STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION CIRCUIT COURT

CAUSE NO. 49C01-1310-PL-038953

GLENDA RITZ, CHAIR INDIANA STATE BOARD OF EDUCATION & INDIANA SUPERINTENDENT OF PUBLIC INSTRUCTION

Plaintiff,

V.

DANIEL ELSENER, TONY WALKER, DAVID FREITAS, CARI WHICKER, SARAH O'BRIEN, ANDREA NEAL, BRAD OLICER, B.J. WATTS, TROY ALBERT, GORDON HENDRY, in their Individual capacities as members of the Indiana State Board of Education, GEORGE ALGELONE, in his official capacity as Director of Legislative Services Agency,

Defendants.

FILED
18 NOV 08 2013
Elizabeth A. White
CLERK OF THE MARION CIRCUIT COURT

ENTRY ON MOTION TO STRIKE APPEARANCE AND COMPLAINT

I. FACTS AND PROCEDURAL HISTORY

The following recital of facts is based on the allegations of the Complaint. Plaintiff, Glenda Ritz, is the Superintendent of Public Instruction for the State of Indiana. As such, Ms. Ritz serves as both the Chair of the State Board of Education (SBOE) and the Director of the Department of Education (Department). The Defendants include the nine (9) other individual members of the SBOE: Troy Albert, Daniel Elsener, David Freitas, Gordon Hendry, Andrea Neal, Sarah O'Brien, Brad Oliver, Troy Walker, and B.J. Watts. George Angelone is also a Defendant. Mr. Angelone is the Director of the Legislative Services Agency (LSA), a bipartisan administrative agency serving the General Assembly. Overseeing the LSA are the Speaker of the House of Representatives, Brian Bosma, and the Senate's President Pro Tempore, David Long.

The underlying dispute between Plaintiff and Defendants concerns the publication of the A-F school grades for the 2012-2013 school year. Both state and federal law require a "grading" of each school's performance. Ind. Code 20-31-8-4. This information may affect the funding of a school district, and can be the basis for intervention by the SBOE in the administration of a school district.

During a regular monthly public meeting of the SBOE held on October 2, 2013, the publication of the A-F grades for 2012-13 was discussed. Although board members agreed that grades could be published before Thanksgiving, no formal action was taken.

On October 16, 2013, the nine (9) defendant board members sent a letter to President Pro Tempore of the Indiana Senate David Long and House Speaker Brian Bosma. The Defendants requested the assistance of the LSA to calculate and publish the A-F grades for the 2012-2013 school year. The Superintendent was not informed that the Defendants planned to send the letter, and she was the only member of the SBOE who was not a signatory. The Superintendent and SBOE staff members received a copy of the letter on October 17, 2013.

On October 18, 2013, Brian Bosma and David Long sent a letter to George Angelone directing the LSA to enter into a data-sharing Memorandum of Understanding with the SBOE for the purpose of undertaking a calculation of the grades for the 2012-2013 school year.

On October 22, 2013, the instant complaint was filed. Appearing for the Superintendent in her official capacity were Michael Moore and Bernice Corley, in-house counsel for the Department of Education. The complaint sought a declaratory judgment that the actions of the individual Board members violated Indiana's Open door law; a preliminary and permanent injunction against defendant Board members, George Angelone, the LSA, and all persons and entities acting under their direction or in concert with them from taking further action unless or until the members comply with the requirements of Indiana's Open Door Law; awards for plaintiff's costs, if any, incurred in prosecuting the lawsuit.

On October 24, 2013, the Attorney General filed a motion to strike the appearance of Plaintiff's counsel and complaint.

On October 28, 2013, Plaintiff filed her response, which was followed by the Attorney General's Reply. The motion was set for hearing on November 5, 2013. Before the hearing the Court granted Plaintiff's Motion to Dismiss Defendant Angelone without prejudice. At the

hearing Plaintiff in response to the Court's question orally moved to dismiss Count II of the Complaint, and the same was granted.

This Court then heard oral argument on the Motion to Strike. Appearing for Plaintiff was Mr. Michael Moore and Ms. Bernice Corley. Appearing for the Attorney General was Deputy Attorney General David Arthur, Deputy Attorney General Dennis Mullen, and Deputy Attorney General Kenneth Joel.

At the conclusion of argument Plaintiff was given leave to file no later than November 8, 2013 a supplemental memo on the dissenting opinion in *State ex rel. Young v. Niblack*. On November 7, 2013, Ritz filed her supplemental brief. The matter was then taken under advisement until November 9, 2013.

II. LEGAL DISCUSSION

Chapter 2 of Article 5 of Title 4 sets forth the powers and duties of the Attorney General. Sec. 1 provides in pertinent part as follows:

> **IC 4-6-2-1**
>
> **Prosecuting and defending suits by or against state and state officers.**
>
> Sec. 1 The attorney general shall prosecute and defend all suits instituted by or against the state of Indiana, the prosecution and defense of which is not otherwise provided for by law...

Section 3 of Chapter 5 of the above article prohibits state agencies, as defined in the chapter, from retaining counsel other than the Attorney General, absent the Attorney General's written consent:

> **IC 4-6-5-3**
>
> **Written consent; employment of attorneys or special General counsel**
>
> Sec 3. No agency, except as provided in this chapter, shall have any right to name, appoint, employ, or hire any

> attorney or special or general counsel to represent it or perform any legal service in behalf of such agency and the state without the written consent of the attorney general.

As a general proposition, the above statutes clearly vest in the Attorney General's hands the sole responsibility for the legal representation of the State. Plaintiff makes four (4) arguments in her brief and oral argument why the instant case is an exception to that general rule. The Court finds those arguments unpersuasive for the following reasons.

Argument 1: This Case Does Not Satisfy the Conditions of Ind. Code 4-6-2-1.5.

This argument was not raised in oral argument but was addressed in Plaintiff's response to the instant Motion. Ind. Code 4-6-2-1.5(a) states as follows:

> **Suits against state governmental offices or employees and teacher; defense by attorney general**
>
> Sec. 1.5 (a) Whenever any state governmental official or employee, whether elected or appointed, is made a party to a suit, and the attorney general determines that said suit has arisen out of an act which such official or employee in good faith believed to be within the scope of the official's or employee's duties as prescribed by statute or duly adopted regulation, the attorney general shall defend such person throughout such action.

It is true that this provision does not authorize the Attorney's General's representation in behalf of Superintendant Ritz, in that this section only applies to instances in which a State official is a defendant rather than a plaintiff. One could conceivably regard this provision as implicitly amending section 1. In other words, the General Assembly might have intended to scale back the scope of the Attorney General's mandatory responsibilities to the circumstances described in section 1.5.

The above interpretation is unlikely for two (2) reasons. First, had the General Assembly intended such a substantial change in law, it would have adopted a more direct method i.e. amending and/or repealing Section 1. If we accept Plaintiff's position, we are left as Defendant

points out with a Section 1 that serves no purpose. It is black-letter law that Courts should avoid constructions of statutes which render them superfluous.

Second, Plaintiff's interpretation is not consistent with the underlying purpose of Chapter 2. "The office of the Attorney General was re-created by the Indiana Legislature in 1943, in order to give the State independent legal representation and to establish a general legal policy for State agencies." *State ex rel. Sendak v. Marion County Superior Court,* 373 N.E.2d 145, 148 (Ind. 1978). If it makes sense for the State of Indiana to speak with one voice, the Attorney General's, in cases in which a state official is a defendant, why shouldn't the State speak with one voice, when it is necessary for the State to initiate suit.

A more plausible interpretation is that this section was intended to clarify and even expand the Attorney General's duties. This Section was probably intended to cover those cases in which an individual is sued in his individual capacity for acts which the defendant in good faith performed in pursuit of his official duties. This interpretation harmonizes the two sections and is more consistent with the legislative purposes of Chapter 2.

Argument 2: Requiring Superintendant Ritz to be Represented by the Attorney General Will Strip Her of Her Right to Enforce Ind. Code Open Door Law (ODL).

Assuming that Supt. Ritz has standing to invoke the ODL Ind. Code 5-14-1.5 et seq., it is by no means clear that she will not be afforded counsel by the Attorney General, should she decide to pursue her claims under that Act. If her request is denied, that raises different issues than are now before the Court. In the same vein, the contention raised by Plaintiff's counsel that her request for representation by the Attorney General was denied in an arbitrary and capricious manner was neither proven nor pled. The only fact that is clear on this topic is that the Attorney General did not give his written consent to Plaintiff to retain counsel other than from his office.

Argument 3: As a Constitutional Officer, Plaintiff is Exempt From Obtaining the Attorney General's Written Consent Pursuant to Ind. Cod 4-6-5-6(b)(4).

The above statute reads as follows:

IC 4-6-5-6
Definitions; exemptions from act

(b) The term "agency", whenever used in this chapter, means and includes any board, bureau, commission, department, agency, or instrumentality of the state of Indiana; provided, however, this chapter shall not be construed to apply where...

(4) A constitutional officer of the state is by law made a board, bureau, commission, department, agency, or instrumentality of the state of Indiana.

Neither party has been able to explain the phrase "constitutional officer being made a board, bureau..." While the above statutory language is unclear, two (2) cases decided by the Indiana Supreme Court subsequent to the enactment of this provision militate against its application to the instant case.

In *State ex rel. Young v. Niblack* 99 N.E. 2d 839 (Ind. 1951), Superintendant of Public Instruction Wilbur Young retained private counsel when he was named as a defendant in a suit brought by the State of Indiana seeking declaratory relief as to the distribution of state funds to various Indiana school corporations. Young moved for a change of venue. The Attorney General moved to strike the appearance of Young's counsel, invoking Burns' Ann. St. 49-1903, the forerunner of today's Ind. Code 4-6-2-1. The Attorney General's Motion to Strike was granted, whereupon Young sought a Writ of Mandamus to order the trial court judge to allow private counsel to continue to represent Superintendant Young.

Our Supreme Court denied the Writ by a 3-2 vote. While the court did not construe the exemption language now found at Ind. Code 4-6-5-6, that language was in effect at the time of the decision. Thus, in a case involving the very constitutional office and agency now before this Court, the Supreme Court held that the Superintendant of Public Instruction was not empowered to retain his own counsel, but was required to be represented by the Attorney General.

State ex rel. Sendak v. Marion County Superior Court, Room No. 2, 373 N.E.2d 145 (Ind. 1977), more explicitly deals with the application of the exemption language of Ind. Code 4-6-5-6 (b) (4). This case concerned Governor Bowen's hiring of counsel to represent the Alcoholic Beverage Commission. The trial court denied the Attorney General's Motion to Strike private

counsel's appearance, from which decision the Attorney General successfully sought a Writ of Mandamus.

The Court cited the *Niblack* case and *Indiana State Toll Bridge Commission v. Minor* (1957), 236 Ind. 193, 139 N.E. 2d 445, for the general proposition that the Attorney General is charged with the responsibility of defending the State and its officers and employees when sued in their official capacities. The Court then considered the Governor's reliance on Ind. 4-6-5-6 (b)(4):

> Respondents argue this case is within the statutory exception to the consent requirements in IC 4-6-5-6(b)(4). That section states that the statute does not apply where a constitutional officer is, by law, made a board, bureau, commission, department agency or instrumentality of the State. However, The Governor of Indiana is not by law made the Alcoholic Beverage Commission. The ABC is a separate entity of the government....

State ex rel. Sendak v. Marion County Superior Court, Room No. 2, supra, at 148.

This Court can find no legally significant difference between the relationship of the ABC to Governor Bowen and the relationship of the State Board of Education to Superintendant Ritz. It is true that the Superintendant of Public Instruction serves on the SBOE as its Chair. On the other hand, as the instant litigation illustrates, the Board may act independently of its Chair, just as she may act independently of the Board. The SBOE interacts with and is undoubtedly influenced by its Chair, but is not controlled by her. In this regard, it cannot be said that the Superintendant was "made" into the Board. For that reason, Plaintiff's third argument must fail.

Argument 4: Even if the Attorney General Were Willing to Represent Superintendant Ritz, Such Representation Together With His Representation of the Defendants Would Constitute a Conflict of Interest Under Rule 1.7 of the Rules of Professional Conduct.

Plaintiff gingerly treated the issue of whether representation of all of the parties by the Attorney General would violate the Rules of Professional Conduct ("RPC"), conceding on the one hand that such multiple representation did not fall within the scope of the RPC, but asserting on the other hand that such a conflict should nonetheless be considered by the Court in deciding

whether to allow Ms. Corley and Mr. Moore to continue as counsel. The Attorney General is of course subject to the RPC. Moreover, this Court is empowered to insure fidelity to the RPC. What the Court is not empowered to do is to create and enforce ethical rules not recognized by the RPC.

For the Court to consider the alleged conflict of interest, the Plaintiff must therefore demonstrate that the Attorney General's conduct or reasonably anticipated conduct violates Rule 1.7. It does not.

To begin with, the Attorney General has not entered his appearance for Superintendant Ritz, nor for that matter, the Defendants. After reviewing the case, the Attorney General may advise his state clients to enter into an out-of-court settlement. Or he may decide that with appropriate safeguards, his office can represent both sides in a new action he would file. Or he may ultimately decide to give his written consent to allow Ms. Corley and Mr. Moore to resume their representation. In sum, even if Rule 1.7 were applicable, the question of the Attorney General's compliance with it is not ripe for adjudication.

Most importantly, however, even if the Attorney General were to decide that he would replace present counsel in behalf of Superintendant Ritz, Rule 1.7 would be inapplicable. As acknowledged by Plaintiff in argument, his conduct would not be covered by the RPC. Paragraph 18 of the Preamble to the RPC addresses the topic as follows:

> [18] Under various legal provision, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. ***Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.***

(emphasis added).

As noted by Ritz in her Supplemental Brief, the dissent in the *Niblack* case discusses at length the ethical perils of the Attorney General representing both sides in an intragovernmental suit. The dissent demonstrates, however, that the majority was well aware of the ethical concern raised in this case and whether rightly or wrongly rejected them. In our common law system, case law precedent must be followed by the trial court. Neither the *Niblack* nor the *Sendak* opinions have been questioned by our Supreme Court. Until they are, this Court is obliged to follow them.

III. CONCLUSION

For all of the above reasons, the Court GRANTS the Attorney General's Motion to Strike the appearances of Bernice Corley and Michael Moore and the Complaint herein. This is a Final Order concluding this matter, but is without prejudice to the claims herein being filed by the Attorney General or by other counsel consented to in writing by the Attorney General.

SO ORDERED this 8th day of November, 2013:

Hon. Louis F. Rosenberg
Judge, Marion Circuit Court

Distribution:

Counsel of Record