

1976

Joyce Heder v. The State of Utah; D. Frank Wilkins; Leray Howell; and John Does I through X : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SEP 15 1976

JOYCE HEDER,

Plaintiff - Respondent,

-v-

THE STATE OF UTAH; D. FRANK
WILKINS; LERAY HOWELL; and
JOHN DOES I through X,

Defendant - Appellant.

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Case No. 14180

APPELLANTS BRIEF

Appeal from the District Court of Salt Lake County, State
of Utah, the Honorable Stewart M. Hanson, Jr., presiding.

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FILED

OCT 15 1976

Clark, Supreme Court, Utah

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Plaintiff - Respondent, :

-v- :

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOYCE HEDER, :

Plaintiff - Respondent, :

vs. :

The STATE OF UTAH; D. FRANK :
WILKINS; LERAY HOWELL; and :
JOHN DOES I through X, :

Case No. 14180

Defendant - Appellants. :

:

APPELLANTS BRIEF

STATEMENT OF THE NATURE OF THE CASE

Appellants appeal from an order granting respondents partial summary judgment holding as a matter of law respondent was a covered merit system employee.

DISPOSITION IN THE LOWER COURT

The Honorable Stewart M. Hanson, Jr., Judge of the Third Judicial District Court, held that as a matter of law plaintiff-respondent, a court reporter, was a covered merit system employee and granted a partial summary judgment. The court further ordered that damages be resolved at later proceedings.

RELIEF SOUGHT ON APPEAL

Appellants seek the reversal and vacating of the lower courts order and that the case be remanded to the lower court with the directive that the respondent was not a merit employee and not subject to the merit system.

STATEMENT OF FACTS

Respondent was employed as a court reporter by the State of Utah. For several years she worked for Judge Merrill C. Faux and was Judge Faux's reporter when he retired December 31, 1972. Respondent remained employed during January 1973 as Judge Faux was asked to sit during that month.

Judge D. Frank Wilkins, Court administrator, notified respondent in writing that as of February 1st, 1973, she would be terminated because there were no positions for court reporters open in the District Court.

Respondent requested a merit system council hearing on her termination on January 30, 1973. This request was denied by the merit system council since court reporters had not been certified to participate in the Merit System.

This action was then commenced.

I.

THE LOWER COURT ERRED IN RULING THAT COURT REPORTERS ARE MERIT EMPLOYEES BECAUSE OF SPECIFIC STATUTORY LANGUAGE TO THE CONTRARY.

Court reporters of the entire Judicial System of the State of Utah -- Supreme Court, District Courts, and Juvenile Courts -- have been specifically placed beyond and outside the scope and meaning of the Merit System as enacted and amended. Because of this specificity, the lower court erred in holding otherwise.

Utah Code Annotated 67-13-6 is a crucial and controlling statute relative to those positions, individuals or agencies exempted from merit system status. In particular, Section 6 (a) (4) exempts the following:

"....those employees whose regular duties include public advocacy and defense of administration policy; and those in a personal and confidential relationship to elected officials and to heads of departments agencies and other major offices...."
(emphasis added)

Referring to the above statutory language, clerks and reporters of the court, whether it be the Supreme Court or District Court have personal and confidential relationships with the judges for whom they work. This perhaps is better shown by legislative mandate in Utah Code Annotated 78-56-1.1 where is found:

"The court administrator shall appoint a certified shorthand reporter with the approval of the district judge to report the proceedings in each division of the district courts. The certified shorthand reporters shall hold office during the pleasure of the court administrator, and the district judge." (emphasis added.)

The legislature here acknowledges that the relationships between the court and reporters are of such a personal nature, that not only must there be compatibility, but the Court must have control over its own business and personnel. Otherwise, the Judicial System no longer becomes one of independence under the Utah constitution, but one controlled by the legislature telling the courts who they may and may not hire and/or dismiss thus prohibiting the courts to function as is required by law.

Some ambiguity exists relative to Utah Code Annotated 67-13-6(g) where reference is made to "employees of the judiciary who are not exempt by the provisions of this section" as being covered by the merit system. This state of confusion dissipates when it is seen that the deletion of the former paragraph (a) (8) was not a legislative mandate that all personnel of the judiciary, Supreme Court and otherwise, are included under the merit system.

No one would argue that the District judges are covered by the merit system. They are elected officials serving under the specific exemptions of Utah Code Annotated 67-13-6(a) (1) and (2).

None-the-less, subparagraph (4) as previously quoted specifically exempts those in a "personal and confidential relationship to elected officials" from coverage of the merit program.

What could be more personal and confidential than a court reporter assigned to be the reporter for a certain Judge. The reporter is not "the" reporter for "the courtroom", for if the Judge changes courtrooms, the courtreporter changes with him to the new location. The reporter is the reporter of the judge, not the State's reporter, and under Utah Code Annotated 78-56-1.1 as previously quoted, the Judge has control over the dismissal of his reporter. Further it should be pointed out that many situations take place in front of the court reporter, but in chambers, because of the sensitive nature of the matters involved, the judge can request certain portions of transcript to be presented to him by the reporter without either party aware. Because of this relationship, it becomes imperative to permit the broad discretion of the Judge to control the situation before him. Nothing could constitute a more confidential or personal relationship as required by subparagraph (a) (4).

Colorado has had similar experiences as Utah in the "Civil Service" form of government, even though Utah's system is relatively new. Colorado's Constitution, Article XII, Section 13,

paragraph (3) makes it possible if deemed advantageous for Judicial Officers and employees to become a part of the Civil Service or Merit System. It states:

"Officers and employees within the judicial department, other than judges and justices, may be included within the personnel system of the state upon determination by the supreme court, sitting en banc, that such would be in the best interests of the state."

Jed. M.L.S. & Quesada

The above provision was interpreted by the Colorado Supreme Court in Inre Interrogatory of Governor, 162 Colo. 188, 475 P.2d 31 (1967) in responding to an inquiry of interpretation as permitted by the Colorado Constitution. The pertinent language of the court is as follows:

"Our opinion is that the foregoing interrogatory should be answered in the negative. In other words, it is our view that employees of courts of record of the State of Colorado and the positions they occupy, as authorized by statute, are not subject to the Civil Service provisions of Article XII, section 13 of the Constitution of Colorado.

At the outset, it should be noted that the issue posed by the interrogatory is not whether employees of courts of record should be under a merit system, as opposed to the so-called spoils system. Rather, the more precise issue is whether such employees should be brought under a merit system which is in turn under the control of the State Civil Service Commission.

It is our considered view that the construction and interpretation given Article XII, section 13 of the Constitution of Colorado by all three branches of our state government has consistently been that the aforementioned provision in our Constitution does not apply to, or in any manner encompass, employees of courts of record. And this interpretation by the several branches of state government has not only been both contemporaneous and long standing in nature, but squares with the separation of powers doctrine. Let us first examine the judicial interpretation heretofore given this particular section of the Constitution."

Thus we find our neighbor state recognizing the problems posed in the case at bar. U.C.A. 67-13-6(a)(4), however specifically permits the "personal and confidential" status to be exempt. Because of the permissible posture of the Constitution, Colorado established by voice of the court the finding as spelled out in Utah Law. The mere fact that language specifically naming judicial employees ^{from said} as exempt ^{was deleted} does not carte blanche prove that judicial court reporters are under the merit system. U.C.A. 67-13-6(a)(4) argues strongly against that position.

In further supporting this position, it must be observed that there is no clear and unequivocal declaration of legislative intent that 78-56-1.1 is repealed or done away by the implementation of the 1971 amendment to the merit act. This Code section specifically provides that the Judge may dismiss the court reporter without question because the reporter serves at the pleasure

or whim of the Judge, and therefore prevails over the less specific and ambiguous provision of the 1971 amendment.

In re Utah Savings and Loan Association 21 Utah 2d 169, 442 P.2d 929 (1968) clarifies this issue. There the Utah Supreme Court said:

"It is true here, as it is in so many areas of the law, that one statute has been enacted at one time with a particular purpose in mind, and that another has been enacted at another time with a different purpose in mind. When this has been done and there is an apparent conflict, it is not proper to put all the emphasis to one statute, as though it stated all of the law on the subject to the exclusion of the other. They should be looked at together, in their relationship to each other, with a view to reconciling any such apparent conflict and giving each its intended effect insofar as that can be accomplished without nulifying the other."

The Court further cited an early Utah case, University of Utah v. Richards 20 Utah 457, 59 p. 96 (1899) which says:

"One act is not to be allowed to defeat another, if by reasonable construction the two can be made to stand together."

These holdings of the above cases come parallel to the present matter and as previously stated dismiss the confusion as to which statute prevails. U.C.A. 78-56-1.1 was enacted in 1969 to protect the integrity of the Judicial System. This statute protected the confidential nature of judicial matters.

The 1971 Amendment to the merit act was of a wholly different nature. It was not enacted for the specific purpose

of increasing and protecting the integrity of the Judicial System but was a part of a general bill aimed at increasing the scope of the merit coverage. The conflict therefore arises by two wholly unrelated matters having been enacted, one a specific statute, the other a general statute. Thus, the decision of In re Utah Savings and Loan Association, supra, must control.

The court said it is not proper to put all emphasis to one statute [U.C.A. 67-13-6(g)], as though it stated all the law on the subject to the exclusion of the other [U.C.A. 78-56-1.1]" *harrow* (brackets added). Looking at them together to give each its intended affect without nullifying the other is what must be done.

U.C.A. 78-56-1.1 permits the Judge specifically to dismiss reporters--to take them off the payroll. The effect to be maintained is therefore clear. Does U.C.A. 67-13-6 permit this statute to maintain its identity?, Yes! Section 6(a)(4) permits those positions of a relationship to elected officials [Judges] to be exempt from the merit act in spite of subsection 6 (g). Thus, U.C.A. 78-56-1.1 has maintained its identity and force.

Does U.C.A. 78-56-1.1 permit U.C.A. 67-13-6 to maintain its identity and purpose? Yes! This latter statute is a general statute enacted by the legislature to expand the strength of the merit system. Subsection (g) of that subsection specifically defers its position to employees who are not "exempt by the

provisions of this section..." As has been shown, the specific statute, U.C.A. 78-56-1.1 controls and maintains its identity and therefore becomes the exception spoken of under subsection (g). Thus, the Supreme Court's decision to reconcile and allow each to maintain its identity has been accomplished and the Judges are allowed to hire and dismiss court reporters as desired--the reporters, therefore, are not under the merit law.

Some question could arise, however, that the statute later in time prevails-even over a specific statute. Appellants feel this position has no strength in the present matter. Pacific Intermountain Express v. State Tax Commission 7 Utah 2d 15, 316 P.2d 549 (1957) presents to the reader both general rules relative to the above position, but as stated in Bateman v. Board of Examiners of the State of Utah 7 Utah 2d 221, 322 P.2d 381 (1958):

"Generally speaking we do not disagree with this rule, nor with the reasoning upon which it is based. But like all general rules it must be applied with discernment as to whether it fits the fact situation at hand and no rule should be given force in application where the facts plainly negative any such intent."

In 1966 this court reaffirmed that position in Howe v. Jackson 18 Utah 2d 269, 421 P.2d 159(1966) that both statutes must be considered in light of their background and purpose in deciding how to rule. The exact language of the court is as follows:

"Therefore, when such problems arise a statute should be considered in the light of its background and purpose; and also in connection with other aspects of the law which have a bearing on the problem, in order that its intent and purpose be fulfilled."

The background and purposes have been clearly set forth. And what is the intent of U.C.A. 78-56-1.1? It is to allow judges of all state courts, not just the district courts, to control their staff and reporters in fulfillment of their constitutional duties under Article VIII of the Utah Constitution. Such cannot be done if the court judges do not have the discretion of releasing from employment those individuals not found to meet with the approval of the judges of the court.

It is therefore seen that (1) court reporters are specifically exempted from merit by virtue of U.C.A. 67-13-6(a)(4) and that U.C.A. 78-56-1.1 as a specific and unrepealed statute, allows dismissal of court reporters which is in full harmony with the provisions of the merit bill.

II

THE LOWER COURT FURTHER ERRED IN ITS RULING IF COURT REPORTERS ARE COVERED, BECAUSE THE RESPONDENT WAS NOT CERTIFIED AT THE TIME OF DISMISSAL FROM SERVICE.

If the Supreme Court fails to accept appellant's first argument regarding the exemption of court reporters under the merit act, the fact still remains and is uncontroverted that the respondent was not certified nor was she on probation as required

by the merit law.

As defined by Utah Code Annotated 67-13-6(e): "The term 'Merit System' shall refer to positions under schedules B and C."

What are those schedules? U.C.A. 67-13-6(b) (2 and 3) says as follows:

"Schedule B - The competitive schedule, consisting of all positions filled through competitive examination, written or un-written and to which tenure shall apply following a probationary period, subject to the availability of funds and continued need for the position.

Schedule C - The noncompetitive schedule, consisting of all positions for which it is not feasible to administer competitive examinations at entry. Following satisfactory completion of at least a one year probationary period, employees under this schedule shall receive tenure."

Under either schedule B or C, before an employee may receive what is termed "tenure," a probationary period must be undertaken and completed by the employee in question. Then certification, i.e. merit status, can be gained. Therefore, under the above the respondent cannot claim that prior service gave her tenure in position when the merit system went into effect. In fact, the statutes above provide exactly the opposite. Utah Code Annotated 67-13-7(a) specifically sets forth the requirements of certification for those employed when the act went into effect before merit status is given. That Section states:

"All employees, officers and other personnel not otherwise exempt by law, who prior to the effective date of this act have served continuously for a period of one year or more, and either who have been certified under existing merit system rules and regulations or who are certified in writing ninety days after the effective date of this act by the appointing officer under whom they serve to be serving satisfactorily, shall be deemed to have tenure under the merit system..." (Emphasis Added)

Based on the preceeding language, it is seen that provision was made for employees in respondent's situation - those who had been serving in their capacity for one year prior to the effective date of the act. However, U.C.A. 67-13-7(a) spells out specific procedures necessary for persons such as respondent in order to take advantage of coverage. Those procedures are (1). The employee must be certified under the existing rules and regulations and (2). said certification is established by the appointing officer certifying in writing within 90 days that the employee is serving satisfactorily. In the case at bar none of the procedures was followed or even attempted. It is therefore difficult for appellant to comprehend now the lower court held that the respondent was on merit as a "matter of law." Everything points to the contrary conclusion that as a "matter of law" the employee was not under the merit system because none of the required procedures was followed or even attempted.

If U.C.A. 67-13-7(a) had been utilized within 90 days as there required, tenure would be given - not requiring a probation

period, for those state employees covered by the act. Since it is the States contention that court reporters do not fall under the scope of the act, these arguments tend to be academic at the most. Nevertheless if certification, as required by the statute had not been completed in time, then any employee covered by the act would have to look to schedules B and C to see how tenure could be achieved. Those schedules specifically call for a probationary period. The oregon Supreme Court reiterated the widely held position regarding the status of probationary employees in Schlieting v. Bergstrom 13 Or. App. 562, 511 P.2d 846 (1973).

The court said:

"We conclude that the better approach is for courts to not review whether the hiring or firing of a probationary public employe is "arbitrary." Except for the substantive constitutional limitations discussed elsewhere, a public employer can base personnel dicisions concerning probationary employees on any reason or no reason. In short, personnel decisions concerning public employees are within the unfettered discretion of their employers."

Therefore, in keeping with above position, even if the respondent had been on probation, her dismissal would have been proper.

The merrit system regulations further point out the soundness of this position and the fallibility of the lower court's ruling. Article VII, Section 5, paragraph 1 of the merit system and personnel regulations dated December 1, 1973 (still in effect)

says as follows:

"All employees, officers and other personnel not otherwise exempted by law, who prior to May 11, 1965, or prior to the date their agency or their position comes under Merit System coverage and who have not been certified under the previously existing Merit System may be discharged; or if they are certified in writing by the administrative officer to be serving satisfactorily on the effective date of such coverage shall have status as:

a. Probationary employees in the class of position in which they are serving until they have completed a satisfactory one-year probationary period from the date of original appointment. Nothing herein contained shall preclude positions held by any incumbent from being reclassified or reallocated or preclude the establishment of additional classes or the division, combination, alteration or abolition of existing classes, pursuant to this act and appropriate regulations."

Further, paragraph 3 of the same makes provision for new agencies or positions coming under the merit act after the act goes into effect. Thus, if this court finds that the 1971 amendment places court reporters under merit coverage, this paragraph must also control to determine to whom and when merit status attaches. It reads as follows:

"When a position within a covered agency is brought under the Merit System subsequent to the date the agency came under Merit System coverage, the incumbent, in order to be eligible for continued employment in such position, shall on the effective date of such coverage meet the requirements in Paragraph 1 and 2 of this section in the same manner as if his agency were being brought under the Merit System on such date."

Certainly, if this court held that court reporters fall under the merit system, they would be controlled by the language "brought under the Merit System" subsequent to the effective date of the Act, and would therefore dictate that procedures be followed for certification which were not in the case at bar.

Paragraph 2 states:

"Persons with one year or more of service who are not certified in Paragraph 1 above as serving satisfactorily on the date of such coverage may:

- a. Be separated; or
- b. Be placed on probation for a six-month period commencing with the effective date of such Merit System coverage, with the rights of probationary employees; or
- c. Be given provisional status pending the establishment of an adequate register for their respective positions."

Here, it is clearly seen from the regulations that (1) certification is a must, (2) the procedures must be followed and not by-passed, (3) probation is necessary if the employee was not covered when the act went into effect and (4) certain sanctions are spelled out when there is non-compliance. None of the above has been complied with in the present matter except the dismissal provision. This court must not allow such a flagrant violation of merit procedures to stand as presented by the respondent. To do so, would in effect nullify the entire procedures of merit law and set a bad precedent.

Not only the above cited regulations permit discharge for non compliance and/or during the probationary period, but Utah Code Annotated 67-13-7(b) and (c) likewise permit such action:

"(b) Persons with one year or more of service, not so certified may (1) be separated; or (2) be placed on probation for a six-month period commencing with the effective date of this act with the rights of probationary employees; or (3) be given provisional status pending the establishment of an adequate register for their respective positions.

(c) An employee who has had less than one year of service on the effective date of this act may be discharged; but if retained, shall be required to satisfactorily complete a probationary period of one year from the date of his appointment in order to be retained in state service."

Thus once again certification is requisite to merit status, for if one is "not so certified" he may be "separated," from that position and merit status totally or "placed on probation." The respondent was separated and dismissed in this matter as permitted above.

In essence, the laws and regulations state that until one is certified and until one follows the procedures of the merit system--even over extended periods--one is not a merit employee.

The respondent's situation here as to certification is very similar to that of an Assistant Attorney General. Under the Attorney General Career Service Act 67-5-6 et. seq. an attorney may be placed in career service status six months after he is recommended for career status by the Attorney General. If the

Attorney General doesn't make recommendation, the attorney is not placed in career service status. The status is not conferred automatically, the Attorney General must specifically recommend such status and upon this certification merit status is bestowed.

It is therefore clear upon this closer analysis of the laws involved, that even if court reporters fall under a non-exempt status, the respondent failed to comply with the laws and regulations and cannot be considered as "a matter of law" to have been "on merit."

CONCLUSION

It has been shown that court reporters do not fall under merit system because of their relationship with the Judicial system and that even if they did, the laws and regulations were not followed to give the respondent merit status.

Therefore, it is respectfully submitted to this court that the decision of the lower court be reversed and remanded for further action in compliance with its opinion.

Respectfully,

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