

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 18-CI-43**

COMMONWEALTH OF KENTUCKY
ex rel. ANDY BESHEAR, ATTORNEY GENERAL, et al.

PLAINTIFFS

v.

OPINION AND ORDER

**WILLIAM M. LANDRUM III, in his official capacity as
Secretary of the Finance and Administration Cabinet, et al.**

DEFENDANTS

This matter is before the Court on Plaintiff's Motion for Temporary Injunction, and by agreement of the parties, on expedited cross-motions for summary judgment. The parties appeared before the Court on January 19, 2018 for a hearing on the matter. Hon. J. Michael Brown and Hon. S. Travis Mayo appeared on behalf of Plaintiffs; Hon. Stephen Pitt and Hon. Brett Nolan appeared on behalf of Defendant William M. Landrum III; and Hon. David Fleenor appeared on behalf of the Legislative Research Commission ("LRC").¹ The Court, having reviewed the pleadings and briefs, considered the argument of counsel, and being otherwise sufficiently advised, hereby **GRANTS** Plaintiffs' Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

BACKGROUND

The Office of the Attorney General ("OAG") recently began the process of investigating and litigating potential violations of state consumer protection, Medicaid, antitrust and/or other statutes in the manufacturing, distribution, and/or dispensing of prescription opioid products within the Commonwealth. To "bolster its experience, provide more attorneys, and cover the

¹ Defendant LRC was dismissed by an Agreed Order of Dismissal entered on January 31, 2018.

extensive costs that come with litigating against some of the largest companies in the world,” the OAG sought assistance from outside counsel. *See* Pls.’ Mot. for Summ. J. 3. Accordingly, in June 2017, the OAG issued a Request for Proposals (“RFP”), in which it sought proposals for contingency fee contracts. Under such contracts, the outside counsel would receive payment only if the OAG recovered under the suit. In other words, these contracts would allow the OAG to receive assistance from outside counsel at no cost to the Commonwealth.

In response to the RFP, seventeen (17) law firms submitted proposals. The OAG convened a review panel to review and score the proposals from the ten (10) firms with the highest technical scores. Ultimately, the panel awarded the highest technical score to the firm of Morgan & Morgan PLLC (“Morgan & Morgan”). In addition, Morgan & Morgan sought the lowest proposed fee schedule, which complied with the contingency fee limits requested in the RFP.

The OAG prepared a contract for the above-referenced legal services with Morgan & Morgan and submitted it to the Finance and Administration Cabinet (“Cabinet”) on September 21, 2017. On October 31, 2017, some five (5) weeks after OAG submitted the contract, the Cabinet responded, rejecting the proposed contract. The Cabinet explained that the contract should include additional language referencing the requirements of KRS 48.005(3), which provides that any acquired funds would first be paid to the State Treasurer before being distributed to counsel. On November 2, 2017, the Cabinet proposed language to address these concerns. The OAG added this language and submitted the revised contract on November 14, 2017.

Nearly one (1) month later, on December 13, 2017, the Cabinet notified the OAG that it disapproved of the added language and rejected the revised contract. The OAG revised the

contract again and submitted this third version. The OAG would later explain that it complied with the Cabinet's directives because "the need to get the contract in place and act to combat the opioid epidemic was too great to argue the point." *See* Compl. Ex. 1 ¶ 13 (Jan. 16, 2018 Affidavit of Holly McCoy-Johnson).

The Cabinet ultimately approved the contract on December 21, 2017, and it took effect on December 22, 2017. *See* Def.'s Mem. in Supp. Of Cross-Mot. 4; Def.'s Resp. to Pl.'s Mot. for Temp. Inj. 2. Pursuant to the contract, the OAG and Morgan & Morgan began their investigation and issued at least sixteen (16) Civil Investigative Demands ("CIDs") to twelve (12) potential defendants, seeking information related to the marketing, distribution, and sale of opioids in the Commonwealth. The OAG expects that it will receive over one (1) million documents in response to the CIDs.

Meanwhile, the Cabinet submitted the contract to the LRC and its Government Contract Review Committee ("Committee"). The Committee held a meeting for additional review of the contract on January 9, 2018, at which time members of the OAG voluntarily appeared for informational purposes. The Committee ultimately voted to disapprove the contract and informed Secretary Landrum of this decision in a letter dated January 10, 2018. *See* Compl. Ex. 3. In the letter, the LRC explains the reason for its disapproval of the contract: "The committee is concerned, in consideration of the enormity of the potential financial settlement resulting from litigation, a more favorable contingency fee schedule has not been extended to the Commonwealth and there is no cap on the total amount of fees to be paid to the contractor." *Id.* The Committee then explained, "By disapproving this contract, the committee was merely exercising its statutory oversight duties in an attempt to protect taxpayer dollars." *Id.*

Under KRS 45A.705, Secretary Landrum had ten (10) days to respond. However, on January 16, 2018, prior to Secretary Landrum's response, the OAG filed the present action and a Motion for Temporary Injunction. Specifically, the OAG sought to enjoin Secretary Landrum from canceling or otherwise interfering with the contract.

Attorney General Beshear also issued a letter dated January 17, 2018, in which he expressly approved the contract and explained that “[t]he contingency fee contract for legal services shall remain effective as originally approved.” Pls.’ Notice of Supp. Auth. Ex. A. He also explained that the contract was “necessary and advisable” because “cancellation or delay of this contract could jeopardize the ongoing investigation and litigation of corporations—opioid manufacturers, distributors and retailers—that have contributed and continue to contribute to the opioid epidemic in Kentucky, and the potential recovery from those corporations.” *Id.*

Meanwhile, in response to the Attorney General's Motion for Temporary Injunction, the Court scheduled a hearing on the Motion for January 19, 2018. Shortly after the hearing was scheduled, the OAG received copies of two (2) letters from Secretary Landrum, one addressed to the LRC and the Committee and the other addressed to Morgan & Morgan Kentucky PLLC, both dated January 18, 2018. *See id.*, Exs. B, C. To the LRC and the Committee, Secretary Landrum states that he “will not overrule the decision to disapprove the contract.” *Id.*, Ex. B. He then declares that, “for all of the reasons raised by the Committee, I have determined that the contract is canceled pursuant to KRS 45A.705(6)(b).” To Morgan & Morgan, Secretary Landrum similarly states,

I am writing to notify you that the contract between the Commonwealth of Kentucky, Office of the Attorney General, and Morgan & Morgan PLLC (PON2 040 1800000868) has been canceled pursuant to KRS 45A.705(6)(b). The Government Contract Review Committee (the “Committee”) disapproved this contract on January 9, 2018. I reviewed the decision of the Committee and determined to cancel the contract.

Id., Ex. C. The provision referenced in Secretary Landrum's letters, KRS 45A.705(6)(b) provides that, "Upon receipt of the committee's disapproval or objection to a personal service contract, tax incentive agreement, or memorandum of agreement, the secretary of the Finance and Administration Cabinet or his or her designee shall determine whether the personal service contract, tax incentive agreement, or memorandum of agreement shall" be canceled.

On January 19, 2018, the Court heard argument on the Motion for Temporary Injunction. At the conclusion of the hearing, the parties agreed to treat Plaintiffs' Motion for Temporary Injunction as a Motion for Summary Judgment. Pursuant to an agreed briefing schedule, Plaintiffs filed a supplemental memorandum in support of their Motion for Summary Judgment and Defendant Landrum filed a Cross Motion for Summary Judgment. Accordingly, this matter has been fully briefed.

ANALYSIS

Section 91 of the Kentucky Constitution provides that "[t]he duties of [the Attorney General and other constitutional state officers] shall be such as may be prescribed by law." In turn, the laws prescribing the Attorney General's duties can be found in Chapter 15 of the Kentucky Revised Statutes ("KRS"). For example, KRS 15.020 states that "[t]he Attorney General is the chief law officer of the Commonwealth of Kentucky," and in that capacity, he "shall exercise all common law duties and authority pertaining to the office of the Attorney General under the common law, except when modified by statutory enactment." In other words, the Attorney General, as the state's chief legal officer, retains "all common law duties and authority" unless those duties are otherwise amended by the General Assembly. The inherent common law powers of the Attorney General include, among others, "the power to institute, conduct and maintain suits and proceedings for the enforcement of the laws of the state, the

preservation of order, and the protection of public rights.” *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. App. 1974) (citation omitted). However, KRS 15.100(3) also expressly provides that “the Attorney General may enter into such contracts for legal services as he deems necessary and advisable.” Thus, there is no doubt that the Attorney General may contract for outside legal services; instead, the issue before the Court is whether those contracts are subject to legislative review and final approval or veto by the Secretary of Finance and Administration, the oversight process mandated by KRS Chapter 45A, Kentucky’s Model Procurement Code (“MPC”). *See, e.g.*, KRS 45A.705 (explaining review and approval for personal service contracts).

The parties do not dispute that the LRC’s disapproval of the contract is merely advisory under *Legislative Research Commission By and Through Prather v. Brown*, 664 S.W.2d 907 (Ky. 1984). Still, Secretary Landrum relies on the LRC’s decision as the sole basis for disapproving and canceling the contract, as stated in his January 18, 2018 letters, quoted above. In essence, Secretary Landrum has adopted the LRC’s non-binding objections to veto the Attorney General’s decision to enter into a contract for legal services. To do so, Secretary Landrum relies on his authority under the MPC. For example, KRS 45A.030(3) provides that the secretary of the Cabinet is the chief purchasing officer and responsible for all procurement of the Commonwealth. KRS 45A.050(1) similarly transfers “all rights, powers, duties, and authority relating to the procurement of supplies, services, and construction, and the management, control, warehousing, sale, and disposal of supplies, services, and construction” to the secretary.

However, the duties and powers conferred by these provisions must be evaluated within the context of the MPC. The MPC applies only to “expenditure[s] of public funds by this Commonwealth under any contract or like business arrangement.” KRS 45A.020. Thus, it

applies only when the Commonwealth, through a contract or similar arrangement, spends state funds—i.e., tax-payer funds—to procure supplies, services, or construction. In those situations, the contract is subject to the authority of the secretary of the Cabinet and the procurement process outlined in the MPC. The MPC does not, however, require that the Attorney General submit to the secretary’s procurement authority or otherwise seek approval of a contingency-fee-based legal services contract, where no public funds are expended to obtain the services.

Instead, KRS 15.100(3) explicitly provides the Attorney General with the express statutory authority to contract for outside legal services; the MPC is not triggered unless state funds are expended to obtain those services. This analysis is supported by House Bill 303, which proposed the 2016 biennium budget and was enacted into law. In its section discussing legal services contracts, it states, in pertinent part, “Notwithstanding KRS Chapter 45A, the Office of the Attorney General may contract with outside law firms on a contingency basis.” 2016 Ky. Acts Ch. 149 § 1, Part I(A)(19)(3). Our Supreme Court has repeatedly and emphatically held that such legislative action in a state budget can suspend statutory mandates that would otherwise require compliance. *See Beshear v. Haydon Bridge Co., Inc.*, 304 S.W.3d 682, 700 (Ky. 2010); *Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 443 (Ky. 1986). Here, it appears that the current state budget, enacted into law, authorizes the Attorney General to enter into contingent fee legal services contracts “notwithstanding KRS Chapter 45A.” Accordingly, it is not necessary to obtain the approval of the Secretary of Finance and Administration for such contracts.

Moreover, to the extent the decisions of the LRC and Cabinet developed out of a concern that the OAG must be held publicly accountable for any funds recovered through a judgment or settlement, this Court notes that KRS 48.005 already provides for such accountability. That

statute sets forth the procedures for using funds or assets obtained by settlement or judgment in legal actions by or on behalf of the public, the Commonwealth, or its constitutional officers. In other words, it mandates public accountability of the funds once they are recovered; it does not contemplate legislative or executive preapproval of each contingency-fee-based legal services contract entered into by the OAG.

Likewise, to the extent that the legislative oversight committee expressed concern that the contract provided no cap on attorney's fees, the Court notes that this concern is addressed by operation of law under the Kentucky Rules of Professional Conduct, Rule 3.130(1.5)(a). That rule provides that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." In the current case, the total amount of the attorney's fees, if any, cannot be foreseen at the outset of the litigation. If and when the litigation results in a settlement or judgment that triggers the payment of the contingent fee, such payment is still subject to the provisions of the Code of Professional Responsibility and any judicial review that may be appropriate.

Furthermore, though the duties and powers of the Attorney General may be amended by statute, the legislature cannot abrogate the Attorney General's inherent common law powers to the extent that he is practically prevented from discharging the substantial duties of his office. *See Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820, 829 (Ky. 1942). As noted above, the duties of the Attorney General, as the chief legal officer of the Commonwealth, include bringing suits necessary to enforce the laws of this state, preserve order, and protect the public. In some cases, the Attorney General will find it "necessary and advisable" to hire outside legal counsel to assist in such suits. If the Cabinet, or any other state agency, impedes the

exercise of his statutory authority to do so, the Attorney General will effectively be prevented from discharging his constitutional duties.

For example, in the present case, the Secretary effectively vetoed the Attorney General's decision to receive outside assistance in a matter of the utmost importance: holding accountable those corporations responsible for the opioid epidemic that has devastated our communities and the lives of so many citizens of the Commonwealth. The review and ultimate disapproval of the contract not only caused a delay in the OAG's investigation and institution of that litigation, it also significantly inhibited the OAG's ability to prosecute those important matters. For this reason, and the reasons stated above, the Court finds that neither KRS 15.100(3) nor the MPC requires the Attorney General to submit and receive outside approval of contingency-fee-based legal services contracts. Entering into such contracts is a necessary part of the Attorney General's common law and constitutional duty to bring actions to protect the legal rights of all Kentucky citizens. *See Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 172 (Ky. 2009).

The Court also notes that the office of the Secretary of Finance and Administration is a position that requires no legal training or expertise. To allow the Secretary to hold veto power over these contracts entered into by the Commonwealth's independently-elected constitutional chief legal officer would inappropriately inject the Cabinet into the Attorney General's exercise of legal judgment, strategy, and tactics in discharging his fundamental constitutional obligations. This analysis is not altered by the fact that the OAG has typically submitted its proposed contracts for legal services to the Cabinet and the LRC for review. As explained above, the process does not result in a binding determination. Rather, under these circumstances, the practice of review is a matter of comity among the Attorney General, the Secretary of Finance

and Administration, and the legislative branch. To the extent this practice of comity results in the purported cancelation of a contingent-fee-based legal services contract of the Attorney General under KRS 45A.705, the Attorney General has the authority to override that cancelation and implement the contract under KRS 15.100 and his constitutional authority.

As noted above, there is a serious question as to whether the MPC applies at all to contingency-fee-based legal services contracts. Yet even if the MPC does apply, under the circumstances of this case, the Secretary's approval of the contract at issue was a ministerial act and his action under KRS Chapter 45A was arbitrary. The governing principle of the MPC is rooted in the statutory command that "every contract or duty under this code shall impose an obligation of good faith in its performance or enforcement." KRS 45A.015(1). Here, Secretary has failed to articulate any good faith basis for his denial of approval of this contingency-fee-based legal services contract, and accordingly, his attempted veto of the contract does not comply with the MPC. In other words, even if the MPC could be construed to give the Secretary discretion regarding the approval of such a contract, such approval may not be arbitrarily withheld. Here, the Attorney General made all appropriate changes to address every legitimate concern raised by the Secretary or the LRC, and yet the Secretary still withheld his approval of the contract. Accordingly, the action of the Secretary was arbitrary and capricious, and must be considered null and void.

For these reasons, the Attorney General, an independently-elected constitutional officer, retains the fundamental authority to enter into this contingent-fee-based legal services contract, regardless of the Cabinet's approval. The Attorney General's authority in this respect is set forth in KRS 15.100 and re-affirmed in the current state budget, but it is rooted in his constitutional duty to serve as the state's chief legal officer. The power of the Governor to implement executive

authority under Section 81 of our Constitution does not authorize him to micro-manage or dictate legal strategy and tactics to the state's independently-elected chief lawyer who represents all citizens. *See also Commonwealth ex rel. Beshear v. Bevin*, 498 S.W.3d 355, 364–66 (Ky. 2016).

CONCLUSION

Accordingly, for the reasons stated above, the Court hereby **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment. Accordingly, it is hereby **ORDERED AND ADJUDGED**:

1. The Court finds and declares that, pursuant to his statutory authority under KRS 15.100(3), the Attorney General may enter into contracts for legal services on a contingency basis and the review and approval process of the MPC under KRS 45A is advisory only for such contracts by the Attorney General.
2. The Court finds and declares that the Attorney General, pursuant to his statutory authority under KRS 15.100(3), may enter into contracts for legal services on a contingency fee basis without receiving pre-approval by the secretary of the Cabinet or any other state officer or agency, as provided by the biennial state budget, 2016 Ky. Acts Ch. 149 § 1, Part I(A)(19)(3).
3. The Court finds and declares that the Attorney General's constitutional authority would be significantly impeded if he is required to receive pre-approval of contingency based legal services contracts.
4. The Court finds and declares Secretary Landrum's determination (set forth in his January 18, 2018 letters to the LRC and the law firm) that the contract at issue is canceled pursuant to KRS 45A.705(6)(b) is NULL AND VOID.

5. This is a final and appealable order and there is no just cause for delay in the entry of this judgment.

So **ORDERED** this the 20th day of February, 2018.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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