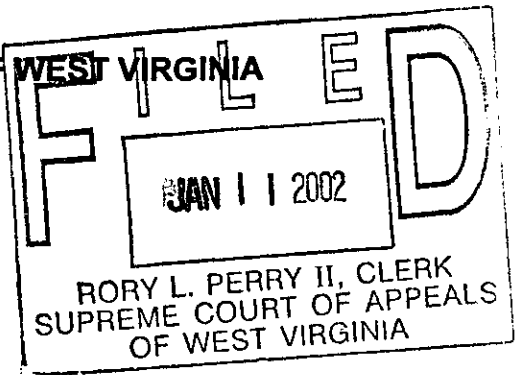


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston



STATE OF WEST VIRGINIA ex rel.
THE ATTORNEY GENERAL FOR
THE STATE OF WEST VIRGINIA,

PETITIONER,

v.

NO. 30094

GREGORY A. BURTON, CABINET SECRETARY OF THE DEPARTMENT OF ADMINISTRATION; NICHELLE PERKINS, DIRECTOR OF PERSONNEL OF THE DEPARTMENT OF ADMINISTRATION; KAY HUFFMAN GOODWIN, CABINET SECRETARY OF THE DEPARTMENT OF EDUCATION AND THE ARTS; MIKE CALLAGHAN, CABINET SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION; PAUL NUSBAUM, CABINET SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES; JOE MARTIN, CABINET SECRETARY OF THE DEPARTMENT OF MILITARY AFFAIRS & PUBLIC SAFETY; BRIAN KASTICK, CABINET SECRETARY OF THE DEPARTMENT OF TAX AND REVENUE; and FRED VANKIRK, CABINET SECRETARY OF THE DEPARTMENT OF TRANSPORTATION,

RESPONDENTS.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA; THE WEST VIRGINIA BOARD OF EDUCATION, THE WEST VIRGINIA DEPARTMENT OF EDUCATION AND THE SUPERINTENDENT OF SCHOOLS; THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD; and THE WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY,

INTERVENORS.

**AMICUS BRIEF OF GLEN B. GAINER III,
WEST VIRGINIA STATE AUDITOR**

The West Virginia State Auditor joins in the Department of Administration's argument that Petitioner has neither the Constitutional nor the Statutory authority to be the State's exclusive lawyer, as was set forth by Respondents with particularity, in their Memorandum in Opposition To Petitioner's Writ of Prohibition dated October 31, 2001. The West Virginia State Auditor further asserts the arguments set forth below:

I. THE ATTORNEY GENERAL MAY NOT USE CONTROL OF ATTORNEY SERVICES AS A MECHANISM TO ABROGATE OR INFRINGE UPON THE CONSTITUTIONAL AND STATUTORY DUTIES OF OTHER CONSTITUTIONAL OFFICERS.

The West Virginia State Auditor maintains the Constitutional responsibility to issue warrants on behalf of the State of West Virginia when based upon lawful appropriations. It is his duty, rather than any other officer's, to make the *determination whether a warrant will issue. The Auditor has a sworn duty to utilize his understanding of the State's interests therein and is elected to fulfill that purpose.*

The Petitioner suggests that "the State's interest" is a concrete and tangible thing, separate and apart from the interpretations of its elected officials. He believes that he has the unique ability, authority and power to divine such interests, thereby overriding, when in conflict, the interpretations of the other officers that the people of the State of West Virginia have seen fit to elect.

It is clear that Petitioner seeks to control attorney services for purposes of asserting his own view of the "State's" interest. His brief repeatedly asserts that proposition.

"...his [the Attorney General's] loyalty was to 'the State' rather than to any individual officer whose interests might conflict therewith. Would attorneys who are now paid and supervised by the 40 officers who have bypassed the Attorney General feel similarly bound to represent the interests of the State rather than the personal interests of their bosses?" Memorandum in support of Petition for Writ of Prohibition, ("Memorandum") at 12.

"...the Attorney General's loyalty is to an organizational entity - the State - rather than any individual constituent of that entity." Memorandum at 20.

By defining, what frequently may be political, philosophical or intellectual differences of opinion, as personal interests, he would impermissibly wrest Constitutional and/or statutory authority from those officers.

A. EXCLUSIVE REPRESENTATION AND DETERMINATION OF STATE'S INTERESTS WOULD INFRINGE UPON DUTIES OF OTHER CONSTITUTIONAL OFFICERS.

The West Virginia State Auditor, like the Treasurer, Governor, Secretary of State, Attorney General and Commissioner of Agriculture, is an elected official provided for by the Constitution, which states in part,

"[t]he executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general...[they] shall perform such duties as are prescribed by law". W. Va. Const. Art. VII, section 1.

Like the other Constitutional officers, the Auditor has taken an oath to uphold the Constitution and laws of this State.

"Every person elected or appointed to any office, before proceeding to exercise the authority, or discharge the duties thereof, shall make oath or

affirmation that he will support the Constitution of the United States and the Constitution of this State, and that he will faithfully discharge the duties of his said office to the best of his skill and judgment; and no other oath, declaration, or test shall be required as a qualification, unless herein otherwise provided." W. Va. Const. Art. IV, section 5.

Like the other Constitutional officers, he is elected by the people who, presumably, chose him because they supported his vision of the duties and responsibilities of the office. To allow the Petitioner to supplant his judgment of such responsibilities for that of the Auditor, robs the people of their choice and renders the Constitutional division of the executive branch meaningless. *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 207 S.E.2d 421 (1973).

The Constitution provides the Auditor with certain clear duties. It states that,

"[n]o money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the auditor". W. Va. Const. Art. X, section 3.

The Auditor's duty to issue warrants thus originates in the Constitution, which specifically provides that the Auditor issues all warrants in this State upon his determination that a requisition is proper and in accordance with a lawful appropriation. It is the Auditor's Constitutional duty to review such requisitions and establish whether they are in accordance with the laws of this State.

Under Petitioner's view of his role in State government quoted above and set forth repeatedly throughout his Memorandum, the Auditor's determination of a lawful appropriation could be supplanted, when conflicting, by the Attorney General's view of what is lawful.

As a separate and distinct, politically elected official, his conception of the "State's" interest may conflict with that of the Auditor. To give exclusive jurisdiction of all legal counsel to Petitioner, under his conception of that role, would render the office of Auditor, and all other Constitutional offices, mere figurehead positions having no ability to exercise their own view of their duties when in political or ideological conflict with the views of the Attorney General.

Constitutionally mandated, elected officials must, therefore, maintain the ability to seek counsel which will, within the dictates of their ethical obligations, assert and support the interpretations and viewpoints of the office, rather than the interpretations and viewpoints of the Attorney General's office.

The danger inherent in such political conflicts, and therefore the need of such elected Constitutional officers to maintain their own counsel, is apparent from the history of the case of *Tomblin v. Gainer*. In that case the Attorney General's office defended the Auditor throughout approximately seventeen years of complex litigation. From 1988 until October of 1999, Senior Deputy Attorney General Silas B. Taylor fulfilled that function.

On October 1, 1999, the Attorney General filed a motion to intervene as a party plaintiff based on his political vision of the State's best interest. That motion, although requesting that he be admitted as a party adverse to his own client, was not served on the Auditor. Thereafter, on October 19, 1999, the Attorney General's office filed a Notice of Substitution of Counsel, which unilaterally substituted the Attorney General's counsel with the Auditor's General Counsel as counsel of record.

In *Tomblin* the Petitioner sought to assert his own political views of the "State's interest" and did so at the expense of his client. That case clearly illustrates the tension inherent in allowing one elected official to provide exclusive representation to another. This problem would increase dramatically if the Attorney General were given the authority to use an exclusive relationship as a platform to further his understanding of the "State's" interests.

B. EXCLUSIVE REPRESENTATION AND DETERMINATION OF STATE'S INTERESTS WOULD INFRINGE UPON ENFORCEMENT DUTIES OF AUDITOR UNDER HIS STATUTORY AUTHORITY.

In addition to his Constitutional role, the Auditor has long held the statutory duty and authority to examine claims and make determinations whether money is due from the State and authorized by law. West Virginia Code § 12-3-1. This Court affirmed that duty in *Pryor v. Gainer*, 177 W.Va. 218, 351 S.E. 2d 404 (1986):

This section requires the Auditor to 'examine the claim' and to pay only 'so much thereof as he shall find to be justly due,' and to pay only 'if payment thereof be authorized by law'. *Pryor*, 351 S.E.2d at 407.

The Auditor also maintains responsibility as Chief Inspector of Public Offices, West Virginia Code § 6-9-1 *et seq.*; Commissioner of Securities, § 32-2-101 *et seq.*; Commissioner of Delinquent and Nonentered Lands, § 11-3-33; Trustee for Public Utility Tax Receipts, § 11-6-1 *et seq.*; and Administrator of Social Security Fund, § 5-7-2.

All of these provisions require that the Auditor enforce statutes in accordance with his understanding of the State's interests therein. The Auditor

could not fulfill the important functions of, for example, passing on claims and inspecting public offices without reference to and evaluation of whether claims and actions are authorized by law pursuant to the authority granted to him. The manner and method of fulfilling these functions is committed to the Auditor's sound discretion, a discretion which may not be overridden by a differing conception of those duties, as long as the exercise thereof is lawful. *State ex rel. Buxton v. O'Brien and the County Court of Mason County*, 97 W. Va. 343, 125 S.E. 154 (1924). In *Buxton*, referring to the limitations of its own power, this Court indicated that:

"Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made." Syllabus point 1, *Burton*. (emphasis added)

The Petitioner seeks to do what the Supreme Court will not- limit the lawful exercise or discretion of executive officials when such exercise does not comport with his view of the proper exercise of those duties on behalf of the State. In footnote five of his Memorandum, Petitioner discusses the Workers Compensation decision to seek dismissal of certain lawsuits related to unpaid premiums and suggests that the Commissioner would not have maintained the legal authority to exercise that unpopular, although discretionary authority, had he provided the Division with legal counsel.

"Had such attorneys been operating under a statute which required them to represent "the State" rather than "the Commissioner", would their motions to dismiss have ever been filed?" Footnote 5 of Petitioner's Memorandum at 12.

Petitioner seeks to abrogate the executive exercise of lawful discretion when he disagrees with the action taken or result reached. Petitioner cites the Workers Compensation Commission and the Department of Environmental Protection, unfortunately embroiled in recent controversial litigation, to support the quest to greatly expand his authority to set or "divine" policy. The two examples he provides overlook the countless actions taken by a myriad of officials with less controversial results. The notable exceptions should not overcome the rule of executive branch discretionary authority long recognized by this Court.

II. THE REQUESTED EXPANSION OF THE ATTORNEY GENERAL'S ROLE WOULD VIOLATE DUE PROCESS RIGHTS AND THE DUTY OF CONFIDENTIALITY.

The Attorney General also asks the Court to strip the officers and agencies of state government of their individual rights to due process. He asserts that he should have such power over agencies in order to promote the goals of efficacy and efficiency in the delivery of legal services to the "State".

A "house lawyer" defending an action against his boss may choose a litigation strategy designed to minimize the possibility of individual exposure, even though that strategy increases the overall exposure of the State, either through the waiver of appropriate defenses or through the suppression of information. For instance, an attorney whose primary allegiance is to an individual officer may seek to characterize willful misconduct as mere neglect in order to maximize the possibility of tax-funded "insurance" coverage, thus protecting his employer at the expense of the State. **An attorney whose allegiance is to the State would not seek to protect the wrongdoer, but rather would seek to recover from him the damage to the State caused by the misconduct...**Footnote 8, Memorandum at 22.

It is a long-standing constitutional principle that each individual possesses a due process right to counsel and access to the Courts. *Manchin, supra citing*

State ex rel. Staley v. Hereford, 131 W.Va. 84, 45 S.E.2d 739 (1947). *State ex rel. Wine v. Borderhircher*, 160 W.Va. 27, 230 S.E.2d 747; *Sisler v. Hawkins*, 158 W.Va. 1034, 217 S.E.2d 60 (1975); *State ex rel. Widmyer v. Boles*, 150 W.Va. 109, 144 S.E.2d 322 (1965). See also *In Re: Assessment of Certain Real Estate of Eastern Associated Coal Corp*; 157 W.Va. 749, 204 S.E.2d 71 (1974).

The Petitioner wishes to strip that Constitutional right from the officers, and agencies of state government under the guise of efficiency or efficacy. He alleges that legal services would be better provided if he, in his sole discretion, could manage litigation policy, determining in each instance his vision of the best interests of the State. He would use his position, and the confidences obtained thereby, to attack rather than protect the individuals that he is duty bound to represent.

The *Manchin* court recognized the danger in this when it adopted the holding in *Motor Club of Iowa v. Dept. of Transportation*, 251 N.W.2d 510 (1977).

To accord the attorney general the power he claims would leave all branches and agencies of government deprived of access to the court except by his grace and with his consent. In a most fundamental sense, such departments and agencies would thereby exist and ultimately function only through him, *Manchin*, 296 S.E.2d at 909 (quoting *Motor Club of Iowa v. Dept. of Transportation*, 251 N.W.2d at 516).

Additionally, this court has repeatedly affirmed the view that the officer or agency is client, see eg. *Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850, (1995) (Finding that Attorney General had violated ethical duties

in disclosing his client's ("DEP'S) change of position). See also, *State ex rel. Caryl v. MacQueen*, 182 W.Va. 50, 385 S.E.2d 696 (1989).

In discussing the Attorney General's argument that he represent "the people" and was, therefore, not duty bound to advocate for state officers and agencies, the *Disciplinary Board* Court noted that the responsibility implicit in a lawyer's ethical obligation to his client is:

. . ."clearly consistent with the respondent's function as the Attorney General of the State. To conclude otherwise would serve to denigrate the legal profession and destroy the public's trust and confidence in the entire judicial system, *Disciplinary Board*, 461 S.E.2d at 862.

The *Disciplinary Board* Court also noted that the Attorney General has a duty of confidentiality and may not disclose information obtained from his representation. Petitioner's Memorandum clearly shows an intention to use those confidences in a manner prohibited by the law articulated by the *Disciplinary Board* Court. Apparently, Petitioner seeks to overturn that decision so that he may use such confidences to personally attack his clients. Petitioner's bias against the agencies and officers he seeks to represent is apparent in the rhetoric that he employs.

An officer who elects to seek legal advice or advocacy from a subordinate of his choosing, rather than a lawyer in general service to the State, is likely to make that election because he desires that his personal agenda be served over the interests of the State at large. Memorandum at 19.

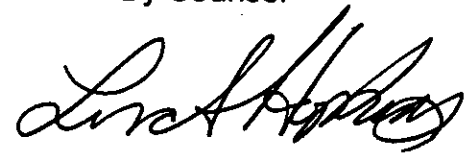
Petitioner unjustifiably assumes malfeasance or improper motivation on behalf of other officers and ignores the fact that other Constitutional officers have also sworn to uphold the laws of this State, an oath which the Auditor takes very

seriously. Petitioner also ignores the fact that there are ethical duties binding all attorneys, regardless of their employer and that such duties do not allow attorneys to advocate a "climate of lawlessness" as the Attorney General suggests. See West Virginia Rules of Professional Conduct. The bias inherent in his position underscores the dangers implicit in the grant of power he requests.

CONCLUSION

The power to control all lawyers and litigation, and to utilize confidences to civilly and criminally prosecute cases against his clients violates the Constitution and statutes of this State as previously set forth herein and as set forth by Respondents. It also violates individual officers and agencies rights to due process under the law. Such relief should, therefore be denied.

Glen B. Gainer, III
By Counsel



Lisa A. Hopkins
General Counsel

CERTIFICATE OF SERVICE

I, LISA A. HOPKINS, General Counsel for the West Virginia State Auditor, do hereby certify that I have served a copy of the foregoing "**AMICUS BRIEF OF GLEN B. GAINER III, WEST VIRGINIA STATE AUDITOR**", by mailing a true copy thereof by United States first class mail to the address as follows:

Michael R. Crane, Esquire
Room 200-W, Building 1
1900 Kanawha Boulevard, East
Charleston, WV 25305-0800

Silas B. Taylor
Senior Deputy Attorney General
State Capitol, Room E-26
1900 Kanawha Boulevard, East
Charleston, WV 25305

Jennifer Bailey Walker, Esquire
Room 200-W, Building 1
1900 Kanawha Boulevard, East
Charleston, WV 25305-0800

Alan M. Drescher
Office of Judges
Post Office Box 2233
Charleston, WV 25328

M. E. "Mike" Mowery, Esquire
Room 404-M, Building 1
1900 Kanawha Boulevard, East
Charleston, WV 25305

Charles R. McElwee
Robinson & McElwee-Charleston
Post Office Box 1791
Charleston, WV 25326-1791

Mark W. McOwen, Esquire
Room 450-M, Building 1
1900 Kanawha Boulevard, East
Charleston, WV 25305-0470

David S. Alter, II
Bureau for Child Support Enforcement
Post Office Box 3227
Charleston, WV 25332-3227

Debra H. McHenry
Special Assistant Attorney General
The Segal Law Firm
810 Kanawha Boulevard, East
Charleston, WV 25301

Gregory W. Bailey
Bowles, Rice, McDavid, Graff & Love
Post Office Box 1386
Charleston, WV 25325

Stuart Calwell, Esquire
Post Office Box 113
Charleston, WV 25321-0113

Thomas B. Miller
Schrader, Byrd & Companion-Wheeling
Post Office Box 6336
Wheeling, WV 26003

Mary Jane V. Pickens
WV State Insurance Commission
Post Office Box 50540
Charleston, WV 25305-0540

Diana Stout
WV Treasurer's Office
Building 1, Room E-122
1900 Kanawha Boulevard, East
Charleston, WV 25305

Robert E. Lannan
Robinson & McElwee-Charleston
Post Office Box 1791
Charleston, WV 25326-1791

John Poffenbarger, Esquire
Room 199-E, Building 1
1900 Kanawha Boulevard, East
Charleston, WV 25305-0220

William L. Ballard
Bureau of Employment Programs
Legal Services Div. Lit. Unit-3rd Floor
One Players Club Drive-3rd Floor
Charleston, WV 25311-1638

William C. Porth, Jr.
Robinson & McElwee-Charleston
Post Office Box 1791
Charleston, WV 25326-1791

Susan B. Saxe
WV Consolidated Public
Retirement Board
1900 Kanawha Boulevard, East
Charleston, WV 25305-0720

Heidi L. Talmadge
Bureau for Child Support Enforcement
Post Office Box 3227
Charleston, WV 25332-3227

Carol Egnatoff
Bureau for Child Support Enforcement
Post Office Box 3227
Charleston, WV 25332-3227

Garrett M. Jacobs
Attorney General's Office-WVDH &HR
350 Capitol Street, Room 251
Charleston, WV 25301

Bruce Ray Walker
State College & University Systems of
West Virginia
Central Office, Legal Division
1018 Kanawha Boulevard, E, Suite 700
Charleston, WV 25301

Chad M. Cardinal
WV Regional Jail & Correctional
Facility Authority
Post Office Box 50285
Charleston, WV 25311

Richard E. Hitt
Public Service Commission
Post Office Box 812
Charleston, WV 25323

Rebecca M. Tinder-Bell
WV Department of Education
Building 6, Room 362
1900 Kanawha Boulevard, East
Charleston, WV 25305

Kimberly D. Bentley
Bureau for Child Support Enforcement
Post Office Box 3227
Charleston, WV 25332-3227

Ancil G. Ramey
Steptoe & Johnson-Charleston
Post Office Box 1588
Charleston, WV 25326-1588

Brendan V. Sullivan, Jr.
Williams & Connolly
725 Twelfth Street, N.W.
Washington, DC 20005

Mary G. Clark
Williams & Connolly
725 Twelfth Street, NW
Washington, DC 2005

S. Thornton Cooper, Esquire
Public Service Commission
Post Office Box 812
Charleston, WV 25323

Rochelle Lantz Glover
Bowles, Rice, McDavid, Graff & Love
Post Office Box 1386
Charleston, WV 25325-1386

Howard E. Seufer, Jr.
Bowles, Rice, McDavid, Graff & Love
Post Office Box 1386
Charleston, WV 25325-1386

Rebecca S. Charles
WV Environmental Quality Board
1615 Washington Street, E, Suite 301
Charleston, WV 25311

Vincent Trivelli
Law Office of Stuart Calwell
Post Office Box 113
Charleston, WV 25321-0113

on this 11th day of January, 2002.



Lisa A. Hopkins