, Superintendent of Public Instruction, and Wisconsin Department of Public

¹ Pursuant to Wis. Stat. § 227.135(2), the submission of scope statements prior to the promulgation of rules is initiated as follows:

(2) An agency that has prepared a statement of the scope of the proposed rule shall present the statement to the department of administration, which shall make a determination as to whether the agency has the explicit authority to promulgate the rule as proposed in the statement of scope and shall report the statement of scope and its determination to the governor

Instruction, were required to comply with certain provisions of the REINS Act, 2017 Wis. Act 57. *Koschkee*, 2018 WI 82, ¶ 3. These provisions require agencies proposing a rule to submit a scope statement in advance to the Department of Administration, which must then determine whether the agency has authority to promulgate the rule and forward the scope statement to the governor for his or her approval or disapproval. *Id.* The Respondents disagreed with the Department of Justice regarding the Respondents' legal position based on this Court's decision in *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, and the Department's ability to represent Respondents in light of these disagreements. *Koschkee*, 2018 WI 72, ¶¶ 4-6. This Court *sua sponte* raised the issue of whether the Governor is a necessary party. *Id.* ¶ 6.

On June 27, 2018, this Court issued an order (Order) resolving these two issues. It determined that Respondents could be represented by counsel of their own choosing, and further that the governor is not a necessary party. *Koschkee*, 2018 WI 82, ¶ 26.

In making its ruling on whether the Governor is a necessary party, the Court explained that “[t]his case raises the question of whether the DPI must submit a scope statement to the governor in the first instance” and will not

“affect the governor’s responsibilities” under Wis. Stat. § 227.135(2). The Court further elaborated that this case does not raise the question of what the governor does with a scope statement once submitted. *Id.* ¶ 20. Applying the criteria for maintaining a declaratory judgment, the Court found the governor lacked the legally protectable interest and need not be joined. *Id.* ¶ 18.

ARGUMENT

The DPI agrees that Wis. Stat. § 227.135(2) requires the DPI to submit scope statements to the Department of Administration, and the DPI does not otherwise challenge the validity of this requirement. Thus, there is no justiciable controversy between the parties.

Furthermore, this issue is moot. The DPI is in full compliance with its duty under Wis. Stat. § 227.135(2) to submit scope statements to the Department of Administration.

On either ground, the Petitioners fail to state a claim upon which relief can be granted, and the Petition to Supreme Court to Take Jurisdiction of an Original Action (Petition) must be dismissed. Wis. Stat. § 802.06(2)(a)6.

I. The Court Should Dismiss this Action Because There is No Justicable Controversy.

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *John Doe I v. Archdiocese of Milwaukee*, 2007 WI 95, ¶ 12, 303 Wis. 2d 34, 734 N.W.2d 827; *see* Wis. Stat. § 802.06(2)(a)6. In order for a court to entertain an action for declaratory judgment, there must be a justiciable controversy. Wis. Stat. § 806.04; *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991) (citing *Loy v. Bunderson*, 107 Wis.2d 400, 410, 320 N.W.2d 175 (1982)). To demonstrate a justiciable controversy, the following four conditions must be satisfied:

- (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it;
- (2) The controversy must be between persons whose interests are adverse;
- (3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest; and
- (4) The issue involved in the controversy must be ripe for judicial determination.

Loy, 107 Wis. 2d at 410, 320 N.W.2d 175. The Petition fails to show any of these four conditions.

A. There is no controversy as to whether the DPI must submit scope statements to the Department of Administration.

The Petition fails to satisfy the first two conditions of a justiciable controversy, because there is no controversy between the parties. The existence of a bona fide controversy ensures that the Court, “in resolving the questions raised, will not be acting in a merely advisory capacity.” *Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 72 Wis. 2d 282, 306, 240 N.W.2d 610 (1976).

This Court defined the question raised by this case as “whether the DPI must submit a scope statement to the governor in the first instance.” *Koschkee*, 913 N.W.2d 878, ¶ 20. Both parties answer this question the same way: Wis. Stat. § 227.135(2) requires the DPI to submit scope statements to the Department of Administration. *See* Petition, ¶ 9. The DPI does not contest its obligation to submit scope statements to the Department of Administration. Therefore, the interests of the parties are not adverse in this regard.

The remaining provisions of Wis. Stat. § 227.135(2) referenced by the Petition address tasks assigned to “the Department of Administration and the governor.” *Koschkee*, 913 N.W.2d 878, ¶ 19. However, this case does not concern whether the Department of Administration may determine that the DPI has explicit authority to promulgate a rule as proposed in a scope

statement, nor does this case concern whether the governor may approve or reject that scope statement. *Id.*; *see also* Wis. Stat. § 806.04(11) (“... no declaration may prejudice the right of persons not parties to the proceeding”).

The DPI is not one of the “public officers charged with the enforcement” of these tasks, and therefore these issues do not create a controversy between the Petitioners and the DPI. *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 140, 307 Wis. 2d 1, 745 N.W. 2d 1 (quoting *White House Milk Co. v. Thomson*, 275 Wis. 243, 249, 81 N.W.2d 725 (1957)). If the Petitioners believe the Department of Administration or governor have failed to comply with Wis. Stat. § 227.135(2), the Petitioners’ only justiciable controversy is with the Department of Administration and the governor.

B. The Petitioners do not have a legal interest in any controversy at issue.

The third condition of a justiciable controversy requires the party seeking declaratory relief to have a legal interest in the controversy. In other words, the Petitioners must have standing. *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶ 15, 259 Wis. 2d 107, 655 N.W.2d 189. “In order to have standing to bring an action for declaratory judgment, a party must have a personal stake in the outcome and must be

directly affected by the issues in controversy.” *Id.* The Petitioners must show they have “suffered some threatened or actual injury.” *Fox v. Wisconsin Dep’t of Health & Soc. Servs.*, 112 Wis. 2d 514, 524–25, 334 N.W.2d 532 (1983) (quoting *1st Nat. Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma*, 95 Wis.2d 303, 308, 290 N.W.2d 321 (1980)).

Here, the Petitioners have no stake in this case, and there is no injury or threat of injury, because all parties agree that the DPI must submit scope statements to the Department of Administration. As a result, “[n]o anticipatory or preventative relief is sought in this action,” and the Petitioners fail to demonstrate the third condition of the justiciable controversy test. *Lister*, 72 Wis. 2d at 308, 240 N.W.2d 610.

C. There is no controversy ripe in this matter because relevant facts are contingent and uncertain.

The fourth condition of a justiciable controversy is that the matter be ripe for adjudication, which “requires that the facts be sufficiently developed to avoid courts entangling themselves in abstract disagreements.” *Miller Brands-Milwaukee, Inc.*, 162 Wis. 2d at 694–95, 470 N.W.2d 290. The Court should not make a judgment based on “contingent or uncertain” facts. *Putnam v. Time Warner Cable of Southeastern Wisconsin, Ltd. P’ship*, 2002 WI 108, ¶ 44, 255 Wis. 2d 447, 649 N.W.2d 626. “[A] matter is not ripe

unless the facts are sufficiently developed to allow a conclusive adjudication.” *Milwaukee District Council 48 v. Milwaukee County*, 2001 WI 65, ¶ 41, 244 Wis. 2d 333, 627 N.W.2d 866.

The only issue that is ripe is the one identified by this court: whether the DPI must submit a scope statement in the first instance. On this issue, there is no controversy.

If this Court is asked to consider any controversy as to the application of Wis. Stat. § 227.135(2) *after* a scope statement has been submitted, that would necessarily require the consideration of contingent and uncertain facts. There are no facts alleged as to what actions the Department of Administration will take or has taken in applying Wis. Stat. § 227.135(2) to scope statements submitted by the DPI. There are no facts alleged as to whether the Department of Administration has or will report a scope statement or determination of legislative authority to the governor. There are no facts alleged as to whether the governor would approve or reject a scope statement, or on what grounds the governor would base that decision. There are no facts alleged as to whether the Department of Administration or the governor has or will take actions that violate the injunction upheld by this Court in *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520.

Therefore, as this Court identified, the only issue between the parties to this case is whether the DPI must submit scope statements in the first instance. Because this issue does not present a controversy, and because any controversy that goes beyond the issue defined by this court is not ripe, there is no justiciable controversy in this case that would permit this court to entertain an action for declaratory judgment. This action should be dismissed.

II. Alternatively, this matter is moot.

“An issue is moot when its resolution will have no practical effect on the underlying controversy.” *PRN Assocs. LLC v. State, Dep’t of Admin.*, 2009 WI 53, ¶ 25, 317 Wis. 2d 656, 766 N.W.2d 559. “[A] moot question is one which circumstances have rendered purely academic.” *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis.2d 685, 608 N.W.2d 425. “When a case is dismissed because the issues therein have become moot, the rights of the parties are not adjudicated, and neither party is entitled to judgment.” *PRN Assocs. LLC*, 317 Wis. 2d at ¶ 22 n.8, 766 N.W.2d 559 (quoting *Wisconsin’s Env’tl. Decade, Inc. v. Pub. Serv. Comm’n*, 79 Wis. 2d 161, 171, 255 N.W.2d 917 (1977)).

Any determination on the issue identified by this Court would have no practical effect. *In re Mental Commitment of Ivy S.*, 2008 WI App 148, ¶ 14, 314 Wis. 2d 261, 757 N.W.2d 851. All scope statements alleged by the Petition to be in violation of Wis. Stat. § 227.135(2) have been rescinded. *See* the attached Affidavit of Carl Bryan. After the effective date of Act 57, all scope statements prepared by the DPI have been submitted to the Department of Administration pursuant to Wis. Stat. § 227.135(2) or have been legally nullified. *See* the attached Affidavit of Carl Bryan. Essentially, the Petitioners are requesting this Court to compel the DPI to perform a duty it is already performing. This action is moot and must be dismissed.

CONCLUSION

Based on the language of this Court's Order and its decision to exclude the governor as a necessary party, this Court has correctly limited the scope of this case to include only the duties under Wis. Stat. § 227.135(2) that fall on the DPI. The DPI's duty is limited to submitting scope statements to the Department of Administration. From there, Wis. Stat. § 227.1335(2) imposes duties on the Department of Administration and the governor – neither of which are subject to the DPI's control nor are they party to this

case. Consequently, the DPI and the Petitioners agree on the only legal issue in this case, and the DPI is complying with this duty.

For these reasons, the DPI respectfully requests that this Court grant the motion to dismiss the Petition.

Dated this 6th day of August, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ryan Nilsestuen", with a long horizontal flourish extending to the right.

Ryan Nilsestuen, SBN 1091407
Benjamin R. Jones, SBN 1089357

Attorneys for State Superintendent Evers
and the Department of Public Instruction

Wisconsin Department of Public Instruction
125 South Webster Street
PO Box 7841
Madison, Wisconsin 53707-7841
Ph. (608) 266-8762
Fax (608) 266-5856
ryan.nilsestuen@dpi.wi.gov
benjamin.jones@dpi.wi.gov