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Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

NORMAN D. HAYWARD and
CLARENCE D. EVANS,
Plaintiffs-Respondents,
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
Defendants-Appellants.

Case No. 11120

RESPONDENTS' BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
Judge Stewart M. Hanson, Presiding

ROBERT M. McRAE
HATCH & McRAE
Boston Building
Salt Lake City, Utah
Attorneys for Plaintiffs-Respondents

GORDON A. MADSEN
RONNOW, MADSEN & TANNER
574 East 2nd South
Salt Lake City, Utah
Attorneys for defendants-appellants

FILED
MAY 13 1968
Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

of the

STATE OF UTAH

NORMAN D. HAYWARD and CLARENCE D. EVANS, *Plaintiffs-Respondents,* 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 *Defendants-Appellants.*	Case No. 11120

BRIEF OF PLAINTIFFS-RESPONDENTS

STATEMENT OF KIND OF CASE

This appeal arises from an action in the lower court in which plaintiffs, as deputy sheriffs of the Salt Lake County Sheriff's Department, sought to invalidate a captain's promotional examination given by defendants in

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their official capacity as members of the Salt Lake County Deputy Sheriff's Merit Service Commission.

DISPOSITION IN THE LOWER COURT

The matter was tried and argued before the Honorable Stewart M. Hanson on December 12, 1967, with the court entering its amended memorandum decision on December 14, 1967, (R. 12 and 13) from which Findings of Fact and Conclusions of Law and Judgment were entered on December 15, 1967 (R. 14 through 18). The declared null and void captain's promotional examination had been given September 9, 1967.

RELIEF SOUGHT ON APPEAL

Respondents seek to uphold the judgment of the lower court.

STATEMENT OF FACTS

At the time of trial a number of exhibits were marked and received in evidence (marked P-1 through P-18) said exhibits being in the exhibit envelope before this Court and each being reasonably self-explanatory. Certain witnesses were called for the purpose of identifying and laying foundation for these exhibits.

Plaintiffs attacked the captain's promotional examination alleging that appellants as the members of the Salt Lake County Deputy Sheriff's Merit Service Com-

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mission in conducting the promotional examination permitted at least two persons to take the examination contrary to the rules and regulations of the commission; that notice of the examination as required by statute was not given; nor had notice of the minimum grading requirements been afforded respondents as required by law; and lastly, plaintiffs were not permitted to take all portions of the examination as contemplated by statute.

ARGUMENT

DEFENDANT COMMISSION EXCEEDED THE AUTHORITY VESTED IN IT BY STATUTE IN CONDUCTING THE SUBJECT MATTER PROMOTIONAL EXAMINATION —

A. STATUTORY AUTHORITY:

B. DISCRETIONARY AUTHORITY VESTED BY STATUTE:

A. *Statutory Authority*:

The history of Title 17, Chapter 30 develops from an initiative petition passed by the required number of voters of this State at the general election November 8, 1960. Since that date no additions or amendments are noted to the original sections, numbered one through twenty-three. (See replacement Volume 2, Utah Code Annotated, 1962)

The purpose of the civil service laws in general

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is ". . . to protect employees from arbitrary and capricious political action and to insure employment during good behavior."*Coopersmith v. City and County of Denver* (Colorado) 399 P.2d 943, 1965.

To differentiate respondents' position in this case with that taken by appellants, it should be pointed out that Utah, unlike most other states, and more particularly, unlike California, New York, Illinois, Ohio, and New Jersey (decisions of whose courts are relied on by appellants) does not have a constitutional or general statutory civil service act applying to civil servants within the State.

Title 10, Chapter 10, applies to City employees of first and second class cities and has been among our statutes for a number of years. County firemen (under 17-28-1, through 14) and the troopers of the Utah Highway Patrol (under 27-11-1 through 27) were afforded civil service protection by specific legislative enactment in 1945 (cited above). The Department of Fish and Game and Parks and Recreation in a one-paragraph act 67-13-1, Chapter Laws of 1959) were placed under a merit service system which was repealed however in 1965 when a State employees system was enacted covering all employees of the State of Utah, and its State institutions, with certain specified exceptions (67-13- through 15). The Operator and Chauffer License Examiner Civil Service Act (67-14-1 through 21) was established by the 1961 legislature.

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It is apparent after examining the various civil service acts, that no uniformity was intended or exists between them except the common intent to create job securiy and equal treatment of employees within a single branch of the many governments within this State or the State itself. There lacks also between the various commissions any uniformity in their authority, duties, control, or right to court review, or the rules requiring adherence to the enabling statutes.

We, therefore, should consider the instant appeal solely on the basis of the intent of the people of Utah in passing the initiative legislation which must now be interpreted. For these reasons little quarrel can be taken by respondents with the cases cited by appellants since each of those cases from states other than Utah necessarily involves civil service commissions who by statute have broad administrative powers and whose sole functions are to act in good faith, fairly and impartially, and without abuse of discretion. This conclusion is reached since the powers and duties of the Deputy Sheriffs Merit Commission are defined by statute and four legislatures have since met and have not seen fit to make any amendments to this act.

Considering the evidence in the light most favorable to the Findings of Fact, Conclusions of Law, and Judgment (*George v. Mann,* .... Utah 2d ...., ... P.2d ......, No. 11109, May 2, 1968), we will consider the points raised in the petition for extraodinary relief in the lower

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court in the sequence they were set forth (R. 1 and 2):

First: Two persons were permitted to take the promotional examination contrary to the Commission rules and regulations. The admitted fact is that one Paul LaBounty and Karl Ehlers took and passed the promotional examination when they had not validly held the rank of lieutenant for a period of three years prior to the examination. Exhibit P-1, being the Rules and Regulations of the Salt Lake County Deputy Sheriffs Merit Service Commission, Rule 3.02 (b) (1) states:

> "1. Said in-rank examinations for the positions of sergeant, lieutenant, and captain will be filled by competitive examination, and 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."

La Bounty's appointment as a lieutenant was made by merit service comission approval on July 14, 1966 (Exhibit P-7), and Ehlers was appointed lieutmenant effective April 28, 1966 (Exhibit P-8). In addition to the shortness of time in rank for these two individuals, Chief Deputy Donald Tingey of the Salt Lake County Clerk's Office was asked on direct examination, referring to Exhibits 11 and 12, if any other records existed in the office of the Salt Lake County Clerk pertaining to the promotion of LaBounty to the rank of lieutenant, to which question Mr. Tingey stated, "No." (Record 54) He

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was also asked with reference to Exhibits 13, 14, 15, 16 and 17, if any other records existed in the office of the Salt Lake County Clerk pertaining to the promotion of Ehlers to the rank of lieutenant, to which he said, "No." (R. 54 and 55) Essentially these exhibits reveal that LaBounty was arbitrarily appointed to the rank of lieutenant on the above date, and Ehlers was reinstated in 1961 as a Depuy Sheriff with no rank and thereafter, made finance director, and on the above date, appointed to the rank of lieutenant, all without adherence to the provisions of 17-30-12, which permits appointment of "specialists" to certain ranks after a public hearing on the matter. It is apparent therefore from a simple mathematical calculation that even assuming these gentlemen were "lieutenants" on the Salt Lake County Sheriffs Department, neither had held the rank for three years prior to September 9, 1967. Also these apparent arbitrary promotions, and the reasons therefor have never been reported in the annual reports of the appellant commission as required by 17-30-12(1) (R. 43), only give them color of rank, not actual rank to be in position for promotion.

Appellants have argued that they have authority to amend their rules and regulations, and give this examination to unqualified people. However, by their own rules (See Exhibit 1, page 10, "Amendments") a procedure for amending the rules and regulations is set forth, which procedure was not followed. (R. 54)

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In *Mulkey v. City of Auburn* (Citing State ex rel George v. Seattle), 375 P.2d 499, (1962), at page 501, the Supreme Court of Washington stated:

> "Although the Commission may exercise wide discretion when conducting examinations, it may not violate its own regulations formerly promulgated."

Arizona, in *Civil Service Board of City of Phoenix v. Warren,* 1952, 244 P.2d 1157, made the following applicable observations:

> "This proposition of law" (that civil service regulations are to be liberally construed) "is incorrect because administrative bodies must comply strictly with civil service laws. We have only to look at the case of Taylor v. McSwain, 54 Ariz. 295, 95 P.2d 415, at page 422, to realize the effect the courts give civil service laws:
>
> > 'It is the general rule that civil service regulations adopted by a commission, under the authority of a statute have the same force and effect, so far as their scope is concerned, as law, and that all persons affected thereby, including the commission and its officers and employees, are bound to follow them so far as they are applicable.' (Citing cases)"

Since Commission rules and regulations appear to have the force and effect of law, Commissions, in order to exercise these functions, are to do so within the realm of power afforded them by statute. 17-30-4 enables appel-

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lants to make ". . . rules and regulations not in conflict with the provisions hereof. . . ." It is unconscionable to permit appellants to make rules and regulations under the power vested in them by the people of this State and then permit them to totally ignore their own rules and allow unqualified persons to take a promotional examination.

Second: Notice as required by statute was not afforded the examinees, including respondents, as 17-30-6(1) sets forth *the* system of giving notice of all examinations for both ". . . appointment to positions as peace officers, as well as for in-service promotions . . . " Subparagraph (2), without reference to either of the foregoing types of examinations states ". . . notice of examinations shall be published one time not less than fifteen 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 the minimum and maximum wages, and physical and educational requirements, and passing grades shall be not less than 70 percent." By implication the obligation to give notice is that of the appellants.

There is no evidence in the record of publication nor is there evidence in the record of posting of notice in a conspicuous place by the Commission nor evidence of fifteen days notice of what the passing grade would be, and appellants did not call any witnesses to establish

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that Sheriff Delmar L. Larson either actually or constructively (on behalf of appellants) gave notice of the impending examination to be given ". . . at a time and place the commission will designate." (Exhibit P-5) as he was ordered to by appellants.

It is argued in appellants' brief that 17-30-12 and the notification provisions contained therein do not apply to in-service promotional exams, and therefore, they are entitled to adopt their Rule 3.02(b)(2). However, the above statute seems reasonably clear in designating the method of notification of examinations and disseminating such other information about the test as the statute describes. Further, this was not Sheriff Larson's job to give notice of exams.

Appellants believe by their above rule that they have the power to order Sheriff Larson of Salt Lake County to perform for the Commission its function of giving notice of examinations. Nowhere in Title 17, Section 30, are appellants given the power to relieve themselves of their notification obligation by transmitting a letter (R. 42 and Exhibit P-5) to the Sheriff "and the Sheriff shall transmit said notice. . . ." (Rule 3.02(b)(2) and Exhibit P-5). This is a function and duty of the commission to give all requisite notices in the manner and style contemplated by law. Exhibit P-2 should be deemed inadequate notice as a matter of law.

Third: Respondents were not given any notice prior

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to the examination of what a passing grade would constitute. The import of the initiative legislation in its entirety requires advance notice to all examinees of what a passing grade will be (17-30-6(2). The notice was given orally on the morning of the examination (R. 51) rather than fifteen or even thirty days before the examination as contemplated by statute or Commission rule. The statute when read as a whole is clear as what was intended to be fair notice to examinees of passing grades and should therefore be followed. In *Taft v. Glade,* 114 Utah 435, 1948, 201 P. 2d 285, at page 287, is found the following:

> "It is our duty in interpreting a statute to give effect to the legislative intent as expressed by the wording of the statute. If reasonably possible, effect should be given to every part of a statute and if the enactment is subject to one or more interpretations by reason of conflicting provisions, then that construction which will harmonize and give effect to all provisions is preferred."

and in *Gord v. Salt Lake City,* 20 Utah 2d, 1967, 434 P.2d 449, at page 451, the following:

> "It" (the statute) "carries with it the presumptions that it is valid, and that the words and phrases were chosen advisedly to express the legislative intent. The statute should not be stricken down nor applied other than in accordance with its literal wording unless it is so unclear or confused as to be wholly beyond reason, or inoperable, or it contravenes some basic constitutional

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right. If it meets these tests it is not the court's prerogative to consider its wisdom, or its effectiveness, nor even the reasonableness or orderliness of the procedure set forth, but it has a duty to let it operate as the legislature has provided."

The lower court should be sustained in its conclusions that appellants failed to adhere to the Act which was detrimental to respondents and further appellants exceeded the authority vested in them by statute.

Fourth: Under objection of respondents' counsel at the time of trial appellants were permitted to make immaterial and self-serving conclusions as to whether or not respondents would have passed the examination had certain provisions of the statute been adhered to. The contents of in-service promotional examinations are prescribed as follows: 73-30-12(2)

> "Such examinations *shall* include an average of service ratings for the next preceding year; a rating of seniority; and a test of the competence of the peace officer to perform duties required in the position for which application is made." (Emphasis ours)

The admitted fact is that respondents were not processed further after failure (according to appellants) of the written portion of the examination. (R. 8)

Rule 3.03 of the Commission (Exhibit P-1) is in direct conflict with this section of the code as it permits the Commission to establish a minimum grade for ". . . all

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or any part or parts of the examinations. . . ." and, in the event of failure by the examinee, he would not be further processed.

The conclusions arrived at from the objected to testimony (R. 45 and 46) is not sustained by the record and the Court's attention is invited to read the succeeding pages of the transcript up through R. 51 as the evidence appears to indicate, and the trial court concluded, that both respondents could have passed the examination if all of the requirements to be examined on had been considered.

Respondents have been damaged in one or more respects by this violation of the laws of this State. Assuming this Court should find the test to have been administered in the manner and style, and after notice contemplated by law, two persons have been permitted to take and pass the promotional examination who, by the Commission's rules were ineligible. Promotions made from the eligibility register, certified to from this examination, (Exhibit P-6) could be made of these ineligible persons thereby filing vacancies which would necessarily have to be filled after the giving of another promotional examination thereby giving respondents an opportunity to qualify for promotion on a subsequent examination.

B. *Discretionary Authority Vested By Statute:*

Appellants have argued the failure of respondents to prove abuse of discretion and arbitrary and capricious

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Commission actions in their plight to overturn the lower court judgment entered in this case. Admittedly, certain amounts of discretion must be available *but within the bounds fixed by law.* They reiterated this a page 5 of their own brief when they say,

> "Rules adopted, therefore, by a commission must be consistent with and not in excess of said authority or constitutional grant." Appellants' brief, page 5, citing *Hale v. Worstell,* 185 N. Y. 247, 77 NE 1177.

Appellants cite *Clayton v. Salt Lake City,* 1963, 15 Utah 2d 57, 387 P. 2d 93, for the necessity of proving fraud, collusion, and dishonesty, etc. in upsetting administrative actions. However, all that case held was that a public authority, to wit, Salt Lake City and Salt Lake County, could review bids to erect their Metrolopitan Hall of Justice and use their discretion in accepting the bid which would be the most prudent investment. This hardly seems to be authority for the proposition that a merit or civil service commission can act contrary to specific statutory powers found in its enabling language.

They have cited *Amerio v. City and County of San Francisco,* 126 Cal. App. 2d 359, 271 P. 2d 996, for permissiveness of discretionary actions by such commissions; however, by *statute* the civil service commission therein discussed had the discretion as to whether or not *to even give* an examination, and also discretion in what qualifications the examinees should possess to fill the

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open position. This is not the case under the subject matter statute as the people of this State have explicitly stated that examinations *must* be given and *how* the examinations are to be given. Any discretion to be exercised by the Commission must be limited to those items not specifically covered by statute.

CONCLUSION

Respondents request this court to uphold the judgment of the lower court declaring the subject matter promotional examination null and void, or alternatively, request this court to order the names of Paul LaBounty and Karl Ehlers stricken from the eligibility register. The Court's attention is invited in reaching this conclusion to the suggestions made by the Honorable Stewart M. Hanson in his memorandum decision about giving and administering further examinations in light of the record of proceedings in the lower court and the arbitrary and unlawful exceeding of statutory authority generally as displayed by the appellant merit commission and merit commissions in general. (See Salt Lake Tribune, Friday, May 10, 1968, Section B, page 1, for a discussion of the Fire Department Civil Service Commission actions.)

Respectfully submitted,

ROBERT M. McRAE,

HATCH & McRAE

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