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TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

(360) 357-2077
e-mail: supreme@courts.wa.gov
www.courts.wa.gov

July 2, 2010

Peter Samuel Holmes
Laura Beth Wishik
Seattle City Attorney's Office
P.O. Box 94769
Seattle, WA 98124-4769

Jeffrey Todd Even
Maureen A. Hart
Office of The Attorney General
P.O. Box 40100
Olympia, WA 98504-0100

Re: Supreme Court No. 84483-6 - City of Seattle v. Robert M. McKenna

Counsel:

Enclosed is a copy of the RULING ORIGINAL ACTION signed by the Supreme Court Commissioner, Steven Goff, on July 2, 2010, in the above entitled cause.

Sincerely,

Ronald R. Carpenter
Supreme Court Clerk

RRC:daf
Enclosure

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE, a municipal corporation,

Petitioner,

v.

ROBERT M. MCKENNA, Attorney General, Washington State,

Respondent.

NO. 84483-6

RULING ON ORIGINAL ACTION

Invoking the original jurisdiction of this court, the city of Seattle challenges the participation of Attorney General Rob McKenna as a plaintiff in a federal lawsuit challenging recent health care legislation passed by Congress and signed into law by the President. The petition relies on that portion of article IV, section 4 of the Washington Constitution resting original jurisdiction in this court for mandamus against state officers. Petitioner seeks from this court the issuance of a writ compelling respondent McKenna to withdraw from the lawsuit.

As respondent points out, mandamus will not lie to compel a discretionary act. *Cmty. Care Coal. of Wash. v. Reed*, 165 Wn.2d 606, 615, 200 P.3d 701 (2009); *see also Walker v. Munro*, 124 Wn.2d 402, 408, 879 P.2d 920 (1994) (mandamus will not lie to compel a discretionary act or to direct a state officer to generally perform his or her duties, constitutional or otherwise); *Gerberding v. Munro*, 134 Wn.2d 188, 195,

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949 P.2d 1366 (1998) (same); *Brown v. Owen*, 165 Wn.2d 706, 725, 725 n.10, 206 P.3d 310 (2009) (mandamus will issue only if the act to be done is ministerial, leaving nothing to the exercise of discretion or judgment). *SEIU v. Healthcare 775 NW v. Gregoire*, No. 82551-3, slip op. at 7-8 (Apr. 8, 2010) (same). On the other hand, as petitioner points out, when a state officer lacks authority to do a certain act, no discretion is involved and mandamus is appropriate to compel the officer to refrain from acting. *State ex rel. Burlington N., Inc. v. Wash. Utils. and Transp. Comm'n*, 93 Wn.2d 398, 410-11, 609 P.2d 1375 (1980) (mandamus issued because commission lacked authority to expends funds from the railroad regulatory fee account to defend and pay judgments in tort cases involving fatal accidents at grade crossings); *see also, City of Tacoma v. O'Brien*, 85 Wn.2d 266, 268, 534 P.2d 114 (1975).

Petitioner grounds the petition on the premise that the attorney general lacks authority to participate as a plaintiff in the federal lawsuit, independent of the necessity to represent another state officer. The Washington Constitution provides that the attorney general "shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law." CONST. art. 3, § 21. When language of this sort is used in a constitution to describe the powers or authority of a state official, the official does not have the common law powers that might be associated with such an office, but only the powers expressly given by the legislature. *Yelle v. Bishop*, 55 Wn.2d 286, 296-97, 347 P.2d 1081 (1959) (involving authority of the state auditor, but relying extensively on an Arizona Supreme Court decision involving authority of that state's attorney general). Thus, this court has stated that "[t]he powers of the Attorney General are created and limited not by the common law but by the law enacted by the people, either in their constitutional declarations or through legislative declarations in pursuance of constitutional provisions." *State v. O'Connell*, 83 Wn.2d 797, 812, 523 P.2d 872 (1974); *see also, State ex rel. Attorney Gen. v.*

Seattle Gas & Elec. Co., 28 Wash. 488, 70 P. 114 (1902); *State ex rel. Hamilton v. Superior Court, Whatcom County,* 3 Wn.2d 633, 101 P.2d 588 (1940).

Petitioner focuses on the statute setting forth the general powers and duties of the attorney general, RCW 43.10.030. That statute provides, with respect to lawsuits, that the attorney general shall: appear for and represent the state "before the supreme court or the court of appeals in all cases in which the state is interested," institute and prosecute all actions "which may be necessary in the execution of the duties of a state officer," and defend all actions "against any state officer or employee acting in his official capacity, in any of the courts of this state or the United States." RCW 43.10.030(1)-(3). Petitioner suggests that none of these provisions expressly grants authority to the attorney general, independent of the duty to represent another state officer, employee, or agency, to bring or join in this federal lawsuit. Seemingly this theory is grounded in the notion that the governor is the constitutional officer designated to see to it that the laws are faithfully executed, *see* CONST. art 3, § 5, so it should be the governor who decides whether lawsuits such as this one should be pursued in the name of the State of Washington. *See State ex rel. Hartley, Governor v. Clausen*, 146 Wash. 588, 592, 264 P. 403 (1928) (the executive department of the State of Washington consists of officers including the attorney general, but the governor is the supreme executive power, with other powers being inferior thereto).

Respondent McKenna also cites these three subsections of RCW 43.10.030, relying in particular during oral argument on the notion that under subsection (2) he may prosecute actions not only as necessary in the execution of the duties of other state officers, but also as necessary to the execution of his own duties, seemingly including a duty to defend Washington interests and the state and federal constitutions. Apparently, under this theory if the attorney general determines that

federal legislation may be unconstitutional or may infringe this state's interests or laws, he is authorized to bring a federal action challenging the legislation. And he may do so independent of the wishes of other state officers, including the governor. Respondent also relies on RCW 43.10.040, which provides that the attorney general "shall also represent the state and all officials, departments, boards, commissions, and agencies of the state in the courts ... in all legal or quasi legal matters." Respondent seems to suggest that this statute provides a broad grant of authority, or at least one broad and inclusive enough to give him the independent authority to decide whether this state should institute or participate in litigation of this sort. Petitioner responds that this statute was enacted in 1941 as part of legislation meant to end the proliferation of attorneys hired by various state agencies and to squarely place the authority for representation of state agencies in the attorney general. *See State v. Herrmann*, 89 Wn.2d 349, 354, 572 P.2d 713 (1977). Petitioner suggests that respondent's reading of the statute would render obsolete many other statutes that grant the attorney general specific authority to act in specific instances.

The matter is now before me for an initial determination whether the petition should be decided by this court, transferred to the superior court, or dismissed. RAP 16.2(d). Petitioner contends that the matter should be retained for a decision by this court. Respondent asks that the petition be dismissed, on grounds that it fails to invoke this court's original jurisdiction, that it fails to present a justiciable controversy, that petitioner lacks standing, and that petitioner fails to state a claim upon which relief can be granted.

Neither party suggests that this petition should be transferred to the superior court, which has concurrent original jurisdiction over actions against state officers. And I conclude that transfer would be inappropriate, since no apparent factual dispute requires transfer to the superior court either for a factfinding hearing or

for a decision on the merits, and the issue presented seems sufficiently important to merit exercise of this court's original jurisdiction, if such is proper. Arguably at stake is not the fate of the underlying federal lawsuit but the role of the attorney general in state government. Petitioner seems to suggest that the legislature has created a traditional attorney-client relationship between the attorney general and the state officers and agencies he is required to represent. He is their statutory counsel, but they make the political and policy decisions for the state. Petitioner does not suggest that the attorney general lacks discretion to decide when and how to exercise his authority. Rather, petitioner urges that the attorney general lacks authority to independently institute federal litigation to assert his vision of state interests. Respondent suggests that his authority to bring and defend actions in the name and interest of the state is discretionary. If in his independent judgment litigation is warranted, he may bring an action, but is not required by law to do so. And because his decision involves the exercise of discretion, and is not purely ministerial, this court may not issue a writ of mandamus.

I will not discuss the parties' arguments in greater detail here. Suffice it to say that the issues in the case seem to me to be sufficiently debatable and important as to call for a decision of the court rather than its commissioner. Therefore, I will not dismiss the action at this point but retain it for the court to decide, subject, of course, to the court's possible later decision that the requisites for the issuance of a writ have not been met.

There remains the question of timing the remaining steps in the proceedings, including time for filing briefs. RAP 16.2(d). The parties seem to agree that they can approve an agreed and adequate statement of facts, at least if they focus on the basic facts giving rise to the petition without argumentative embellishment. And the parties have already provided substantial briefing on the legal questions

posed by the cases, making it likely they can promptly file briefs if called to do so. Since the federal lawsuit will likely be pursued by other plaintiffs regardless of the outcome of this case, there is no emergency calling for a greatly accelerated briefing and argument schedule. But the court can hear argument on November 18, 2010, so a schedule is adopted with that date in mind. The agreed statement of facts will be due July 19, 2010, petitioner's initial brief will be due August 16, 2010, respondent's brief will be due September 13, 2010, and petitioner's reply brief will be due October 4, 2010. Oral argument will be heard November 18, 2010.

COMMISSIONER

July 2, 2010