1970

Joseph E. Nelson v. Clyde L. Miller, As Secretary of State of the State of Utah : Plaintiff's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH E. NELSON,
Plaintiff,

vs.

CLYDE L. MILLER, as Secretary of State of the State of Utah,
Defendant.

Case No. 12258

PLAINTIFF'S BRIEF

Original Proceeding Before the Supreme Court of The State of Utah Pursuant to Utah Code Ann. §78-2-2

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PRELIMINARY STATEMENT

By minute entry dated October 9, 1970, this Court has, upon hearing the parties arguments in this action, ordered that the plaintiff's name be placed upon the ballot for possible election on November 3, 1970. Therefore, in the present posture of this litigation, no issue is raised concerning the denial by the defendant Secretary of State of plaintiff's request to stand for election. Accordingly, we have limited our decision below to those issue directly related to the constitutionality of the mandatory retirement statute.

In plaintiff's Memorandum two assertions were made concerning the constitutionality of Sec. 49-7-1.1.

The first argument demonstrated that the statute in question is inconsistent with both the terms and the intent of the constitutional amendment authorizing the enactment of a system of mandatory retirement of judicial personnel. Secondly, it was argued that the present statute contravenes other constitutional provisions of Article VIII which establish the requirements to be met in the election to, and occupancy of, judicial office in this state. The requisite standards of age, knowledge and character are explicitly defined in Article VIII. Consequently these standards can be neither augmented nor eroded by legislative direction. Therefore, even if the statute under examination could be considered apart from the underlying constitutional amendment, it remains invalid because of inconsistency with independent constitutional requirements.

In the discussion below, we have set our additional considerations which also point to the validity of each of these conclusion.

ARGUMENT

POINT I

SECTION 49-7-1.1 IS BEYOND THE SCOPE OF ARTICLE VIII, SECTION 28 AND IS THEREFORE INVALID.

In the Memorandum previously submitted, it was established that no reasonable interpretation of the above cited amendment could support the scheme of mandatory retirement emobdied in Section 49-7-1.1. To up-

hold the validity of the statute under the amendment would necessarily render the latter provision meaningless. In addition to this textual deficiency, the inconsistency of the statute, when compared to the amendment, is demonstrated by equally compelling practical considerations.

As the statute in question was conceived by the legislature, retirement at a given age is compulsory, even if the particular judge being retired is obviously still qualified to serve. Under a supplementary provision of the Judges' Retirement Act, Section 49-7-5.7, such a judge could be called back to serve either as a district judge or upon the Supreme Court. Not only does this provision indicate legislative recognition of the actual intent of the amendment, i.e. service according to ability; it also creates the statutory possibility of lifetime tenure of judicial personnel, uneffected and uninterrupted by election, age or lack of capacity. When a judge is retired under Section 49-7-1.1, then another must be duly nominated and elected to fill the vacancy. After such an election, the retired judge has no constitutionally valid claim or authority for continued judicial service.[1] Yet under the provisions of Section 49-7-5.7, he may be called upon to serve and receive full pay for such service, which may extend for any period deemed appropriate by the presiding judge of the Supreme Court.

Like the statutory provision at issue, Subsection 5.7 was adopted wholesale from equivalent federal legis-

[1] *See infra,* pp. 5-6.

lation.[2] The only way Subsections 1.1 and 5.7 and Section 28 of Article VIII can be meaningfully reconciled is to ascribe to each of them the meaning clearly apparent from the text of the amendment and implicit in the federal statutory program. Service as a function of demonstrated capacity is the principle underlying both the federal legislation and the state constitutional amendment. The federal statute provides for a system of permissive retirement; the age limits apply only to determine qualification for retirement at full pay. The operative provisions of both the amendment to the state constitution and the statute allowing continuing service are premised on a similar principle of limiting service only in the face of objective findings of actual inability to serve. Only when Subsection 1.1 is similarly construed, can it stand consistently with the other sections of the retirement statute, and, as we have argued, with the amendment itself. If retirement or removal under that provision were premised upon some finding of deficient conduct — as the amendment clearly directs — then continued service upon a "case by case" basis would not be possible for any judge so retired since the standard for service under both Subsection 1.1 and 5.7 would be the same, namely, physical and mental ability. Accordingly, disqualification under one would necessarily indicate disqualification under the other and therefore, *de facto* lifetime tenure under the latter provisions would not be possible.

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[2] *See* 28 U.S.C.A. §294.

POINT II

THE AGE LIMITS IMPOSED BY SECTION 49-7-1.1 CONTRAVENE THE CONSTITUTIONAL MANDATE OF UNIFORMITY AS REQUIRED BY ARTICLE VIII, SECTION 28.

The mandate of Article VIII, Section 28, requires the legislature to establish, "uniform standards for mandatory retirement." (emphasis added) The concept of uniformity, as applied to classes within a group, requires that distinctions should not be of capricious or arbitrary nature and that they have a rational basis.[3] In addition, any differences between classes within a group should be both practical and substantial and not merely represent a factitious equality.[4]

In *State v. Packard,* 250 P.2d 561, (Utah 1952), this court held that,

> "a statute is unconstitutional, as being unreasonably discriminatory, if it differentiates between such classes without any reasonable basis bearing on purpose sought to be accomplished by the statute." 259 P.2d at 556.

It is the plaintiff's position that no such reasonable basis exists to allow this court to determine that §49-7-1.1 is constitutional. The distinction contained in that provision allows only for factitious equality which is discriminatory, and, therefore, violative of the equal protection clause of the 14th Amendment of the Constitution of the United States.

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[3]16 Am. Jur. 2d §498.

[4]*Id.,* §499.

On a practical basis, plaintiff's position is further supported by the fact that district court judges are allowed to serve on the Supreme Court by invitation when the need arises. If a district judge is qualified to serve as a member of the Supreme Court prior to age 70, what reasonable basis can disqualify him from serving in the same capacity upon attaining age 70 and not disqualify a Supreme Court judge at age 70 for the same reasons.

POINT III

THE REMOVAL OR DISQUALIFICATION OF AN ELECTED JUDGE UNDER THE AUTHORITY OF SECTION 49-7-1.1 CONTRAVENES THE CONSTITUTIONALLY DEFINED REQUIREMENTS AND PROCEDURES FOR ELECTION TO AND OCCUPANY OF JUDICIAL OFFICE.

In oral argument, the case of *Boughton v. Price,* 35 P.2d 775, (Ida. 1950), was cited by defendant as authority for the proposition that where a constitution sets out certain minimal requirements for eligibility for constitutional office, it is within the power of the legislature to affectively supplement these minimal qualifications. However, the general rule in this regard is that where a state constitution lays down specific eligibility requirements for a particular office, such constitutional specification is exclusive, and absent some express grant of authority, the legislature is without power to require additional or different qualifications. *Whitney v. Bolin,* 330 P.2d 1003, (Ariz. 1958); *Wallace v. Superior Court,*

298 P.2d 69 (Cal. 1956); *State ex. rel. Chapman v. Appling,* 348 P.2d 759, (Ore. 1960); And See Anno., A.L.R.2d 171. Thus in *State ex. rel. Stain v. Christensen,* 35 P.2d 775, (Utah 1934), this court recognized that,

> There is eminent authority and good reason to support the doctrine that when a constitution prescribes eligibility for an office, its declarations are conclusive of the whole matter whether the language used is affirmative or negative in form. 35 P.2d at 780.

The court went on to hold that this principle could not be applied to invalidate a statute requiring the state treasurer to undertake a bond as a condition for holding office since such a requirement was sufficiently "foreign to the subject matter of eligibility for office." The instant statute deals explicitly with eligibility for office and therefore, under the principle established by the above cited case, is explicitly invalid.

Even if it were determined that Sec. 49-7-1.1 was not, standing alone, an impermissible addition to the stated constitutional requirements for judicial office, it cannot be considered apart from the constitutional amendment it seeks to implement. When its departure from the scope of that amendment is added to its authorized modification of the stated requirements for judicial office, the unconstitutionality of the provision seems plainly evident. Indeed, each constitutional defect aggravates the severity of the other.

POINT IV

UTAH CODE ANNOTATED, SECTION 49-7-1.1 IS STATE ACTION WHICH VIOLATES THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Section 1 of Amendment XIV of the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Holding an elective office is a privilege. Depriving one of the right to hold elective office by reason of maximum age alone is an unreasonable deprivation of this privilege, and violative of the previously quoted section of the United States Constitution.

The same constitutional section states that a State may not deprive any person of life, liberty, or property, without due process of law. The loss of the right to work, merely by reason of maximum age alone, is loss of a

property right which is protected by the above mentioned constitutional provision. The Utah Constitution also prohibits deprivation of life, liberty, or property without due process of law, when it provides in Article 1, Section 7,

> "No person shall be deprived of life, liberty, or property without due process of law."

The right to work, the right to engage in gainful employment, and the right to receive compensation for one's work, are essentially property rights, *McGrew v. Industrial Commission,* 85 P.2d 608, (Utah 1938).

The above mentioned constitutional provision forbids a State from denying any person within its jurisdiction the equal protection of the laws. Traditionally, this amendment prohibits discrimination by reason of race, creed, or color. It may be reasonable for the State, through legislative action, to set standards for office holders (for example, that a Judge must be an attorney admitted to practice in the State), but to establish a maximum age limit as the *sole* basis of disqualification to hold office is unreasonable and denies the equal protection guaranteed by the United States Constitution.

CONCLUSION

On the basis of all of the foregoing propositions, plaintiff respectfully urges that Section 49-7-1.1 be declared unconstitutional.

Dated this 26th day of October, 1970.

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