

FILED

JAN 21 2014

Hearings Unit, CrC
Patricia D. Petersen
Chief Hearing Officer

STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In re the Matter of

EDMUND C. SCARBOROUGH and
WALTER W. WOLF,

Respondents.

No. 13-0084

RESPONDENT EDMUND C.
SCARBOROUGH'S MOTION TO
QUASH THE COMMISSIONER'S
NOTICE OF REQUEST FOR
HEARING

I. INTRODUCTION

Only the attorney general is authorized to initiate or participate in any court or administrative proceeding in a legal or quasi-legal capacity on behalf of a state official or agency. The insurance commissioner's issuance of a notice of request for hearing and subsequent participation in this proceeding through members of his legal staff rather than the state attorney general is contrary to law and requires that the commissioner's notice of request for hearing be quashed.

II. STATEMENT OF FACTS

In March 2013, the insurance commissioner issued a cease and desist order against Respondents Edmund C. Scarborough and Walter W. Wolf. Simultaneous with the cease and desist order, the commissioner issued a notice of request for hearing for imposition of fines. The order and notice were signed by a member of the insurance commissioner's legal staff. In response to the order and notice, Mr. Scarborough denied that he violated the insurance code and

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1 that any fine may be imposed, and requested a hearing on the cease and desist order. The state
2 attorney general has not appeared in this proceeding on behalf of the insurance commissioner.
3 Instead, the commissioner has participated strictly through members of his legal staff.

4 III. AUTHORITY AND ARGUMENT

5 Our state constitution requires that the attorney general "shall be the legal adviser of the
6 state officers, and shall perform such other duties as may be prescribed by law." WASH. CONST.
7 art III, § 21. The attorney general's specific duties are further defined by statute, in chapter
8 43.10 RCW, which provides that the attorney general "shall...[i]nstitute and prosecute all
9 actions and proceedings...which may be necessary in the execution of the duties of any state
10 officer[.]" RCW 43.10.020(2).

11 The attorney general is required to represent all state officials in proceedings of any
12 nature, including administrative proceedings:

13 The attorney general *shall* also represent the agencies of the state in the courts,
14 and *before all administrative tribunals or bodies of any nature*, in all legal or
quasi legal matters, hearings, or proceedings[.]

15 RCW 43.10.040. While the attorney general is authorized to employ attorneys to carry out his
16 duties, RCW 43.10.065, state officials, agencies, and others are prohibited from employing
17 attorneys to act in any legal or quasi-legal capacity:

18 No officer, director, administrative agency, board, or commission of the state,
19 other than the attorney general, shall employ, appoint or retain in employment
20 any attorney for any administrative body, department, commission, agency, or
tribunal or any other person to act as attorney in any legal or quasi legal capacity
21 in the exercise of any of the powers or performance of any of the duties specified
by law to be performed by the attorney general[.]

22 RCW 43.10.067.

23 The Washington Supreme Court has recognized that these statutes impose a mandatory
24 obligation on the attorney general to represent state officials and agencies and prohibits such
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1. officials and agencies from having an attorney other than the attorney general appear in a legal
2 or quasi-legal capacity:

3 ... RCW 43.10.040 requires the Attorney General to represent all state boards
4 and to assign assistants to advise them in all matters involving legal or quasi legal
5 questions.... RCW 43.10.067 requires all boards and other state agencies to rely
6 exclusively upon the advice of the Attorney General, with exceptions not
7 relevant here.

8 *State v. Hood*, 93 Wn.2d 603, 607-08, 611 P.2d 758 (1980). The legislature enacted these
9 statutes and their predecessors to end a prior practice of state agencies hiring attorneys to
10 represent them:

11 It is clear that the purpose of Laws of 1941, chapter 50, was to end the
12 proliferation of attorneys hired by various state agencies and place the authority
13 for representation of state agencies in the attorney general.

14 *State v. Herrmann*, 89 Wn.2d 349, 354, 572 P.2d 713 (1977).

15 Where an attorney other than the attorney general appears on behalf of a state official or
16 agency, the proceeding must be dismissed. *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18
17 (1935). In *Gattavara*, the Department of Labor and Industries sued the defendant to recover
18 delinquent industrial insurance premiums and statutory penalties. *Id.* at 326. The defendant
19 unsuccessfully moved to quash the summons and dismiss the case on the ground that it was not
20 brought by the attorney general. *Id.* at 317. On appeal from a judgment in favor of the
21 department, the Supreme Court reversed, holding that it was error to deny the motion to quash
22 and dismiss. *Id.* at 333.

23 The Supreme Court held in *Gattavara* that, under the state constitution and applicable
24 statutes, the authority of the attorney general to bring actions is "exclusive." *Id.* at 329. The
25 court explained that the requirement is "not a mere technicality":

26 Litigants who are sued always have the right to raise the question that no proper
party has sued them. It goes to the basis of the action. It is not a mere
technicality, for they are entitled to the protection of the action being instituted,
maintained, and a judgment validly authorized by the proper official.

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1 *Id.* at 331. The court further explained that the purpose of the constitutional provision is “a
2 severance of the various branches of the government, thereby creating on office as a check upon
3 the other.” *Id.* at 332-33.

4 Under the state constitution and related statutes, only the attorney general is authorized to
5 commence an administrative proceeding to impose a fine. The insurance commissioner is
6 prohibited from usurping the attorney general’s role by initiating and participating in
7 administrative proceedings through members of his legal staff. Under *Gattavara*, the remedy is
8 to quash the commissioner’s notice of request for hearing for imposition of fines.

9 **IV. CONCLUSION**

10 The insurance commissioner was without authority to initiate an administrative
11 proceeding to impose a fine and to participate in this proceeding through members of his legal
12 staff, rather than the attorney general. The notice of request for hearing for imposition of fines
13 should be quashed.

14 DATED this 21st day of January, 2014.

15 CARNEY BADLEY SPELLMAN, P.S.

16
17 By: 

18 Timothy J. Parker, WSBA No. 8797

19 Jason W. Anderson, WSBA No. 30512

20 Attorneys for Respondent Edmund C. Scarborough

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RESPONDENT EDMUND C. SCARBOROUGH’S
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DECLARATION OF SERVICE

I, Christine Williams, under oath hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On January 21, 2014, I caused to be delivered in the manner indicated a copy of the foregoing document on the following parties at the last known address as stated:

Judge Patricia Petersen - ORIGINAL Chief Hearing Officer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 kellyc@oic.wa.gov via e-mail and legal messenger	Attorney for OIC Mr. Alan M. Singer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 alans@oic.wa.gov via e-mail and legal messenger
Attorney for Walter W. Wolf James A. McPhee Workland & Witherspoon, PLLC 601 W Main Avenue, Suite 714 Spokane, WA 99201 jmcphee@workwith.com via e-mail and U.S. mail	Attorneys for Edmund C. Scarborough Michael M. Miles Duane Morris LLP 100 North City Parkway, Suite 1560 Las Vegas, NV 89106-4617 mmmiles@duanemorris.com via e-mail and U.S. mail

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 21st day of January, 2014.

Christine Williams, Legal Assistant

RESPONDENT EDMUND C. SCARBOROUGH'S
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DECLARATION OF
EMAILED DOCUMENT
(DCLR)

Respondents

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 3400 Capitol Blvd. SE #103, Tumwater WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 6 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: January 21, 2014 at Tumwater, Washington.

Signature: _____

Print Name: James Lincoln