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STATE OF WASHINGTON

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 84704-5

PETER GOLDMARK, COMMISSIONER OF PUBLIC LANDS,

Appellant,

v.

ROBERT M. McKENNA, ATTORNEY GENERAL; PUBLIC UTILITY
DISTRICT NO. 1 OF OKANOGAN COUNTY, a municipal corporation
of the State of Washington,

Respondents.

REPLY ON PETITION AGAINST STATE OFFICER

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I. ARGUMENT ON REPLY

Unambiguously, RCW 43.12.075 states that the Attorney General has a duty to institute an appeal upon request of the Commissioner of Public Lands. The Attorney General all but ignores that determinative statute and instead points to irrelevant case law and statutes in his attempt to avoid issuance of the writ.

A. The Attorney General's Duty to File an Appeal Upon Request of the Commissioner is Mandatory

In our Petition, we made these essential points. One, the Attorney General's powers and duties are as prescribed in the Constitution. *State ex rel. Winston v. Seattle Gas & Electric Co.*, 28 Wash. 488, 497, 68 P. 945 (1902). Two, the Constitution states that the Attorney General "shall perform such other duties as may be prescribed by law." Wash. Const., Art. III, § 21. Three, RCW 43.12.075 states that it "shall be the duty of the attorney general to institute or defend any action . . . when requested to do so by the commissioner." *Id.* (quoted in full in the Petition Against State Officer at 10.)

In an attempt to persuade the Court that RCW 43.12.075 does not say what it says, the Attorney General surmises:

The Attorney General is aware of no statute that imposes a specific duty on the Attorney General to pursue an appeal upon the request or direction of the client, official, or agency, nor is there any statute that grants the Commissioner the authority to direct whether and when to file appeals.

Answer at 9. This is an extraordinary statement considering RCW 43.12.075 imposes that very duty and grants the Commissioner that very authority. The statute explicitly states that the Attorney General has a duty to act upon request of the Commissioner of Public Lands.

The Attorney General also argues that RCW 43.12.075 does not give the Commissioner the authority to “direct” legal strategy. Answer at 8-9. There is a distinction between directing the “legal strategy” of a case and the ultimate decision of whether to initiate a lawsuit or file an appeal of an adverse decision. A lawyer may make strategy decisions as litigation proceeds, but the client decides whether to engage in litigation in the first place or to terminate it. RPC 1.2(a).¹

Disregarding the plain language of the first sentence in RCW 43.12.075, the Attorney General focuses on the second sentence. The

¹ The Attorney General refers to RPC 1.26, Comment 18 which mentions that government lawyers in some circumstances “may” have authority to decide upon settlement or whether to appeal from an adverse judgment. Clearly, in this case the Attorney General does not have that authority because RCW 43.12.075 states that it is the Attorney General’s duty to appeal from an adverse judgment when requested to do so by the Commissioner of Public Lands.

Attorney General argues that because the Commissioner cannot practice law or be a legal representative for the Department, “the likely purpose of that [second] sentence is to simply allow the Commissioner to be named as the party in interest in proceedings relating to public lands. . .” Answer at 7.

The Attorney General’s statutory duty is created in the first sentence, not the second. The Attorney General’s focus on the second sentence is misplaced. Moreover, in the second sentence, the word “represent” obviously does not mean “to represent in a legal capacity” but, rather, means “has the authority to speak on behalf of” the State in a public lands action. The second sentence does not limit or modify either the first sentence’s grant of authority to the Commissioner nor its imposition of a specific duty on the Attorney General.²

The Attorney General also argues that he already complied with RCW 43.12.075 because of the defense he provided in the Superior Court action.

² In a footnote, the Attorney General discusses the parameters of the Commissioner’s role as compared to the role of the Board of Natural Resources. The Attorney General implies that because the Commissioner is the “Administrator” of the agency, he somehow is not authorized to represent the State in an action relating to public lands of the State. Yet again, the Attorney General presents an argument that is directly at odds with the plain language of RCW 43.12.075. The Commissioner is explicitly authorized to represent the Department of Natural Resources in all decisions related to the litigation in Okanogan County per that provision. Furthermore, while RCW 43.30.215(2) indicates that the Board sets policy for the Department of Natural Resources, the Commissioner has considerable independent authority. *See, e.g., Caffall Bros. v. State*, 79 Wn.2d 223, 484 P.2d

But that begs the question concerning his refusal to appeal the adverse Superior Court decision despite the Commissioner's request that he do so. RCW 43.12.075 does not limit the Attorney General's duty to initiating an action in Superior Court; rather, it also requires the Attorney General to defend any action in any other State court, including the Court of Appeals, at the request of the Commissioner.

The Attorney General contends that he has the discretion to make all fundamental legal decisions on behalf of the State – including whether to appeal an adverse decision in a public lands matter – and RCW 43.12.075 does not “disturb” that discretion. But none of the cases cited by the Attorney General regarding his authority and discretion involve RCW 43.12.075. Not one case cited by the Attorney General suggests that he has the discretion to say “no” when the Commissioner of Public Lands requests that he file an appeal of a Superior Court decision. *See Answer at 9-14.*

RCW 43.12.075 is unique to the relation between the Attorney General and the Commissioner. Because the Constitution states that the duties of the Attorney General are prescribed by statute and RCW 43.12.075 imposes this specific duty on the Attorney General, the cases deciding

912 (1971) (Commissioner authorized to determine if sale of public land will serve “best interests” of the State).

authority issues under other statutes are not relevant.

Moreover, none of the Attorney General's cases involved a situation where the Attorney General was refusing to abide by the requests of his client. The first case cited, *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935), involved an agency action to collect industrial insurance premiums from certain businesses. The agency had retained private attorneys to file the action. The question presented was whether private attorneys could represent the agency or whether the Attorney General was the sole attorney who could initiate such an action on behalf of the agency. Thus, the case involved a different issue about a different State agency with different statutory provisions setting forth different authorities and duties. The decision in *Gattavara* that only the Attorney General could initiate such an action sheds no light on the issue here. The Court's statement that State agencies could not "institute actions in their own right, but only in conjunction with the authority of the Attorney General," simply means that agencies must use the Attorney General as their lawyer, not private counsel. It does not answer or even address the issue presented here.

Two other cases relied on by the Attorney General, *Berge v. Gorton*, 88 Wn.2d 756, 761, 567 P.2d 187 (1977) and *State ex rel. Rosbach v. Pratt*,

68 Wash. 157, 122 P. 987 (1912), both raised the question of whether a third party – not a client -- could demand that an Attorney General initiate an action regarding recovery of funds in different circumstances. Again, these cases involved completely different issues and statutes regarding the Attorney General's authority. Challenges to the prosecutorial discretion of the Attorney General under different statutes by third parties are simply not relevant in this case.

The Attorney General also relies on *State ex rel. Dunbar v. State Board of Equalization*, 140 Wash. 433, 249 P. 996 (1926), where the state board of equalization was levying taxes based on an outdated statute that had been recently amended. The Attorney General sued to stop the practice. The agency asserted that the Attorney General lacked authority to bring the action. But this Court found that the Attorney General is granted statutory authority to prosecute such actions by the language of RCW 43.10.030(2) which authorizes the Attorney General to “institute and prosecute all actions and proceedings . . . which may be necessary in the execution of the duties of any state officer.” This Court's finding that the Attorney General enjoys authority to prosecute an action against a wayward state agency is irrelevant to deciding whether the Attorney General has a duty to prosecute an appeal when

requested by the Commissioner pursuant to RCW 43.12.075.

In *Dunbar*, this Court rejected the notion that the Attorney General could not sue a state agency even though the Attorney General also had the duty to represent the agency. This Court explained that “where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers.” But this Court later disavowed the “impossible and improper . . . to defend language.” As explained in a recent Court of Appeals case: “The Supreme Court later clarified the *Dunbar* ruling, explaining that the Attorney General may properly represent both sides in an action between the State and one of its officers.” *Sanders v. State*, 139 Wn. App. 200, 209, 159 P.3d 479, *aff’d* 166 Wn.2d 164, 2071245 (2009) *citing Reiter v. Wallgren*, 28 Wn.2d 872, 879-80, 184 P.2d 571 (1947) (a case relied on by the Attorney General in its Answer)). Thus, *Dunbar* stands only for the proposition that the Attorney General may sue a state agency, not that the Attorney General need not defend a state agency, even one that the Attorney General believes to be misguided.

The Attorney General also cites *In Re: Coordinated Pretrial Proceedings in Petroleum Products Anti-Trust Litigation*, 747 F.2d 1303 (9th Cir. 1984), where the court ruled that it lacked jurisdiction to hear an appeal of a contempt order against the Attorney General, individually, regarding discovery issues before entry of a final judgment on the State's underlying action. The Court reasoned that the Attorney General and the State has a "congruence of interest" requiring the Attorney General to await final judgment on the State's case before his appeal could be heard. In finding "congruence," the Court reasoned that the determination whether to bring the action rests "within the sole discretion of the Attorney General." *Id.* at 1306. But the two Washington cases it cited for that proposition construed a different statute than the one at issue here. That other statute, RCW 43.10.030, clearly gives prosecutorial discretion to the Attorney General when it states the Attorney General "shall . . . institute and prosecute all actions . . . which may be necessary . . ." The "which may be necessary" clause clearly provides discretion. The statute at issue here contains no comparable language.

Indeed, RCW 43.10.030(2) was distinguished on precisely that basis in *Sanders v. State*, *supra*, 139 Wn. App. at 209: "[T]he critical phrase

'which may be necessary' which gives the attorney general discretion to litigate in RCW 43.10.030(2) is absent in RCW 43.10.030(3)." It is absent in RCW 43.12.075, too.³

Two out-of-state cases quoted at length by the Attorney General in a footnote that speak to an Attorney General's general common law duty to protect the broad legal interests of the State are directly at odds with the established law of Washington State. See Answer at 14-15, fn. 8, citing *Humphrey v. McLerran*, 402 N.W.2d 535, 543 (Minn. 1987); *Feeney v. Massachusetts*, 366 N.E.2d 1262, 1266 (Mass. 1977). While the Attorney General in some other states may have "common law powers" that authorize an Attorney General to initiate litigation on behalf of the public interest, our Constitution does not grant out Attorney General "common law" authority. *State ex rel. Hamilton v. Superior Court, Whatcom County*, 3 Wn.2d 633, 640, 101 P.2d 588 (1940). As stated in *State ex rel. Winston v. Seattle Gas & Electric Company*, 28 Wash. 488, 497, 68 P. 946 (1902), *petition for rehearing denied*, 70 P. 114 (1902):

The attorney general of the state, . . . is not a common law officer. . . . Every office under our system of government, from the governor down, is one of delegated powers. It is a

³ Likewise, RCW 43.10.030 makes no reference to a client agency directing the Attorney General to initiate an action. The statute at issue here does.

well settled doctrine that officers of the State exercise but delegated power, and this is particularly true of the attorney general. His office is created by statute and he, as such officer, can only exercise such power as is delegated to him by statute.

Id. at 495.⁴

B. The Writ Should Issue and Attorneys' Fees Awarded

The Washington State Constitution and RCW 43.12.075 leave no question that the Attorney General had a duty to abide by the request of the Commissioner of Public Lands to appeal the Superior Court decision in the underlying case. The Attorney General's response regarding that duty relies on clearly irrelevant cases involving such issues as third parties seeking to force the Attorney General to use his prosecutorial discretion and the common law authority of Attorney Generals in other states. Given the irrelevance of these cases and the unambiguous law we have cited, the defense is frivolous, the writ should issue, and an award of attorney's fees is appropriate.

⁴ In West Virginia, another state that rejects the theory of an Attorney General with common law powers, the Court stated that the phrase "shall perform such duties as may be prescribed by law" in the Constitution operates to defeat the assertion that the Attorney General possesses common law powers. See *Manchin v. Browning*, 170 W.Va. 779, 785, 296 S.E.2d 909 (1982).

Dated this 2 day of July, 2010.

Respectfully submitted,

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Goldmark\Reply on Petition Against State Officer-070110