

JOHN BEL EDWARDS, in His
Official Capacity as Governor
of the State of Louisiana

DOCKET NO. 6514, DIV. **SEC. 26**

SECTION NO. _____

versus

19th JUDICIAL DISTRICT COURT

JEFF LANDRY, in His Official
Capacity as Attorney General
of the State of Louisiana

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA STATE

SEP 30 2016

BY JP
DEPUTY CLERK OF COURT

FILED: _____

DEPUTY CLERK

PETITION FOR WRIT OF MANDAMUS

The Petition of JOHN BEL EDWARDS, in his official capacity as Governor of the State of Louisiana, whose office is in the Parish of East Baton Rouge, respectfully represents:

1.

Made defendant herein is JEFF LANDRY, in his official capacity as Attorney General of the State of Louisiana.

2.

Petitioner, as the Governor of the State of Louisiana, is "the chief executive officer of the state," and he is charged by the Constitution with "see[ing] that the laws of the state are faithfully executed." La. Const. article IV, § 5(A). In that capacity and to that end, Petitioner has directed and continues to direct various executive agencies and departments of the State to enforce and faithfully execute the laws of the State.

3.

Defendant is the executive head and chief administrative officer of the Department of Justice and "the chief legal officer of the state." La. Const. article IV, § 8; La. R.S. 36:701(B). The Department of Justice is domiciled in Baton Rouge, and it has the power to sue and be sued. La. R.S. 36:701(A). By virtue of



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his office, the Defendant is charged with “the assertion or protection of any right or interest of the state.” *Id.* He is, however, as the head of a Department within the executive branch, subject to the policy decisions of the head of that branch, i.e., the Governor. And as the State’s lawyer, he is ethically required by the Rules of Professional Conduct promulgated by the Louisiana Supreme Court to “abide by [his] client’s decisions concerning the objectives of representation” and to “consult with [his] client as to the means by which they are to be pursued.” La. S. Ct. Rules, R.P.C. 1.2(a). His *ex officio* representation of the State “does not constitute an endorsement of [his] client’s political, religious, economic, social or moral views or activities.” *Id.*, 1.2(b).

4.

Notwithstanding the grant of representation authority to the Attorney General, Louisiana constitutional law has long recognized the power of the Legislature to authorize, whether explicitly or implicitly, members of the executive branch to retain private counsel other than the Attorney General to advise and represent them in their faithful enforcement and execution of the laws of the State. See, e.g., *Ricks v. Department of State Civil Service*, 200 La. 341, 374, 8 So.2d 49, 60 (1942) (“the framers of the Constitution never intended [La. Const. article VII, § 56 (1921), which empowered the Attorney General to ‘attend to, and have charge of all legal matters in which the State has an interest’] to operate as a limitation upon the Legislature to prohibit it from passing any act, calling for the employment of counsel where it deemed such was necessary”); *Saint v. Allen*, 172 La. 350, 364, 134 So. 246, 250 (1931) (“[t]he commission has the implied power to employ counsel ... arising out of the power to sue and be sued”).

5.

Pursuant to this authority, the Legislature has enacted statutes governing the retention of private counsel by entities within the executive branch and setting forth the procedures for such employment of private counsel, specifically La. R.S. 42:262 and La. R.S. 49:258.

6.

La. R.S. 42:262 is primarily concerned with the method of compensation of private counsel retained by the attorney general or any state agency, board or commission, exclusive of public postsecondary education institutions, bond counsel, and generally, counsel retained to defend the State in tort actions. The statute prohibits contingency fee contracts [§ 262(A)], provides that attorney fee awards are the property of the State [§262(B)], prohibits payment of any private counsel by a third party [§ 262(C)], and requires the keeping of records of hours and expenses and sets a maximum hourly fee [§ 262(D)]. Subsection F provides additional conditions for the retention of a so-called “special attorney or counsel,” providing in Subsection F(1):

In the event it should be necessary to protect the public interest, for any state board or commission to retain or employ any special attorney or counsel to represent it in any special matter for which services any compensation is to be paid, the board or commission may retain or employ such special attorney or counsel solely on written approval of the governor and the attorney general and pay only such compensation as the governor and the attorney general may designate or approve in the written approval. The approval shall be given in their discretion upon the application of the board or commission.

Read alone, this statute would appear to grant the attorney general (along with the governor) discretion in approving the retention of special attorneys or counsel by state boards and commissions, and the statute is silent as to the retention of such counsel by other executive agencies that are not boards or commissions.

7.

But La. R.S. 42:262 cannot be read alone; by its own terms, La. R.S. 49:258 supersedes La. R.S. 42:262:

Notwithstanding the provisions of any other law to the contrary and specifically the provisions of any law that authorizes the state or a state agency to appoint, employ, or contract for private legal counsel to represent the state or a state agency, including but not limited to the provisions of R.S. 42:261, 262, and 263, and R.S. 40:1299.39(E), any appointment of private legal counsel to represent the state or a state agency shall be made by the attorney general with the concurrence of the commissioner of administration in accordance with the following procedure:

(Emphasis added.) The statute then sets forth a procedure whereby appointments are to be made according to a written procedure, with the governor, attorney general, and commissioner of administration together establishing both the procedure and the minimum qualifications for the private attorneys, with both the procedure and the qualifications to be published “at least annually in the Louisiana Bar Journal or such other publication as will reasonably ensure dissemination to the membership of the Louisiana State Bar Association.” La. R.S. 49:258(1).

8.

La. R.S. 49:258 thus, by its terms, supersedes the discretion set forth with respect to boards and commissions in La. R.S. 42:262(F)(1), and replaces it with a ministerial process for approval of private counsel, by both the Division of Administration and the Attorney General, and appointment by the Attorney General. Defendant has at least partially complied with the provisions of La. R.S. 49:258 by publishing the minimum qualifications in the Louisiana Bar Journal, most recently at 64 La. Bar J. 176 (August-September 2016), a copy of which is attached hereto as Exhibit A. (It should be noted, however, that despite the statutory requirements, neither the Governor nor the Commissioner of Administration participated in the development of the purported “conditions” set

forth therein.) Defendant, through his Chief Deputy Attorney General, has also acknowledged via memorandum that his ministerial function in the appointment of private counsel is limited to the review of the appointed counsel's qualifications and fee arrangements, see Exhibit B.

9.

Notwithstanding his statutory ministerial duty and his acknowledgment of it, Defendant has refused to perform the ministerial task of approving private counsel contracts and appointing private counsel for numerous executive agencies of the State.

10.

Some, but not all, of the private counsel contracts that have been approved by the Division of Administration, but Defendant has refused to approve, are:

- A. A contract between the Department of State and Shows, Cali & Walsh, L.L.P., dated August 1, 2016;
- B. Contracts between the Department of Insurance and Kantrow, Spaht, Weaver & Blitzer, APLC, dated June 7, 2016; and Young, Richaud & Myers, dated June 8, 2016;
- C. A contract between the Louisiana State Bond Commission and Jones Walker, L.L.P., dated August 3, 2016;
- D. Contracts between Offices of the Division of Administration and Frilot, L.L.C., effective August 1, 2016; Kantrow, Spaht, Weaver & Blitzer (A Professional Law Corporation), dated August 8, 2016; and Decuir, Clark & Adams, LLP, dated September 1, 2016;
- E. Contracts between the Department of Economic Development with the Law Offices of Joseph Looney, effective July 10, 2016; and King, Krebs & Jurgens, P.L.L.C., effective August 1, 2016;

- F. A contract between the Department of Natural Resources and Oats & Marino, APPC, dated July 7, 2016;
- G. An amendment to a pre-existing contract between the Department of Public Safety & Corrections and Patrick Jackson, APLC, dated June 2, 2016;
- H. A contract between the Department of Transportation and Development and Theodore "Ted" L. Jones, effective March 1, 2016;
- I. A contract between the Military Department and Taylor, Porter, Brooks & Phillips L.L.P., dated August 9, 2016;
- J. A contract between the Louisiana Workforce Commission and Cravins Trosclair A PLC, dated August 8, 2016;
- K. A contract between the Coastal Protection and Restoration Authority and Dunlap & Fiore, LLC, dated July 22, 2016;
- L. A contract between the Board of Pharmacy and Celia R. Cangelosi, Attorney at Law, dated August 3, 2016;
- M. Contracts between the Office of Elderly Affairs and the Advocacy Center, dated July 1, 2016; and Jane A. Thomas, dated July 1, 2016;
- N. Contract between Southeastern Louisiana University and Seale and Ross dated May 5, 2016;
- O. Contract between the Louisiana State Licensing Board for Contractors and Bankston and Associates, L.L.C. effective August 1, 2016; and
- P. Eleven contracts between various firms and the Patients Compensation Fund.

11.

The Commissioner of Administration has approved all of these contracts. All of the lawyers and law firms who are parties to the contracts meet, and generally far exceed, the minimum qualifications set forth by Defendant. None of

the fee arrangements set forth in the contract violate La. R.S. 42:262 in any way. Yet Defendant has refused to perform his ministerial duty of approving the contracts and appointing these attorneys.

12.

Defendant has explicitly most of rejected the contracts on the grounds that the contracting attorneys should not have agreed not to discriminate in employment and the rendering of services in accordance with Executive Order No. JBE 2016-11.

13.

As an example, the Attorney General has rejected a contract between the State Bond Commission and the two law firms retained as bond counsel for the issuance of general obligation bonds for the State of Louisiana. In so doing, the Attorney General supplied the following reasoning:

The contracts you submitted to retain outside counsel are being returned to you without approval from our office. The Attorney General requires antidiscrimination clauses in legal contracts to be written in conformity with State and Federal law; therefore, these provisions should not contain language exceeding what the law requires. Additionally, On May 14, 2016, the Attorney General issued an opinion regarding the Governor's Executive Order JBE 16-11, which can be found on our website.

This explanation does not provide any further description of the state or federal laws to which the Attorney General is referring.

14.

Notwithstanding the provisions of R.P.C. 1.2(b), Defendant apparently believes that it is necessary that private attorneys who contract with entities within the executive branch must retain the right to discriminate against persons on the basis of sexual orientation and gender identity, and that state departments, agencies, boards, and commissions cannot comply with Executive Order No. JBE 2016-11.

15.

Defendant's ongoing refusal to perform his ministerial duty of approving private counsel contracts and appointing the attorneys is causing ever-increasing disruption of the ability of the executive branch to perform the tasks of governing the State.

16.

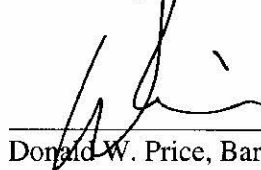
Accordingly, Governor Edwards petitions the Court for the immediate issuance of an alternative writ of mandamus to Defendant, Attorney General Jeff Landry, setting a rule to show cause why the writ of mandamus should not be made peremptory, in accordance with L. C.C.P. article 3782. The writ should compel Defendant to perform his statutory ministerial duty to give written approval of the choice of counsel of the executive branch entities and to appoint said

WHEREFORE, Plaintiff, John Bel Edwards, in his official capacity as Governor of the State of Louisiana, prays that an alternative writ of mandamus issue, stating that the role of Defendant, Jeff Landry, in his official capacity as Attorney General, in approving private counsel contracts is ministerial in nature and limited to a review of private counsel's qualifications and fees; and directing Defendant to approve the pending private counsel contracts for executive branch entities and to appoint said counsel, or alternatively to show cause at a date and time to be set by the Court why this alternative writ should not be made peremptory; that this Petition and said alternative writ be served upon Defendant, Jeff Landry, at 1885 N. Third Street, Baton Rouge, LA 70802; and that all costs of these proceedings be taxed to defendant.

Respectfully submitted,



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