1977

David Westly and the International Brotherhood of Police officers v. Board of City Commissioners of Salt Lake City Corporation : Brief of The Defendant-Respondent

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

DAVID WESTLY AND THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS,

Plaintiff-Appellants,

vs.

BOARD OF CITY COMMISSIONERS OF SALT LAKE CITY CORPORATION,

Defendant-Respondent.

Case No. 14842

BRIEF OF THE DEFENDANT-RESPONDENT

Appeal from a judgment of the Third District Court in and for Salt Lake County, State of Utah; Honorable J. E. Banks, Judge, presiding.

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NATURE OF THE CASE

This is an action whereunder the plaintiff-appellants sought a declaratory judgment seeking the lower court to:

(a) Rule that a 1976 5% wage increase was illegal, when the City payed that raise and accepted waivers, only under procedures outlined by the City Commission;

(b) Rule that a City Commission action, which barred union activities on City time, was illegal; and

(c) Declare that the Statement of Purpose found in Section 34-19-1 Utah Code Ann. created substantive rights of collective bargaining in Utah public sector employees.

DISPOSITION IN THE LOWER COURT

The Third District Court, J.E. Banks granted the

defendant-respondent's motion to dismiss, with prejudice, for failure to state a claim upon which relief could be granted.

RELIEF SOUGHT ON APPEAL

The defendant-respondent seeks to have the lower court's dismissal affirmed.

STATEMENT OF FACTS

Plaintiff-appellants' complaint alleges as the legal basis for relief, that the preamble to Utah's little Norris LaGuardia Act created substantive legal rights of collective bargaining in Utah public sector employees. Premised on that legal theory, plaintiff-appellants assert:

1. Salt Lake City, as a Utah municipal corporation, failed to bargain in good faith when it:

   (a) Exercised its legislative power, adopted its budget, set salaries for its 1976 fiscal year, and permitted protesting employees to waive their salary increase only in a procedure outlined by the Commission. Count I and III, R-2; R-6; and

   (b) Passed a directive that City union activities would be done on other than the public's time. Count II R-5.

2. The police union and its president are entitled to a declaratory judgment and injunctive relief. Count IV, R-7.

POINT I

SECTION 34-19-1, ET SEQ., UTAH CODE ANNOTATED, 1953 DOES NOT ESTABLISH OR CREATE SUBSTANTIVE RIGHTS UPON WHICH THE PLAINTIFF-APPELLANTS MAY BASE A CAUSE OF ACTION.

A.

A STATEMENT OF INTENT OR PREAMBLE TO LEGISLATION DOES NOT CREATE SUBSTANTIVE RIGHTS.

The legal foundation of plaintiff-appellants' complaint is the allegation that the preamble to the so called "Little Norris-LaGuardia Act" of this State created a substantive obligation upon the State of Utah and its political subdivision to collectively bargain with public employees. The relevant portions of this preamble provides as follows:

> "Declaration of Policy -- In the interpretation and application of this chapter, the public policy of this state is declared as follows:
>
> * * *
>
> "(3) . . . it is necessary that the individual employee have full freedom of association, self-organization, and designation of representatives of his own choosing to negotiate the terms and conditions of his employment and that he shall be free from the interference, restraint or coersion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or their (sic) mutual aid or protection." 34-19-1 Utah Code Ann., 1953 as amended (Emphasis added).

Preamble provisions such as the foregoing, have uniformly been held to be a legislative statement of intent and used in the construction of later substantive provisions. They do not create or enlarge the scope of a statute.

This point is succinctly stated by Sutherland on Statutory Construction; this treatise states:

> "The function of the preamble is to supply reasons and explanations and not to confer power or determine rights. [Citations omitted] Hence it cannot be given the effect of enlarging the scope or effect of a statute. [Citations omitted]" Sutherland, Statutory Construction, id. at §47.06, p. 81 (Emphasis added).

Even the State of Washington's decisions (upon which the plaintiff-appellants' placed virtual sole reliance under the case of Krystad v. Lau) upheld this principle and distinguished the Krystad case cited by appellants. It correctly noted:

> "Both in England and in this country it was at one time a common practice to prefix to each law a preface or preamble stating the motives and inducement to the making of it; but it is not an essential part of the statute and is now generally omitted. It is not only not essential and generally omitted, but it is without force in a legislative sense, being but a guide to the intentions of the framer. As such guide it is often of importance. In this sense it is said to be a key to open the understanding of a statute. The preamble is properly referred to when doubts or ambiguities arise upon the words of the enacting part. It can never enlarge. It is no part of the law. Sedgwick, Construction of Statutory & Constitutional Law (2d ed.), pp. 42, 43; 1 Story Constitution (5th ed.), book 3, ch. 6; Edwards v. Pope, 3 Scam. (Ill.) 465; Bouvier's Law Dictionary." International U. of Op. Eng., L. 286 v. Sand Point C. Cl., 519 P.2d 985, 989, 990 (Wash. 1974) (Emphasis added).

This 1974 Washington decision thereafter took great pains to distinguish the 1972 Krystad v. Lau case cited by appellant. Specifically, they rejected the argument now urged upon this Court by plaintiff-appellants that the preamble to

that state's "Little Norris-LaGuardia Act" created substantive rights of collective bargaining in public sector employees. In doing so, that court made it clear that the preamble created no substantive rights and stated of its earlier decision:

> "It was not our intent in that case to lay down a new rule respecting the import of policy statements contained in legislation." Id. at p. 990.

A further discussion of this 1974 Washington decision, which virtually overruled the Krystad case, will be discussed in subpoint I B, infra.

However, it is respectfully submitted that the lower court was entirely correct in its holding that plaintiff-appellants' reliance on a preamble to create substantive collective bargaining rights in public employee unions was ill-founded. As such, all of their allegations failed to state a claim upon which relief can be granted; this Court should also so rule.

B.

WITHOUT SPECIFIC LEGISLATION, PUBLIC SECTOR EMPLOYEES HAVE NO RIGHT TO COLLECTIVELY BARGAIN WITH THEIR GOVERNMENTAL EMPLOYER.

Other states considering the question raised by plaintiff-appellants have uniformly held that, without specific legislation granting rights to collective bargaining, public employees have no such right. Specifically, the laws virtually identical to Utah's "Little Norris-LaGuardia Act" have been uniformly construed not to apply to public sector

employees. A recent illustrative case rejecting the theory propounded by plaintiff-appellants and summarizing the law in this area is Retail Clerks Local 187 v. University of Wyoming, 531 P.2d 884 (Wyo. 1975). This case correctly summarized the law as follows:

> "The section upon which reliance is made is a policy statement and a part of what is sometimes described as a 'little Norris LaGuardia Act.' Although not directly in point, it is highly persuasive that numerous cases have held the prohibition against injunctive relief therein granted not to be applicable when applied to public employees. Anderson Federation of Teachers, Local 519 v. School City of Anderson, . . . (citations omitted) not only cites this as being the overwhelming weight of authority but contains numerous citations and reiterated this view on rehearing (citations omitted).
>
> "It has been held generally that statutes governing labor relations between employers and employees are construed only to apply to private industry (citations omitted) and had the legislative intent been that municipalities be forced to engage in collective bargaining that the legislature would have been explicit in its language, (citations omitted) (Authority cited) is deemed completely sufficient authority to our view that there is a dual basis for holding that the statute upon which the appellants relied is inapplicable by reiterating what is termed as an old and well-known rule 'that statutes which in general terms divest pre-existing rights express words to that effect.' And further, after a general discussion of the purposes of the 'Norris-LaGuardia Act,' concludes: 'These considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees.'" (Citations omitted). Retail Clerks Local 187 v. University of Wyoming, id. at p. 888.

The Utah Statute relied on by plaintiff-appellants in this action, like the Wyoming provision above discussed, forms a policy preamble to the anti-injunction act which follows. As summarized in the Wyoming case, such policy

statements have been uniformly held not to apply to the public sector.

That judicial construction is supported by the obvious intent of the Legislature through its draftsmanship. Even a cursory reading of Chapter 19 of Title 34 reveals that it deals with defining court powers and remedies available in the event of a private sector labor dispute. For example see §34-19-2: "Injunctive Relief Prohibited in Certain Cases;" §34-19-4: Injunctive Relief — Reasons for Prohibiting;" §34-19-5: "Injunctive Relief — When Available;" and §34-19-3: "Limiting Civil Liability of Union Officers." None of the substantive sections of that Chapter remotely deals with collective bargaining, let along collective bargaining for public employees.

It is, further, of interest that even these anti-injunction sections are uniformly held inapplicable to public sector employment. See analysis of cases so holding in Union Organization and Activities of Public Employees, 31 ALR 2d 1142.

It is also significant to note that Chapter 20 of Title 34 deals expressly with the subject of collective bargaining. However, when the Legislature discussed the subject it stated:

> "'Employer' . . . shall not include . . . any state or political subdivision thereof. . . ." 34-20-2(2) Utah Code Ann., 1953 (Replacement Vol. 4 B) (Emphasis added).

Thus, it is clear that the Legislature had no intent to bring state or city governments into a compulsory collective bargaining relationship with public employee unions.

Obviously the plaintiff-appellants did not cite Chapter 20 in their complaint because of the clear expression of legislative intent. Rather, they attempted to create a substantive right out of a preamble to a chapter which was devoted to defining court powers and remedies for a labor dispute in the private sector. Plaintiff-appellants' shoe string theory is clearly contrary to the legislative intent and action.

The conclusion that the Legislature never intended and, in fact, never did create collective bargaining rights for public sector employees, in the section cited by the plaintiff-appellants, is further buttressed by other statutes narrowly drafted by the Legislature, after Chapter 19 of Title 34 was adopted in 1969. See, Firefighter Negotiation Act, §34-20a-1, Utah Code Ann., 1953 adopted in 1975, but subsequently held unconstitutional in Salt Lake City, et al., v. International Association of Firefighters, 563 P.2d 786 (Utah 1977); and Public Transit District Act, §11-20-31, Utah Code Ann., 1953, adopted 1969, 1st Special Session.

These later acts are specific and narrowly addressed to groups of public employees for collective bargaining. One must ask why, if rights of collective bargaining for public employees were intended to be granted under the Utah "Little Norris-LaGuardia Act," were these subsequent acts necessary? Also, one must ask why such legislative intent and action as plaintiff-appellants now urge is so

cleverly obscrued in a preamble to a chapter intended to define the court's role in private sector labor disputes? The answer seems clear that there was no such intent or action.

Interestingly, every state court, which has been urged to adopt the reasoning pressed by plaintiff-appellants, has likewise uniformly rejected the invitation. The case most illuminative of this point is the State of Washington's decision which distinguished the Krystad case cited by plaintiff-appellants. It expressly held that the preamble to the so-called "Little Norris-LaGuardia Act" could not and was not to be construed to grant employees the right of compulsory collective bargaining.

This 1974 decision distinguished the Krystad case as a case relating to "yellow-dog" contracts, which interfered with the right of employees to form or join a labor organization. The court held as follows:

> "Reading RCW 49.32 [Preamble to Little Norris-LaGuardia Act] in its entirety, we are convinced that its purpose was to facilitate the achievement by employees of an effective bargaining position and that it was not its purpose to provide for compulsory collective bargaining.
>
> "Where the legislature has seen fit to impose upon employers as affirmative duty to bargain with their employees, it has done so by express statutory provision." International Union of Operating Engineers Local 286 v. Sand Point Country Club, 519 P.2d 985, 988 (Wash. 1974). (Emphasis added).

The Court thereafter correctly noted some of the problems which would inherently occur from the judicial legislation plaintiff-appellants would now urge upon the Court. It observed:

> "In urging the court not to read a new provision into the policy statement in RCW 49.32.020 [the preamble to the Washington Norris-LaGuardia Act], the respondents have drawn to its attention the immense complexity of problems of labor-management relations and the inadequacy of court structure and facilities to administer the law in this field without statutory guidelines or regulatory agencies. Professor Cornelius J. Peck also notes the hazards attendant upon judicial legislation in this area (note 2, supra). If the statute was open to the construction contended for by the appellants, these considerations might well be significant in persuading the court that such a meaning was not intended. We need not weigh them, however, since we find that neither expressly nor impliedly has the legislature introduced into this statute a provision imposing upon employers a duty to bargain with labor representatives." Id. at p. 988-989; See also Note 3 at p. 988. (Emphasis added).

If the state elects to require collective bargaining between public sector employees and their governmental employer, there are myriad problems which will require considerable legislative study. Some of these problems include: (a) How to resolve negotiation impasse, (b) What issues may be the subject of bargaining and which are management or governmental rights; that is, which subjects are to be reserved as legislative in nature and, hence, not bargainable, (c) May strikes be permitted by public employees and if so, by what groups and under what conditions, (d) How will employee unit determinations be made, how will that unit determination be authorized and certified,

how many units may be certified, etc.

Such complex issues which interface with the right of the electorate to control their government and with government's duty to deliver uninterrupted essential and often life supporting services, make the issues infinitely more complex than private labor disputes.

These political-legal policy decisions must be hammered out in the legislative process. As other courts have uniformly held, these issues cannot and should not be resolved by the judicial legislation urged by plaintiff-appellants. It is respectfully submitted that this Court should reject the plaintiff-appellants' prayer for judicial legislation and affirm the Lower Court in dismissing its complaint.

POINT II

POWER TO SET THE TERMS AND CONDITIONS OF EMPLOYMENT AND WORKING CONDITIONS OF CITY EMPLOYEES IS A LEGISLATIVE FUNCTION. ABSENT A SPECIFIC LEGISLATIVE CHANGE, ESTABLISHING THE SALARY AND WORKING CONDITIONS OF CITY EMPLOYEES IS A LEGISLATIVE FUNCTION VESTED SOLELY AND EXCLUSIVELY IN THE BOARD OF SALT LAKE CITY COMMISSIONERS.

Utah law is clear that cities have been specifically granted the power to:

> ". . . (R)egulate and prescribe the powers, duties and compensation of all officers of the city, except as otherwise provided by law." 10-6-29 Utah Code Ann. 1953 (emphasis added); see also Salt Lake City, et al., v. International Association of Firefighters, 563 P.2d 786 (Utah 1977).

Further, police officers are defined in the Civil Service Act and their activities and rights monitored by the Civil

Service Commission. See Section 10-10-9, et seq., Utah Code Ann., 1953. No attack is made on the Civil Service Commission and no appeal or relief has been sought concerning this matter by the Civil Service Commission.

Thus, the facts alleged in plaintiff-appellants' complaint concerned acts, exclusively within the legislative and executive authority of the Board of Salt Lake City Commissioners. The complaint patently fails to state a legal basis or claim upon which relief may be granted.

POINT III

THE SUBJECT MATTER OF PLAINTIFF-APPELLANTS' COMPLAINT IS MOOT AND THEY SEEK MERELY AN ADVISORY OPINION.

The thrust of plaintiffs' complaint is that: (a) The City gave to its City employees a 5% wage salary raise, but permitted employees to refuse to accept that increase upon certain conditions precedent, among which was that the execution of the waiver form would have to be witnessed by a member of the City Auditor's staff; (b) The Commission directs that no union solicitation or business should be conducted on public time; and (c) The City Commission received certain proposals from the plaintiff-appellants concerning salaries for the City's 1976 fiscal year and that the City did not adopt, in full, the union's recommendations; rather, it exercised its legislative authority and set the salaries for all City employees by passing an ordinance.

Interestingly, there is no allegation in plaintiff-appellants' complaint that any one of the City employees

Interestingly, there is no allegation in plaintiff-appellants' complaint that any one of the City employees that received a salary increase did not willingly accept or spend the money. Further, there is no allegation that any employee, who received a salary increase, attempted to return it to the City or that a tender was refused. Also, there is no allegation (as in truth there could not be) that the union was the certified exclusive bargaining agent for the police.

Rather, the complaint anemically asserts that the City action violated duties of collective bargaining imposed by the preamble to Utah's "Little Norris-LaGuardia Act."

Certainly, its prayer for injunctive and declaratory relief (concerning a salary increase received and presumably spent by City employees) is now just seeking an advisory opinion. No relief is prayed seeking the City to receive the return of that money and no allegation is made that the City would refuse to accept such a donation. The whole issue concerning 1976 salaries has long passed into history and is legally moot.

Likewise, the allegation of a legislatively mandated duty to bargain collectively in good faith for the year 1976 is long since moot, quite aside from the fact that no such right or duty exists in law, for reasons above discussed. This Court can take judicial knowledge that the 1976 fiscal year of Salt Lake City, under state law, terminated June 30,

1976, and that new salaries had been approved and adopted for the July 1, 1976 through June 30, 1977 City fiscal year. See, "Uniform Fiscal Procedures Act," 10-10-23 et seq., Utah Code Ann., 1953. Obviously, no issue remains to be resolved by the Court concerning those salary questions as plead in plaintiff-appellants' complaint.

Thus, the only real issue presented by plaintiff-appellants' complaint, is their assertion that Salt Lake City and, by implication, all of Utah's governmental employees have the right in the future to bargain collectively in good faith, with their public employers. That legal assertion is unsound as a matter of law as heretofore discussed in some detail. However, by virtue of mootness regarding past events, the Lower Court's decision dismissing plaintiff-appellants' complaint should also be affirmed by this Court.

POINT IV

THE CASE LAW CITED BY PLAINTIFF-APPELLANTS IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

Plaintiff-appellants cite Education of Scottsdale v. Scottsdale Education Association at page 8 of their brief for a point not divined by this writer. Significantly, that case has no language quoted and, insofar as the writer can determine, it has no relationship whatsoever with the facts pending before the Court. The case concerns the first amendment protected right of free speech and of association; however, under no strained construction or reading could it be read as imposing the duties on a public employer to bargain collectively with its employees.

The case of State Board of Regents v. United House Food Workers cited at page 7 of plaintiff-appellants' brief holds exactly opposite to the position for which it is cited. That case held that the First Amendment right of free speech protected employees in their right to form an informational picket, under some circumstances. In addition, the case specifically held that the public employees had no right to bargain collectively with their government employer (as that term is used in private enterprise) without a specific state law authorizing and directing that procedure.

The case held that the School's Board of Regents could, if they desired, meet with employees; however, they must retain the final power of decision. The court observed:

> "The power to hire employees, fix their salaries and wages, direct expenditure of money and to perform all other acts necessary and proper for the execution of the powers and duties conferred upon the Regents carries with it the power and authority to confer and consult with representatives of the employees in order to make its judgment as to wages and working conditions. We hold the Regents have authority to engage in collective bargaining in this context." State Board of Regents v. United Packing House, etc., 175 N.W.2d 110, 112 (Iowa 1970).

> ". . . Such action does not involve an improper delegation of legislative powers to private persons as there is no compulsion to sign an agreement and the final decision remains in the Board of Regents." State Board of Regents v. United Packing House, etc., Id. at p. 113 (Emphasis added).

The Court further summarized:

> "On the other hand, if the legislature desires to give public employees the advantages of collective bargaining in the full sense as it is used

in private industry, it should do so by specific legislation to that effect. We cannot imply authority under these general powers to agree to exclusive representation, depriving other employees of the right to be represented by a group of their choosing or of an individual to represent himself. (Citations omitted) . . . The power to fix the terms and conditions of public employment is a legislative function which, with proper guidelines from the legislature, can be delegated to its administrative agencies.

"'An endeavor by the courts to define some limited field for the contract system would be an attempt at judicial legislation.'" State Board of Regents v. United Packing House, etc., Id. at pp. 113, 114 (Citations omitted and emphasis added).

The Iowa Court then succinctly held as follows:

"We have heretofore held that the Board of Regents has no authority to enter into collective bargaining or collective bargaining agreements in the industrial context. We have also held the Board of Regents may voluntarily meet and consult with representatives of groups of employees to discuss wages, working conditions and grievances. The decision whether to do so or not remains that of the Board of Regents. Therefore, any picketing to coerce the Board of Regents to bargain collectively against its better judgment would either be illegal, against public policy or both." Id. at p. 117, 118, citing a long list of cases which demonstrate universal recognition of the same principle.

It is incredulous to the writer that these cases are cited as authority for the proposition that public sector employees are entitled to bargain collectively, without the specific grant of power by the Legislature. The cases do not so hold and, in fact, the Iowa decision holds directly to the contrary.

Similarly, the case of Krystad v. Lau is not in point; in fact, this case did not even involve the issue of collect

bargaining, aside from the entirely separate issue of collective bargaining for public sector employees. The Krystad case involved a private sector employer who fired an employee for seeking to form a labor organization.

This case was subsequently distinguished by the Washington Supreme Court on the issue of collective bargaining. As previously discussed in Point I B, supra at p. 9 the Washington Court clearly held that the preamble to the "Little Norris-LaGuardia Act" did not require collective bargaining, and further, the court distinguished the case in such a fashion as to virtually overrule it. However, with respect to the issue of whether the preamble to the "Little Norris-LaGuardia Act" created a substantive right of collectively bargaining, the court stated:

> "Courts in other jurisdictions which have been asked to find in statutes of this kind an affirmative duty to engage in collective bargaining have consistently refused to do so . . . (Numerous citations omitted). The appellants have cited no case in which a court has found in such a statute the meaning for which they contend.
>
> "There being no affirmative duty on the part of respondents to engage in collective bargaining, the trial court properly dismissed the action." International U. of Op. Eng., L. 286 v. Sand Point C. Cl., 519 P.2d 985, 990 (Wash. 1974) (Emphasis added).

In short, the plaintiff-appellants have cited absolutely no authority for their allegation that the preamble to Utah's "Little Norris-LaGuardia Act" created substantive rights in public employees, which compel governmental

entities to bargain collectively with public labor organizations. On the contrary, every case and every authority found by the writer holds exactly opposite to that position. Therefore, the Lower Court should be affirmed in its decision dismissing plaintiff-appellant's complaint.

CONCLUSION

The manner in which public authorities must determine the wages, hours and working conditions of public employers is governed entirely by Constitution, State law and Civil Service rules and regulations. These laws define and proscribe the authority of a public employer and have specifically granted to the Board of Salt Lake City Commissioners the power to set salaries and other terms and conditions of employment.

General policy statements, such as those found in anti-injunction acts, were not intended and did not alter the powers and responsibility of elected officials. The complex political-legislative problems of public sector collective bargaining can only be appropriately resolved in the halls of the legislative assembly, if a realignment of the traditional and legal relationships between the government and its employees is desired.

Respectfully submitted,

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