

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)

v.)

KATHLEEN McGUINNESS)

Defendant.)

ID No. 2110001942

**STATE'S RESPONSE IN OPPOSITION TO DEFENDANTS' PETITION
FOR APOINTMENT OF PRIVATE COUNSEL FOR A STATE OFFICER**

"The rules of statutory construction are well settled. They are designed to ascertain and give effect to the intent of the legislators, as expressed in the statute. When interpreting a statute, the Court must first determine whether the statute is ambiguous, because if it is not, then the plain meaning of the statutory language controls. When the language and intent of a statute are clear, no ambiguity exists[.]"¹

Delaware law has long codified the provision of counsel for public officials "in a criminal . . . action against the person arising from state employment" 10 Del. Code § 3925. The language is unambiguous: such a defendant, regardless of his or her financial means, is entitled to a court-appointed attorney from the Department of Justice or, if a conflict exists, the Office of Defense Services. Here, contrary to the statute's plain language, the Defendant—of reported significant financial means—has petitioned the Court to take two unnecessary steps that each

¹ *Spintz v. Div. of Fam. Servs.*, 228 A.3d 691, 698 (Del. 2020) (internal quotations and citations omitted).

controvert the statute: first, to appoint her retained private attorney as her counsel, despite no such allowance in the statute and no known conflict with the Office of Defense Services; and second, to compensate her counsel at more than five (5) times the conflict counsel rate. The Defendant argues such without ever mentioning § 3925's existence. We request that the Court deny Defendant's Petition based on a straightforward reading of the one statute designed for this precise purpose.

Factual Background

Kathleen McGuinness ("Defendant") is the elected Auditor of Accounts for the State of Delaware and thus is a public officer pursuant to 29 *Del. C.* § 5812(n)(1)(a). On October 11, 2021, a grand jury indicted the defendant on five (5) counts of misconduct while in office. The indictment includes charges of misusing the public funds she was elected to protect. Through the law firm she retained more than one month ago, Defendant now petitions this Court to appoint that firm as publicly-provided counsel – and compensate the firm far above the one hundred dollar (\$100) per hour appointed attorney rate. The Petition should be denied.

10 Del. C. § 3925 Controls

Delaware law, since 1976, has provided counsel for its employees charged with conduct arising out of their employment.² 10 Del. C. § 3925. The statute is clear: state employees are entitled to a defense provided by the Department of Justice (“DOJ”). If a conflict exists, the Court may then appoint the Office of Defense Services (“ODS”). *See also Manchester v. Rzewnicki*, 777 F. Supp. 319, 327 (D. Del. 1991), *aff’d*, 958 F.2d 364 (3d Cir. 1992) (“In the event that a conflict of interest exists, the official has the right to petition . . .”). The straightforward statute reads, in full—

*Any public officer or employee, in a criminal or civil action against the person arising from state employment, shall be entitled to petition the court for a court-appointed attorney to represent the person’s interests in the matter. If the judge, after consideration of the petition, examination of the petitioner and receipt of such further evidence as the judge may require, determines that the petition has merit, the judge shall appoint an attorney to represent the interests of such public officer or employee. The court-appointed attorney shall represent such person at all stages, trial and appellate, until the final determination of the matter, unless the attorney is earlier released by such person or by the court. The court may first appoint an attorney from the Department of Justice. **If the court determines that the Department is unable to represent such public officer or employee, the court may appoint an attorney from the Office of Defense Services in criminal actions only, and in civil actions may appoint an attorney licensed in this State. This section shall also apply to all federal courts within this State.***

² Though this Response focuses on the criminal case at hand, the statute also provides for defense in civil cases arising from state employment.

10 Del. C. § 3925. (emphasis added). The law outlines a simple process. If a public officer is charged for acts arising from her employment, the employee “shall be entitled” to petition for taxpayer-funded defense provided, first, by DOJ. *Id.* If DOJ is unable to represent the defendant, ODS is that employee’s court-appointed alternative. This process is conditioned upon a defendant petitioning for publicly-provided counsel—s/he may always instead elect to retain private counsel.

The statute was written for exactly this type of case because “[s]tate representation for actions taken while acting on behalf of the state is not only fair, but it may be necessary to encourage professionals to accept such appointments.” *Manchester*, 777 F. Supp at 327. Here, the Defendant is charged with criminal conduct undertaken during her state employment.³ DOJ is prosecuting the Defendant and thus should not provide criminal defense counsel. Therefore, if the Defendant so wishes for state-provided counsel, she may petition under § 3925, which directs the Court to ODS. The undersigned knows of no ODS conflict

³ The State does not concede that the Defendant’s charged conduct arose “from state employment[.]” 10 Del. C. § 3925. The question of conduct arising from state employment is adjudicated later. *See, e.g., Camp Hebron Foundation, Inc. v. Smith*, 1997 WL 358639 at *2 (noting that such appointments are “expressly conditioned upon a subsequent finding that [the employee] was acting within [the] scope of state employment.”). For the purposes of this Petition and Response, *if* the Defendant’s conduct arose from her state employment, the most to which she is entitled is ODS-provided counsel.

regarding this case (e.g. all represented witnesses retained private counsel).

Section 3925 does not allow for taxpayer funding of private counsel that a criminal defendant has already selected. Indeed, doing so would undermine one of the statute's core principles: "State representation . . . conserves public funds." *Manchester*, F. Supp at 327. The law, amended by the General Assembly as recently as 2015, is premised on providing DOJ or ODS counsel—and no one else—to state employees defending themselves from action taken in the course of their employment.

Nor does Supreme Court Rule 68 subvert applicable state law. Here, the statute defines a court's jurisdiction to appoint counsel in criminal matters; a rule cannot prevail over the statutory requirement to appoint ODS (in lieu of DOJ). *See Imbragulio v. Unemployment Insurance Appeals Board*, 223 A.3d 875, 879-80 (2019). Perhaps cognizant of the clear statute, Defendant's petition never mentions § 3925. She instead asks this Court to appoint her chosen and retained private law firm as court-appointed counsel, and desires to shoehorn in hourly rates several times that of all this Court's appointed attorneys.

To the extent Defendant believes that § 3925 cedes to Rule 68, such a view "would theoretically permit this court to override by court rule any statutory provision duly enacted by our General Assembly. . . . [I]t would offend the

separation of powers established by the Delaware Constitution[.]” *Nelson v. Frank E. Best Inc.*, 768 A.2d 473, 490 (2000).

Section 3925 governs this precise case: a state employee criminally charged with conduct that she may argue arose out of her employment. DOJ has a conflict, so the law provides for taxpayer-funded counsel through ODS. If the Defendant wishes to be represented free of personal expense, the law expressly provides for it. Though the Defendant may wish it, “[T]he Court cannot change the statute.” *Williams v. Singleton*, 2 Storey 488, 491 (1960) (refuting “Appellant [who] would have us amend a jurisdictional statute by applying the rule.”).

Here, “the statutory language is clear and unambiguous,” therefore the Court’s “inquiry ends and the plain meaning of the statute governs the action.” *Swallows Holding, Ltd. v. C.I.R.*, 515 F.3d 162, 170 (3d Cir. 2008); *see also Gov’t of the V.I. v. Knight*, 989 F.2d 619, 633 (3d Cir. 1993) (“[I]f the statutory language is unambiguous, the plain meaning of the words ordinarily is regarded as conclusive.”).

Deleterious Effects of Granting Defendant’s Petition

Setting aside clear law to pay \$550 per hour to her retained private law firm, as the Defendant wishes, would exacerbate existing systemic inequities. ODS (including the Office of Conflict Counsel) handles almost thirty-five thousand

cases annually.⁴ In none of those cases is anyone compensated close to five hundred and fifty dollars (\$550) per hour. Undersigned counsel understands the current conflict counsel rate to be approximately one hundred dollars (\$100) per hour for Superior Court cases.⁵

Public reporting shows the defendant is independently wealthy by any standard and, but for § 3925, would otherwise not qualify for ODS' services. Her State salary is \$112,000 and she has, in the recent past, loaned her political campaigns more than seventy-five thousand dollars (\$75,000).⁶ She owns a house estimated to be worth between \$2.2 million and \$3.7 million.⁷

The Defendant is already entitled to more than all other defendants because, by virtue of her state employment, § 3925 provides for ODS counsel regardless of her financial means. Compensating a wealthy defendant's law firm by several times the Court's standard fees would metastasize the statutory entitlement into something absurd.

⁴ According to ODS' FY21 budget presentation.

⁵ This is already more than the State's prosecutors are paid. The Attorney General, Delaware's highest-paid prosecutor, was paid just under \$150,000 in 2020—or roughly \$75 per hour. Line prosecutors are compensated at rates between approximately \$31 and \$60 per hour (\$60,000 to \$115,000 per year).

⁶ Xerxes Wilson, *Indicted State Auditor Wants Public to Pay for \$550-per-hour Attorney*, THE NEWS JOURNAL, October 15, 2021, available at <https://www.delawareonline.com/story/news/2021/10/15/delawares-indicted-state-auditor-wants-public-pay-her-defense/8468319002/>.

⁷ Estimate from Zillow. DOJ is omitting the Defendant's address from a public filing.

Conclusion

In light of the conflict presented herein, the Defendant, as a public officer charged with misconduct while in office, has two choices: she may petition under § 3925 and be provided counsel by the Office of Defense Services at the expense of the State of Delaware; or she may proceed with her own private counsel at her own expense. It is sadly consistent with the Defendant's charged conduct that she would demand the taxpayers spend extra money when the law clearly commands a less profligate alternative. The law is clear, and for that reason we respectfully request that Defendant's Petition be denied.

WHEREFORE, in the interests of justice, the State of Delaware respectfully requests that the defendant's Petition be denied.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Alexander S. Mackler
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Dated: October 18, 2021

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ORDER

IT IS SO ORDERED this _____ Day of _____, 2021, that the defendant's Petition for Appointment of Private Counsel for a State Officer in the above matter is **DENIED**.

The Honorable Jan R. Jurden
President Judge
Superior Court of the State of Delaware