

FILED



2014 APR - 2 A 9: 56
OIC HEARINGS UNIT
PATRICIA D. PETERSEN
CHIEF PRESIDING 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 MEMORANDUM
ON JUDICIAL NOTICE OF
GOVERNOR'S MEMORANDUM

I. INTRODUCTION

The governor agrees with Respondent Scarborough that state law prohibits agency staff from initiating or prosecuting adjudicative proceedings and from representing the agency in such proceedings as attorneys. The governor further recognizes that agency staff may not appear on behalf of an agency in adjudicative proceedings where they will perform any "legal function." Mr. Scarborough has no objection to the Chief Hearing Officer's taking judicial notice of the memorandum.

II. STATEMENT OF FACTS

This proceeding was instituted based on the OIC's issuance of a notice of request for hearing for imposition of fines dated March 8, 2013, and signed by Ms. Andrea Philhower as "Staff Attorney" for the OIC. Subsequent to that notice, the OIC has continued to prosecute this action through "Staff Attorneys" appearing on its behalf. These attorneys have prepared and signed pleadings, interrogatories, motions, and legal memoranda. They have presented written

RESPONDENT EDMUND C. SCARBOROUGH'S
MEMORANDUM ON JUDICIAL NOTICE OF
GOVERNOR'S MEMORANDUM - 1

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1 and oral legal arguments and would examine witnesses and present argument at the hearing.
2 The OIC seeks imposition of fines and taxes totaling nearly \$1 million based on alleged
3 violations of the insurance code. The parties have briefed a pending summary judgment motion
4 by Mr. Scarborough on the legal issues. An OIC staff attorney prepared, signed, and submitted a
5 42-page opposition and cross-motion for summary judgment citing legal authority and making
6 legal arguments.

7 On December 20, 2013, Governor Jay Inslee, through his general counsel, Nicholas
8 Brown, distributed a memorandum to the heads of all state agencies, boards, and commissions,
9 entitled "Prohibition on Employing In-house Attorneys." In the memorandum, the governor
10 recognized that state law mandates that the attorney general's office serve as the "exclusive
11 source of legal representation for state agencies, boards and commissions" including "before all
12 administrative tribunals or bodies of any nature." The governor warned that "state law prohibits
13 state agencies from employing attorneys as... 'staff attorneys'" and directed state agencies to
14 "cease[]" this practice and disallow staff to perform any activity that "constitutes a legal
15 function." The governor cited RCW 43.10.030, .040, and .067.

16 On January 20, 2014, simultaneous with his summary judgment motion, Respondent
17 Scarborough filed a motion to quash the OIC's notice of request for hearing for imposition of
18 fines. The basis of the motion was that this proceeding was instituted and is being prosecuted by
19 OIC "staff attorneys" and not by the attorney general as required by RCW 43.10.030, and the
20 OIC is not represented by the attorney general as required by RCW 43.10.040 and .067.

21 The OIC requested two extra weeks to respond to the motion to quash on the basis that
22 the issues raised in the motion "require[d] further research and time to prepare a response than
23 previously anticipated." The OIC's 20-page opposition, filed on March 4, 2014, was signed by
24 Mr. Alan Singer as "Staff Attorney." The OIC's opposition did not mention the governor's
25 memorandum dated December 20, 2013. Submitted with the OIC's opposition was a declaration
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RESPONDENT EDMUND C. SCARBOROUGH'S
MEMORANDUM ON JUDICIAL NOTICE OF
GOVERNOR'S MEMORANDUM - 2

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1 signed by Commissioner Mike Kreidler, dated February 28, 2014, stating his position or
2 understanding that OIC staff attorneys act only as his delegates and not as legal counsel.

3 III. AUTHORITY AND ARGUMENT

4 A. Staff Attorneys Performing Legal Functions for an Agency Is Prohibited by the 5 Constitution, Statute, and Governor's Instruction.

6 The state constitution mandates that the attorney general "shall be the legal adviser of the
7 state officers, and shall perform such other duties as may be prescribed by law." WASH. CONST.
8 art. 3, § 21. Accordingly, the legislature has mandated that the attorney general
9 "shall...[i]nstitute and prosecute *all* actions and proceedings" by any state agency. RCW
10 43.10.030 (emphasis added). The legislature has also mandated that all agencies be represented
11 by the attorney general in all proceedings and hearings, including before all administrative
12 tribunals, and has forbidden agencies from employing attorneys to perform legal or quasi-legal
13 functions. RCW 43.10.040, .067.

14 The constitution vests the governor with the "supreme executive power of this state."
15 WASH. CONST. art. 3, § 2. "The governor may require information in writing from the officers of
16 the state upon any subject relating to the duties of their respective offices, and shall see that the
17 laws are faithfully executed." WASH. CONST. art. 3, § 5. As the supreme executive, the
18 governor is authorized to act in the event that the attorney general fails or refuses to carry out his
19 duties. *State v. Clausen*, 146 Wash. 588, 592-93, 264 P. 403 (1928).

20 The governor's memorandum exemplifies his carrying out of his constitutional duty to
21 see that state laws are faithfully executed. The memorandum echoes Mr. Scarborough's position
22 that state law prohibits agencies such as the OIC from allowing staff to perform legal or quasi-
23 legal functions such as representing the agency as "staff attorneys" in adjudicative proceedings,
24 and practicing law in the course of doing so. There is no dispute that this proceeding was neither
25 instituted nor is it being prosecuted by the attorney general, nor is the OIC represented by the
26

1 attorney general as required. There can be no dispute that the OIC Staff Attorney is acting as an
2 attorney and performing a "legal function." The notice of request for hearing for imposition of
3 fines must be quashed.

4 **B. No Exception to the Requirement of Attorney General Representation Applies.**

5 The governor acknowledges that certain agencies, with approval from the attorney
6 general's office, utilize staff members to "handle certain administrative hearings internally."
7 This is not disputed. For instance, the insurance commissioner has appointed a chief hearing
8 officer to handle administrative hearings under WAC 284-02-070(2)(d)(i). And to the extent
9 agencies utilize their staff to present the agency's position in certain internal hearings, they may
10 do so only with specific authorization and without practicing law.¹ Indeed, the governor's
11 memorandum warns agencies to stay "within the bounds of the approval provided by the
12 Attorney General's Office" and not to allow staff to perform any activity that "constitutes a legal
13 function." See RCW 43.10.067 (barring agencies from employing attorneys to act "in any legal
14 or quasi legal capacity in the exercise of any of the powers or performance of any of the duties
15 specified by law to be performed by the attorney general"). The attorney general lacks the
16 power to approve any arrangement that violates the constitution or a statute.

17 There is no exception in the constitution or in chapter 43.10 RCW that authorizes
18 agencies to employ attorneys to represent them and practice law in contested adjudicative
19 proceedings. The OIC's characterization of its "staff attorneys" as employees who merely
20 happen to be attorneys, but appear only as "lay representatives" for the commissioner appearing
21 pro se, is factually incorrect and legally prohibited.² The staff attorneys do not act as lay
22 representatives but engage in the practice of law. In this proceeding, they have prepared and
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25 ¹ See Respondent Scarborough's Reply in Support of Motion to Quash at 5-6.

26 ² OIC's Opposition to Motion to Quash at 6.

1 signed pleadings, interrogatories, motions, and legal memoranda. They have presented legal
2 argument on motions and would examine witnesses and present argument at the hearing.

3 There is no legal or actual distinction between the role of staff attorneys in a contested
4 adjudicative proceeding such as this one, and a court proceeding where the OIC concedes it must
5 be represented by the attorney general.³ If the OIC were allowed to institute and prosecute this
6 matter through staff members, then the constitution and chapter 43.10 RCW would be rendered
7 meaningless because there will be no limit to the legal or quasi-legal functions that any agency
8 head or delegee may perform "pro se," without utilizing the attorney general. A court will reject
9 an interpretation that would render a statute meaningless. *Prison Legal News, Inc. v. Dep't of*
10 *Corrections*, 154 Wn.2d 628, 644, 115 P.3d 316 (2005).

11 **IV. CONCLUSION**

12 The governor's memorandum supports Mr. Scarborough's motion that the OIC's notice
13 of request for hearing for imposition of fines be quashed for failure to comply with RCW
14 43.10.030, .040, and .067.

15 DATED this 1st day of April, 2014.

16 CARNEY BADLEY SPELLMAN, P.S.

17
18 By: 

19 Timothy J. Parker, WSBA No. 8797

20 Jason W. Anderson, WSBA No. 30512

21 Attorneys for Respondent Edmund C. Scarborough

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25 ³ *Id.* at 9, 10.

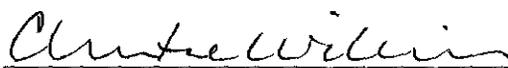
CERTIFICATE OF SERVICE

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 April 1, 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:

<p>Judge Patricia Petersen – ORIGINAL Chief Hearing Officer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 <u>kellyc@oic.wa.gov</u> via e-mail and legal messenger</p>	<p><u>Attorney for OIC</u> Mr. Alan M. Singer Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 <u>alans@oic.wa.gov</u> via e-mail and U.S. mail</p>
<p><u>Attorney for Walter W. Wolf</u> James A. McPhee Workland & Witherspoon, PLLC 601 W Main Avenue, Suite 714 Spokane, WA 99201 <u>jmcphoe@workwith.com</u> via e-mail and U.S. mail</p>	

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

DATED this 1st day of April, 2014.


Christine Williams, Legal Assistant