

1967

Norman D. Hayward and Clarence D. Evans v.  
Frank Pennock, Leslie B. White, and Joseph  
Mazuran, As Chairman and Members of the Salt  
Lake County Merit Service Commission,  
Respectively, Salt Lake County Sheriff's  
Department : Brief of Defendants-Appellants

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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**NORMAN D. HAYWARD and  
CLARENCE D. EVANS,**

*Plaintiffs-Respondents*

vs.

**FRANK PENNOCK, LESLIE B.  
WHITE, and JOSEPH MAZURKIN  
as Chairman and Members of the  
Salt Lake County Merit Service  
Commission, respectively, Salt Lake  
County Sheriff's Department,**

*Defendants-Appellants*

## DEFENDANTS' APPEAL

**APPEAL FROM THE JUDICIAL  
JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, UTAH  
Judge Stewart M. Heston**

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Salt Lake County Merit Service  
Commission, respectively, Salt Lake  
County Sheriff's Department,  
*Defendants-Appellants*

CASE NO.  
176216

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## BRIEF OF DEFENDANTS-APPELLANTS

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### STATEMENT OF KIND OF CASE

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This is an action in the nature of injunction or extraordinary relief brought by Norman D. Hayward and Clarence D. Evans, Lieutenants in the Office of the Salt Lake County Sheriff, who, by a Petition for Extraordinary Relief (R. 1-3), sought to invalidate a Captains' Examination given by the defendants who individually comprise the Salt

Lake County Merit Service Commission, claiming the same to be contrary to and beyond the authority conferred by Chapter 30 of Title 17, Utah Code Annotated (The Merit System Statute).

## DISPOSITION BEFORE THE TRIAL COURT

The matter was tried before the Third Judicial District Court, Judge Stewart M. Hanson presiding, on December 12, 1967. The Court entered its Memorandum Decision December 13, 1967, amended the same December 14, 1967 (R. 12, 13), and executed its formal Findings of Fact and Conclusions of Law and Judgment December 15, 1967 (R. 14-18). Said Findings, Conclusions and Judgment invalidated said Captains' Examination (which was administered by the defendants, incidentally, on September 9, 1967) and held the same to be null and void and further ordered the defendants to vacate the eligibility register resulting from said examination (R. 14).

## RELIEF SOUGHT ON APPEAL

Defendants-Appellants contend that such Findings, Conclusions and Judgment were in error and accordingly filed their Notice of Appeal December 20, 1967 (R. 19), and seek a reversal of the lower court's action.

## STATEMENT OF FACTS

At the time of trial there was admitted into evidence by the stipulation of the parties the Rules and Regulations of

the Merit Commission (Exhibit P-1), Minutes of the Commission's meeting held July 27, 1967 (Exhibit P-2), Minutes of the meeting of the Commission held August 31, 1967 (Exhibit P-3) Minutes of the meeting of the Commission held September 14, 1967 (Exhibit P-4), a letter of the Commission to Sheriff Larson dated August 7, 1967 (Exhibit P-5), and a letter from the Commission to Sheriff Larson dated September 29, 1967 (Exhibit P-6). Testimony was received from Frank M. Pennock, Commission Chairman, Joseph Mazuran, a Commissioner, Donald Sawaya, a Deputy County Attorney, and Donald S. Tingley, Deputy County Clerk. A number of other exhibits were thereafter received in the course of the testimony, some of which will be more specifically alluded to hereinafter.

The Captains' Examination conducted by the defendants-appellants, who will hereinafter be referred to collectively as the Commission, was attacked by plaintiffs-respondents on three grounds which will be discussed in some detail in the Argument hereinafter. There were, in addition to the plaintiffs-respondents, four other candidates who were given the Captains' Examination on September 9, 1967. Plaintiffs-Respondents failed to pass said written examination (R. 45). The other four candidates, Arthur E. Allen, Paul E. LaBounty, Larry J. Dow and Karl Ehlers, passed the written examination and were placed on the Captains' Register from which the Sheriff could make promotions to the rank of captain (Exhibit P-6).

At the time of the written examination, which consisted of 190 questions (R. 31), the candidates were orally informed that in order to pass the same they would need a

score of 143 correct answers to the 190 questions, which constitutes 75% of the examination (R. 32). Mr. Pennock was interrogated at some length at the trial about the ratio of the written examination to the oral interview of the candidates by the Commission, the in-time service of the candidates, and the merit rating given each candidate by the Sheriff (R. 31-36, R. 48-51, Exhibit P-3), which will be referred to in detail in the Argument hereinafter.

The remaining matters of fact relate to Minutes of meetings of the Commission, notices or requirements therefor, etc., which will be discussed in relevant detail in the course of the Argument.

## ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE RELIEF PRAYED BY PLAINTIFFS-RESPONDENTS, THERE BEING NO SHOWING AT THE TRIAL AN EXCEEDING OF STATUTORY AUTHORITY, ABUSE OF DISCRETION, FRAUD, COLLUSION, LACK OF GOOD FAITH OR CAPRICIOUSNESS ON THE PART OF THE DEFENDANTS-APPELLANTS.

Chapter 30 of Title 17 of the Utah Code Annotated, hereinafter referred to as the Merit Act, from which the Commission derives its authority and powers, has never been construed in whole or part by this Court. It is axiomatic, however, that any Merit Service Commission exercises only its statutory powers and must find within its enabling language whatever warrant it has for any authority it claims



and further has only such powers as are expressly granted it by statute or necessarily implied. *People ex rel Polan vs. Hoehler*, 405 Ill. 322, 90 NE 2d 729. *Stauffer vs. San Antonio*, 162 Tex. 13, 344 SW 2d 158. Rules adopted, therefore, by a commission must be consistent with and not in excess of said authority or constitutional grant. *Hale vs. Worstell*, 185 N.Y. 247, 77 NE 1177.

This Court has often reaffirmed the rule that the judicial branch of government will not interfere with discretionary acts of administrative agencies or commissions absent the showing of fraud, collusion, capriciousness, etc. A recent example is *Clayton vs. Salt Lake City*, (1963) 15 Utah 2d 57, 387 P. 2d 93, where the court said, through Justice Crockett:

“The court is reluctant to interfere with the administrative function and would do so only if facts were shown to indicate dishonesty, fraud, collusion or lack of good faith in performing the duty mentioned. That is not demonstrated here.”

With that general foundational law, at the outset it is observed that plaintiffs-respondents attacked the validity of the September 9, 1967 examination on three grounds. (The Complaint itemizes four (R. 1, 2), two of which, however, deal with the matter of notice and will herein be considered singly). They were (1) that candidates then ineligible to take said examination were allowed to be tested; (2) that the notice from the written examination did not comply with what plaintiffs-respondents contended were statutory requirements, both as to requiring publishing notice of the examination and as to the announcement of minimum passing grade: and (3) that following the written

examination and plaintiffs-respondents failing to pass the same, plaintiffs-respondents were not further processed by the Commission, and the Commission allegedly failed to accredit plaintiffs-respondents properly for time in service, merit rating and oral interview, as plaintiffs-respondents contend the Merit Act requires the Commission to do.

With regard to the first challenge, the record is clear that at Page 6 of Exhibit P-1, the Rules and Regulations of the Commission adopted July 27, 1967, the Commission provided: "All merit officers who have served an in-rank term of not less than three (3) years shall be eligible to take the competitive examination for the next promotional rank above their present status." From the Minutes of the meeting held July 27, 1967 (P-2) where said Rules and Regulations were adopted by the Commission, discussion was had about the above quoted sentence. The Minutes read:

"Discussion was had relative to Rule 3-Examinations and Subdivision 3.02(b)1 which provides that any candidate for an examination have served in rank for a term or not less than three years. It was agreed that said rule ought to be part of the permanent rules, but that inasmuch as the last examination waived that requirement, and inasmuch as there was an immediate need to fill vacancies on the captain and lieutenant level, and a new examination at either level may shortly be needed, it was accordingly proposed by Commissioner Mazuran, seconded by Dr. White and unanimously passed that on the forthcoming captain's examination this three years in-rank requirement would again be waived."

Exhibits P-7 through P-17, together with the supporting testimony of Deputy County Clerk Donald S. Tingley,

makes it reasonably clear that Lieutenants Karl Ehlers and Paul LaBounty had not served in the rank of lieutenant for three full years prior to September 9, 1967. The court below, in its Memorandum Decision, as amended in paragraph three (R. 12) and in the Findings of Fact, paragraph 6 (R. 17), concluded that the above noted waiver of the three-year in-rank requirement was void and that only the Rules and Regulations were applicable. Defendants-Appellants herein maintain that ruling was error. The controlling case in point appears to be *Weiss vs. Keefer*, (1914), 3 Ohio App. 426, 20 Ohio CCNS, 366, 36 Ohio CC 204. In that case a Corporal in the Police Department was allowed to take a promotional examination for Sergeant though he had served less than the minimum two years required by the Civil Service Commission's Rules. The Ohio Court of Appeals ruled that such in-service requirement, having been created by the Civil Service Commission in its Rules, it could be waived by the Commission. The pertinent language of the opinion reads as follows:

"We are of the opinion that the Civil Service Commission had the power to so waive or suspend this rule, that its action in making all the corporals then on the force eligible to this examination was within its power, that the examination was within its power, and that the examination was held according to law; nor was it necessary to note on its minutes that a rule had been suspended, there being no objection on the part of any member, and all members being present." (The "members" referred to in the opinion refer to the membership of the Civil Service Commission.)

As noted above, the evidence is clear that the unanimous intent and purpose of the Commission was to waive

the three-year in-service requirement. There is nothing in the Merit Act or the Commission's Rules and Regulations that prevents it from so waiving or suspending a given rule. Indeed, the Merit Act provides at 17-30-23: ". . . it shall be the duty of the Merit Service Commission to provide by rule for the operation and functioning of any activity within the purpose and spirit of the act which may be or may become necessary and proper and which is not specifically provided hereby." There being no showing in the Court below that the waiver of the rule herein was in bad faith, capricious, fraudulent, etc., the Trial Court should not have intruded into the exercise of discretion by the Commission and set it aside.

With regard to the second contention advanced by Plaintiffs-Respondents, they maintain that the notice of the September 9, 1967 examination did not conform to the Merit Act requirements in two particulars: (1) That the notice was not published in a paper of general circulation within the county; and (2) that the notice did not specify the passing grade. In the Court below Plaintiffs-Respondents relied upon the provision of Section 17-30-6(2) which provides:

"Notice of examination shall be published one time not less than 15 days prior to the examination in a newspaper of general circulation in the area concerned and shall be posted in a conspicuous place in the office of the department concerned. The notice shall set forth minimum and maximum wages, physical and educational requirements and passing grades, which shall not be less than 70% . . ."

It is to be noted, however, that this Section begins with the following language:

“At such time as may be necessary, the Commission shall conduct open competitive examinations to determine the qualification of applicants *for positions as peace officers. . .*” (Emphasis added.)

It is clear, from a reading of the Section as a whole, that it relates to original competitive examinations open to the public for beginning peace officers newly recruited into the Sheriff’s employ. This interpretation is further re-enforced by the provisions of Section 17-30-12(2) relating to vacancies occurring within the system and promotions and provides :

“Vacancies occurring in the Merit System classification of any county shall be filled by promotion in so far as possible. A promotion shall be made only after open competitive examination, *admission to which shall be limited to Merit System officers. . .*” (Emphasis added.)

This section relating to promotional examinations limited to Merit System officers contains no language prescribing notice or what form such notice, if any, should take, nor what items should be therein included. The Merit Commission’s Rules (Exhibit P-1) provide under Rule 3, pages 5-7, for examinations and specify, at Rule 3.02, two types of examination: (a) For the applicants for the office of deputy; and (b) for promotional or in-rank examinations. At Rule 3.02(b)2, it reads :

“Notice of such in-rank examinations shall by letter be transmitted by the Commission to the Sheriff, and the Sheriff shall transmit said notice by posting or letter or otherwise, whichever is best calculated to give actual notice to the eligible officers, in writ-

ing, that a competitive examination is to be given. Said notice shall be given not less than thirty (30) days prior to the date on which the examination is to be given."

In connection with the Captain's Examination in issue, notice was transmitted to Sheriff Larson by letter (Exhibit P-5) dated August 7, 1967 as follows:

"In that connection, you are hereby notified, pursuant to the rules and regulations of this Commission, that an in-rank examination for the position of Captain will be given by this Commission on Saturday, September 9, 1967, at a place and time the Commission will designate. The examination will be taken from, but not limited to, the Utah Code, the Rules and Regulations of the Salt Lake County Merit Service Commission, the current Red Cross Manual, the traffic code of Salt Lake County and the State of Utah and related questions on law enforcement and additional questions concerned with responsibilities of command."

Plaintiffs-Respondents asserted no claim in the Court below and there is not evidence to the effect that eligible candidates or otherwise failed to receive appropriate notice, nor that any of them complained at the time of the giving of the test that they were prejudiced by not being informed previously what the passing grade for the examination would be. On the contrary, Plaintiffs-Respondents and all other eligible lieutenants (including the two Plaintiffs-Respondents contend were ineligible) appeared at the appropriate time and place and were examined.

This situation seems analogous to that in the case of *Almassy vs. Los Angeles County Civil Service Commission*,



(1949) 34 C. 2nd 387, 210 P. 2nd 503, 514. In that case the Appellant sought to invalidate two promotional Civil Service examinations because of an evaluation technique employed by the Commission using a "general qualifications appraisal record" relating to voice, speech, judgment, poise and other general personality traits arrived at through oral interview by examiners. Appellant contended these appraisals did not constitute "open competitive examination" as required by the State and the Commission's Rules. The Court there said:

"In determining the problem of the validity of the two promotional civil service examinations here in question, it must be remembered that petitioner does not claim that there was any arbitrary, fraudulent, or capricious action on the part of the commission, or any person acting on its behalf, in the conduct of the examinations, but confines his objections solely to the *propriety of the method of procedure adopted* by the commission for testing the candidates. In view of the conclusion that the examinations as prescribed by the commission were appropriate to the competitive selection of civil service personnel, and in the absence of any charge or showing that the commission, or anyone acting in this matter, proceeded otherwise than honestly and in good faith in the evaluation process, petitioner cannot prevail in this mandamus proceeding." (Emphasis added.)

Again, the notice requirements for promotional examinations restricted to Merit System officers clearly should be different than an open competitive examination to the public for incoming deputies. The Rules of the Commission, the notice actually given, seem reasonable and well within the omnibus authority given the Commission to "provide by rule" for its operations and functions under the Merit Act.

It was accordingly error, therefore, for the Trial Court to impose the duty of published notice and providing therein the passing grade.

As to Plaintiffs-Respondents third and final contention, they maintain that the fact that the Commission failed to consider their time in service, their merit rating, and refused to further process them with a physical examination and oral interview prejudiced their interest and was contrary to the mandatory language of Section 17-30-12(2). The relevant language therein provides:

“Such examination shall include an average of service ratings for the next preceding year, a rating of seniority, and test the competence of the peace officer to perform the duty required in the position for which application is made. The combined weights of service rating and seniority shall be not more than 40% of the whole examination.”

The issue here, therefore, is another of the Rules of the Commission, or rather parts of two Rules. They are as follows: (Exhibit P-1, p. 6) Rule 3.02(b)4:

“4. Upon passing said written examination, candidates will be further rated by the Commission as follows:

The written examination shall constitute sixty per cent (60%) of the rating; personal interview with the Commission, twenty per cent (20%); merit rating, fifteen (15%) and seniority, five per cent (5%).  
5. All candidates in addition to the above examinations must meet the physical and agility requirements promulgated by the Commission.



3.03 *Minimum Grades.* The Commission may determine a minimum grade for all or any part or parts of the examinations as provided for above. Any applicant who fails to meet the minimum grade set by the Commission shall be considered as failed the examination and his application shall not be further processed and he shall be so notified."

It is further provided in the Minutes of the Merit Commission of its meeting August 31, 1967 (Exhibit P-3) as follows:

"It was proposed by the Chairman and unanimously carried by the Commission in accordance with the earlier discussion of this Commission that there would be approximately 200 questions, and that a passing grade would need to be 75%. The written test would constitute 60% of the total rating; the merit rating, time in service and oral interview would constitute the remaining 40%. Any candidate failing to pass the written examination would be processed no further. It was further proposed by the Chairman, seconded by Dr. White and unanimously carried that those candidates who were further processed, having passed the written examination, would be required to receive at least 36% of the possible 40% in order to be placed on the eligibility register."

As noted in the Statement of Facts, Chairman Pennock was interrogated in detail about the written examination, the percentage of the overall rating that examination bore in ratio to the oral interview, in service time and merit rating. On cross examination by his own counsel, Mr. Pennock further indicated that not only did Plaintiffs-Respondents fail the written examination, but that they were processed no further (R. 44, 45). He was asked if he had

in his possession the individual records of Plaintiffs-Respondents and replied in the affirmative; he was then asked if in the files there appeared both the years in service for Plaintiffs-Respondents and their individual merit ratings, and he responded that such were in the files (R. 45). He was then asked:

“Q. Assuming, Mr. Pennock, that an oral interview had been given, which, as I understand it, would be your final element with regard to further processing, is that correct?

A. Yes.

Q. Assuming that such an interview had been given in each of the instances of the plaintiffs herein and they had received the maximum number of points, which I believe you testified was 20, is that correct?

A. Yes.

Q. Then in that event, apart from their failing or passing the written test, would the plaintiffs have been eligible, without again giving any numbers, to have been placed on an eligibility roster for captain?

MR. McRAE: Objection.

THE COURT: Let's make the record. The objection will be noted. Go ahead.

A. No.” (R. 45-6).

When questioned as to why the Commission adopted the policy of not further processing candidates who failed the written portion of the examination, Mr. Pennock said:

“A. The Salt Lake County Commission has given the Merit Commission a rather limited budget, and with

this thought in mind if we had continued to process everyone who took the examinations I don't believe that we would have had the finances to do it.

Q. What finances are needed with regard to further processing?

A. Medical examinations. They had to be part of this. So would much time in personal interviewing, and we felt this was extremely important and wanted to be sure the interview was meaningful to the men that took it, and it was just a matter of plain economics.

Q. Those were considerations that lead to the adoption of that specific rule, 3.03?

A. Basically, yes." (R. 60-61).

The ruling of the New Jersey Supreme Court in a case of remarkable similarity seems pertinent here. It is *Zicherman vs. Department of Civil Service*, (1963) 40 N.J. 347, 192 A. 2d 566. In that case an examination was given by the Department of Civil Service for the Clerk of the District Court of Essex County. The test included a written and an oral portion. The appellant took the examination with three others. Two of the four passed the written portion. The Statement of Facts in the opinion continues as follows:

"Two of the applicants achieved a passing score on the written test. The other two, including the appellant, failed to achieve a score of 70% on the written test and, in accordance with civil service practice, were excluded from further participation in the examination."

The appellant thereafter claimed the examination was improper both as to the manner in which it was given, that the questions bore no relationship to the duties of the clerk, and that he was prejudiced in not being given the oral portion of the examination in order to demonstrate his knowledge and skill and ability to discharge the duties of clerk. The Court there ruled:

“The preparation and administration of civil service examinations is an administrative function ‘delegated most liberally to the authorized examiners of the Department (of Civil Service) by the Legislature.’ *Artaserse vs. Dept. of Civil Service*, 37 N.J. Super. 98, 105, 117 A. 2d 22, 26 (App. Div. 1955). The fulfillment of that function is a matter requiring special expertise, involving as it does the determination of what job knowledge, skills and abilities are necessary or desirable in a candidate for a particular position, and the highly technical problem of devising suitable examination questions which will demonstrate as accurately as possible whether an applicant possesses those requirements sufficiently to qualify for the position. See *Brotspies v. Dept. of Civil Service*, N.J. 66 N.J. Super. 492, 496-498, 169 A. 2d 484 (App. Div. 1961).

In view of the above, the courts cannot intervene to nullify a civil service examination unless it is clearly shown that the Department has abused its discretion. See *Flanagan v. Civil Service Department*, 29 N.J. 1, 12, 148 A. 2d 14, 20 (1959), where this court said:

‘It is important to the efficient functioning of the public service employment program that ‘(c)ourts should let administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong—but it is their question. (They

are) vested with a high discretion and its abuse must appear very clearly before the courts will interfere.' *Maxwell v. Civil Service Commission*, 169 Cal. 336, 146 P. 869, 871 (Sup. Ct. 1915). If there is any fair argument in support of the course taken or any reasonable ground for difference of opinion among intelligent and conscientious officials, the decision is conclusively legislative, and will not be disturbed unless patently corrupt, arbitrary or illegal. Doubts held by the court as to the wisdom of the administrator's decision do not alter the case.'

See also, *Kelly v. Civil Service Com.*, 37 N.J. 450, 460, 181 A. 2d 745 (1962); *Brotspies v. Dept. of Civil Service*, N.J. 72 N.J. Super. 334, 342, 178 A. 2d 367 (App. Div. 1962); *Artaserse v. Dept. of Civil Service*, Supra, 37 N.J. Super., at p. 105, 117 A. 2d, at p. 26."

Also of importance is the language in a similar opinion from the District Court of Appeals of California in the case of *Amerio vs. City and County of San Francisco*, (1954) 126 Cal. App. 2d 359, 271 P. 2d 996:

"We are satisfied that the facts disclosed by this evidence furnish a reasonable basis for the determination of the Civil Service Commission and: 'Where the position is one as to the proper mode of filling which there is fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action of the commission should stand, even though the courts may differ from the commission as to the wisdom of the classification.' *Pratt v. Rosenthal*, 181 Cal. 158, 163-164, 183 P. 542, 544."

Since the Statute in question requires that the written portion of an examination constitute at least 60% of the

overall rating, is a regulation or policy of a testing commission, per se, invalid if it requires that a candidate must first pass that written portion before being allowed other factors to figure into his overall grade? Clearly, that determination is a matter of discretion with the Commission. Clearly, further, such a ruling hardly appears capricious, fraudulent or otherwise irrational as to justify judicial interference. Holding that the examination should be stricken as null and void "for failing to include in said test all of the items specified by Statute" (R. 14) is another interference on the part of the Court with the proper exercise of discretion by the Commission which this Court should reverse.

Giving the Plaintiffs-Respondents the maximum dignity affordable to their position and assuming that this refusal to process them having failed the written examination was ultra vires and contrary to statutory mandate, then, in that event, at worst, the Commission should have been ordered by the District Court below to further process these candidates. It should not have ordered the test to be nullified. The rights of the other candidates who successfully passed the written portion of the examination should equally be considered by the Court. It is to be borne in mind as well that the written examination itself, the questions, the content, the manner in which it was given, are not contested by Plaintiffs-Respondents and should, accordingly, remain in full force and effect together with the eligibility register derived therefrom. As noted above, however, even had the Plaintiffs-Respondents been further processed and been given the maximum available points from the other areas of merit rating, oral interview and service time, even in that event they would have been ineligible to be placed on such a

register. These being the facts, invalidating the test is the more prejudicial to those other candidates who in good faith took and passed the examination.

## CONCLUSION

For the foregoing reasons, Defendants-Appellants submit that the Trial Court erred in granting the Plaintiffs-Respondents the relief prayed below, and said judgment in its entirety should accordingly be reversed with instructions to dismiss Plaintiffs-Respondents' complaint.

Respectfully submitted,

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