

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF HEALTH,  
Petitioner

v.

No. 379 M.D. 2013

D. BRUCE HANES, in his capacity as the  
Clerk of the Orphans' Court of  
Montgomery County

RECEIVED & FILED  
COMMONWEALTH COURT  
OF PENNSYLVANIA  
2013 SEP -3 A 11:29

**PETITIONER'S PRE-ARGUMENT SUBMISSION**

To expedite the argument schedule on September 4, 2013, and to address the fourth issue that this Court specified in its August 22, 2013, Order, Petitioner Department of Health hereby submits the following two exhibits, which did not yet exist at the time that the Department filed its reply brief:

Exhibit A: Letter from the Office of General Counsel to the Office of Attorney General dated August 30, 2013.

Exhibit B: Letter from the Office of Attorney General to the Office of General Counsel, also dated August 30, 2013.

Respectfully submitted,

BY: Alison Taylor  
**ALISON TAYLOR**  
Chief Counsel  
Attorney I.D. 61873

Office of Legal Counsel  
Department of Health  
825 Health and Welfare Building  
625 Forster Street  
Harrisburg, PA 17120

**N THE COMMONWEALTH COURT OF PENNSYLVANIA**

**COMMONWEALTH OF PENNSYLVANIA,** :  
**DEPARTMENT OF HEALTH,** :  
**Petitioner** :

**v.** :

**No. 379 M.D. 2013**

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**Montgomery County** :

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**CERTIFICATE OF SERVICE**


I, Alison Taylor, Chief Counsel, Pennsylvania Department of Health, Office of Legal Counsel, hereby certifies that on September 3, 2013, I served a true and correct copy of the foregoing, Pre-Argument Submission by causing same to be deposited in the United States Mail, postage prepaid.

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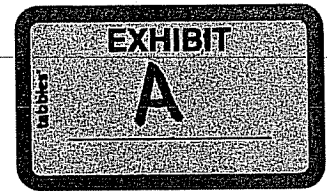
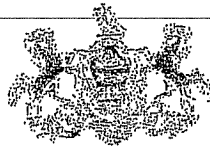
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*Counsel for Petitioner Department of  
Health*

**Date: September 3, 2013**





COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE OF GENERAL COUNSEL

August 30, 2013

**VIA ELECTRONIC AND HAND DELIVERY**

Susan J. Forney  
Executive Deputy Attorney General  
Director, Civil Law Division  
Office of Attorney General  
Strawberry Square, 15<sup>th</sup> Floor  
Harrisburg, PA 17120

Re: *Pa. Department of Health v. Hanes*  
No. 379 M.D. 2013 (Pa. Commw. Ct.)

Dear Sue:

As you know, the Department of Health (DOH) on July 30, 2013, filed in Commonwealth Court an action in mandamus against D. Bruce Hanes in his capacity as the Clerk of the Orphans' Court of Montgomery County (Clerk). DOH's suit seeks a writ of mandamus to require the Clerk to comply with the Marriage Law by issuing marriage licenses only to couples of mixed gender, consistent with the definition of "marriage" under 23 Pa.C.S. § 1102 (defining "marriage" as "[a] civil contract by which one man and one woman take each other for husband and wife") and the policy of the Commonwealth as expressed in 23 Pa.C.S. § 1704 (expressing "the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman").

DOH is pursuing its mandamus action based principally on its statutory duty to "[t]o see that the laws requiring the registration of ... marriages ... are uniformly and thoroughly enforced throughout the State." 71 P.S. § 534(c). DOH is represented in this action by the Office of General Counsel (OGC), including DOH's Office of Legal Counsel.

On the day that the mandamus action was filed with Commonwealth Court, I communicated to you through electronic mail notice that DOH had filed the action and that OGC attorneys were providing representation. I also stated in that message that OGC filed the mandamus action without making the customary referral or request for delegation based on the decision of the Attorney General announced on July 11, 2013, that she: (i) would not defend the constitutionality of the same sex marriage restrictions contained in the Marriage Law; (ii) therefore could not represent the Secretary of Health in *Whitewood, et al. v. Corbett, et al.* (M.D. Pa.); and (iii) had decided to authorize the General Counsel to represent the Secretary of Health in her stead under section 204(c) of the Commonwealth Attorneys Act (71 P.S. § 732-204(c)).

Susan J. Forney  
Executive Deputy Attorney General  
August 30, 2013  
Page Two

OGC's representation of the Secretary of Health in this matter is based on the reasons expressed by the Attorney General for the actions taken in connection with *Whitewood*, constituting an authorization we deemed broad enough to encompass litigation necessary to enforce the Marriage Law. In fact, in the weeks following OGC's filing of the mandamus action, the Office of Attorney General (OAG) has not communicated any objection to OGC's actions.

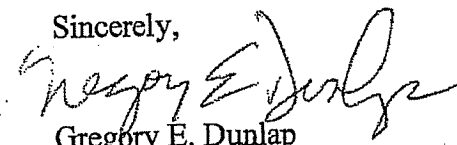
In opposition to DOH's mandamus action, the Clerk asserts that DOH lacks standing to pursue a mandamus action and that OGC also lacks authority to pursue the action. The Clerk argues that OGC can pursue the action only if, as provided by the Commonwealth Attorneys Act, the Attorney General has authorized the General Counsel to do so under section 204(c) of the Commonwealth Attorneys Act, or the Attorney General was asked to initiate the action and failed or refused to do so. OGC contends, of course, that it has authority under the Commonwealth Attorneys Act to initiate and pursue the mandamus action for the reasons expressed above. However, a recent Order of the Commonwealth Court prompts this request for confirmation of our actions.

In preparation for oral argument to consider DOH's motion for peremptory judgment, Commonwealth Court has directed the parties to address "the effect of the Attorney General's delegation of the duty to defend the constitutionality of Section 1704 of the Marriage Law, 23 Pa.C.S. § 1704[,] to the General Counsel." This direction from the Court appears to be related to the Clerk's assertion that OGC lacks authority under the Commonwealth Attorneys Act to initiate or pursue an action in mandamus.

OGC is confident that it has authority under the Commonwealth Attorneys Act to initiate and pursue the pending action in mandamus. However, in light of the Court's Order suggesting that the General Counsel's legal authority might be an issue, OGC requests that OAG act *expressly* under section 204(c) of the Commonwealth Attorneys Act (71 P.S. § 732-204(c)) to confirm authorization of OGC to conduct mandamus action litigation against the Clerk (such as is now pending in Commonwealth Court at No. 379 M.D. 2013).

We greatly appreciate your consideration of this request.

Sincerely,



Gregory E. Dunlap  
Executive Deputy General Counsel





COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE  
ATTORNEY GENERAL

August 30, 2013

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15<sup>th</sup> Floor, Strawberry Square  
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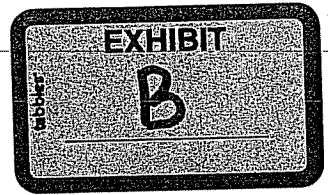
**Re: *Department of Health v. Hanes*  
No. 379 M.D. 2013 (Commonwealth Court)**

Dear Greg:

I am responding to your letter of this date requesting confirmation of the General Counsel's authority to bring the above action in mandamus. Pursuant to Section 204(c) of the Commonwealth Attorneys Act, I am confirming on behalf of the Attorney General that she has delegated the authority to handle the above-referenced case to your Office with the usual qualifications and limitations set forth below.

This delegation does not include authority to handle appeals of this case to the Pennsylvania Supreme Court, the Court of Appeals for the Third Circuit of the United States or the United States Supreme Court, unless the matter delegated is itself an appellate matter. Authority to handle appeals requires a separate delegation by the Attorney General in accordance with the attached Appeals Procedure. If authority to handle an appeal to one of the appellate courts listed above is delegated, a further delegation is required for authority to handle any subsequent appeal.

After a decision in the case, the information and documents listed in the appeal procedure should be sent to John G. Knorr, III, Chief Deputy Attorney General, Appellate Litigation Section, so that a decision may be made in a timely fashion about the handling of any appeal.





Gregory Dunlap  
August 30, 2013  
Page 2


*Department of Health v. Hanes*

This authorization shall continue until either terminated or amended in writing by this Office.

Sincerely,

KATHLEEN G. KANE  
Attorney General

BY:

  
SUSAN J. FORNEY  
Executive Deputy Attorney General  
Director, Civil Law Division

SJF/lls  
ICMS Log No.: 32510  
SR-50306-QY3D

C Alison Taylor, Chief Counsel, Department of Health

**OFFICE OF ATTORNEY GENERAL  
PROCEDURE FOR APPEALS OF DELEGATED CASES**

**The following procedures are in effect for the representation of the Commonwealth in any appeal. All requests for appeal delegations are to be sent to John G. Knorr, III, Chief Deputy Attorney General, Appellate Litigation Section, Office of Attorney General.**

**1. Adverse Decisions.** Within seven days after receipt of an adverse final decision or an interlocutory ruling from which an appeal may lie, please forward a copy of the opinion with a memorandum recommending whether or not an appeal should be taken.

**2. Favorable Decisions.** If the other party seeks discretionary review of a decision favorable to the Commonwealth, please forward the petition or other papers with a copy of the brief below. For cases in which the opposing party has an appeal as of right, please forward a copy of the lower court's opinion and appellant's brief. In either case, these documents should be sent immediately.

**3. Delegation.** In addition to the above, the General Counsel shall submit a request for delegation of any case which the General Counsel or the agency wishes to handle on appeal.

**4. Briefs.** If the appeal has been delegated to the General Counsel, the assigned attorney is to send the brief to Mr. Knorr seven days before the date it is due to be filed. This requirement does not apply to appeals in the Commonwealth Court.