

1949

J. K. Piercey v. Civil Service Commission of Salt Lake City and Harold Fox : Brief of Plaintiff

Utah Supreme Court

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E. R. Christensen; City Attorney; Homer Holmgren; A. P. Kesler; Assistants;

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Case No. 7278

IN THE SUPREME COURT
of the
STATE OF UTAH

J. K. PIERCEY, Chief of the Fire
Department of Salt Lake City, a
municipal corporation of the State
of Utah,

Plaintiff,

vs.

CIVIL SERVICE COMMISSION
OF SALT LAKE CITY, and HAR-
OLD FOX,

Defendants.

FILED

13 11 1949

CLERK, SUPREME COURT, UTAH

PLAINTIFF'S BRIEF

E. R. CHRISTENSEN,
City Attorney

HOMER HOLMGREN,
A. P. KESLER,
Assistants

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IN THE SUPREME COURT of the STATE OF UTAH

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Plaintiff,

vs.

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OF SALT LAKE CITY, and HAR-
OLD FOX,

Defendants.

Case No. 7278

PLAINTIFF'S BRIEF

STATEMENT OF FACTS

In our statement of facts, in giving the page of the record where matter referred to or quoted is found, we shall use the letter "R", together with the page number, to indicate the page in the judgment roll, and the letter "T", together with the page number, to indicate the page in the transcript of the hearing held before the Civil Service Commission.

Defendant Harold Fox was employed as a member of the Fire Department of Salt Lake City, November 23, 1943 (T 205). On August 6, 1948, he submitted to plaintiff, J. K. Piercey, Chief of the Fire Department of Salt Lake City, his written resignation from the Salt Lake City Fire Department as follows (R 49): "Effective this date, I hereby tender my resignation from the Salt Lake City Fire Department." His resignation was then and there accepted by the plaintiff (T 59). Having thus resigned he turned in that same day the equipment furnished him by Salt Lake City, which was the natural thing to do after he had resigned (T 24, 147). At no time thereafter did he report for duty (T 43). On August 7, 1948, he sought legal advice and, as a result, his attorney, Calvin Rawlings, (T 16), prepared a letter addressed to plaintiff and the Board of City Commissioners stating that "I (Fox) hereby withdraw my resignation from the Salt Lake City Fire Department and request that you disregard my letter of resignation dated August 6, 1948." (R 14). This letter was signed by Fox and mailed by his attorney's secretary and was received by plaintiff August 9, 1948 (T 44).

On August 6, 1948, plaintiff sent to City Commissioner Romney, Commissioner of the Public Safety Department, a letter addressed to the Commissioner and the Board of City Commissioners that Fox "had submitted his resignation to become effective as of August 6, 1948. I respectfully request that his resignation be accepted." (Commissioner's Exhibit "A", R 47). It was always the practice in the department, and the advice

of the City Law Department, that the man resigns to the Chief, and that the Chief has the right to accept resignations. The Chief, however, reports the resignation to the City Commission. Commissioner's Exhibit "A" was sent to Commissioner Romney as a part of this regular procedure (T 75-76).

Under date of August 18, 1948, the City Recorder sent Fox a letter advising him that "at a meeting of the Board of Commissioners held August 17, 1948, your petition No. 846 tendering your resignation from the Salt Lake City Fire Department, effective August 6, 1948, was taken up and filed and I was directed to notify you that in view of the opinion of the City Attorney, a copy of which is submitted, the Board of Commissioners has at this time accepted this resignation." (R 4).

On August 19, 1948, Fox filed with the Civil Service Commission a notice of appeal to the Civil Service Commission reading as follows:

"NOTICE OF APPEAL.

"You will please take notice that I, Harold Fox, Fireman First Grade, in the Salt Lake City Fire Department, appeal to this Commission from the actions of Fire Chief, J. K. Piercey, of the Salt Lake City Fire Department, and the Salt Lake City Board of Commissioners in accepting my resignation from the Fire Department of Salt Lake City after said resignation had been withdrawn and Fire Chief Piercey and the Salt Lake City Board of Commissioners duly notified of said withdrawal.

“It is my position in this matter that the actions of Fire Chief Piercey and the Salt Lake City Board of Commissioners were an attempt to discharge me from the Salt Lake City Fire Department.”

Attached to the notice of appeal were a copy of the Recorder's letter above referred to, and a copy of the letter of the City Attorney dated August 17, 1948, advising the City Commission that in view of some doubt as to whether the City Commission or the Chief of the Fire Department has the right to accept the resignation, it was his opinion that the City Commission should accept the resignation of Mr. Fox so as to make it final and afford Mr. Fox whatever remedy he might have (R 3).

We wish to emphasize that the notice of appeal is from the actions of Chief Piercey and the City Commission in accepting Fox's resignation after said resignation was withdrawn and notice of withdrawal given. No claim is made in the notice of appeal, or in the letter withdrawing the resignation, that the resignation submitted was void or voidable by reason of any duress practiced in its procurement and hence not binding upon Mr. Fox. The notice of appeal was not served upon the plaintiff.

On August 21, 1948, after the notice of appeal had been filed with the Civil Service Commission, said Commission served a written notice upon the City Attorney for Salt Lake City and upon counsel for Fox that on August 30, 1948, it would hear arguments from respective counsel on the question of the jurisdiction of the

Civil Service Commission in the matter of said appeal (R 5). The minutes of the Commission for August 30, 1948, (R 32) show that the Commission heard arguments of counsel upon the question of jurisdiction and that a memorandum of authorities was to be submitted by the City Attorney. The matter was then taken under advisement. On September 3, 1948, the City Attorney filed a memorandum of authorities (R 6-12), maintaining the position that the Civil Service Commission was without jurisdiction to entertain the appeal.

On September 9, 1948, the Civil Service Commission served notice upon the City Attorney and plaintiff notifying them that the Commission did, by resolution dated September 8, 1948, assume jurisdiction of the appeal of Harold Fox from *the removal by Chief of the Fire Department Piercey* and ordered the Chief within ten days after service to file with the Civil Service Commission and serve upon Harold Fox his complaint of removal (R 15). A copy of the notice of appeal was attached to this notice. It will be noticed that the assumption of jurisdiction related only to the so-called removal by the Chief of the Fire Department Piercey of Mr. Fox from the Fire Department and made no reference whatever to any action taken by the City Commission in accepting Fox's resignation. Nor is any mention made by the Civil Service Commission of any resignation or that it assumed jurisdiction to pass upon the validity of the resignation submitted by Mr. Fox.

Chief Piercey responded to said order to the effect that Fox had never been removed from the Fire De-

partment except by his own resignation therefrom in writing, as hereinabove set out, and for that reason the Chief had no specifications of complaint of removal to make in said matter. (R 16).

Mr. Fox answered the Chief's response, admitting the resignation, and for the first time asserted that such resignation was a nullity as it was obtained by duress and threats of blasting Fox in the newspapers with unfavorable publicity (R 17-A). He further alleged that he withdrew his resignation prior to its acceptance by the Board of City Commissioners or by any other body or person authorized to accept it, setting out the letter of withdrawal hereinbefore quoted. He further asserted that the action of the City Commission in notifying him of their acceptance of the void and withdrawn resignation in effect was an attempted discharge, and was intended as such.

The Civil Service Commission set the matter for hearing November 22, 1948, at which time evidence, both oral and written, was taken. This testimony is contained in the transcript of testimony filed herein. Before any evidence was taken at the hearing plaintiff objected to the proceeding upon the ground that there is no jurisdiction in the Civil Service Commission to hear the appeal. This objection was stated in full. The objection was overruled by the Commission, (R 1-8) and plaintiff excepted to such ruling and thereupon the Commission directed Mr. Fox to proceed with his testimony. At the conclusion of Fox's evidence, and after he had rested, plaintiff made a motion that the appeal be dismissed

upon the ground that the Civil Service Commission had no jurisdiction to entertain the appeal and that the evidence did not show any overreaching as would vitiate the resignation tendered by Fox. This motion was denied. (R 26).

On December 20, 1948, the Commission made and entered findings of fact, conclusions of law, and decree (R 23-28). We shall not attempt here to make a statement of the testimony taken at the hearing or of the findings of fact made by the Commission. Such statement will be made later in connection with our argument on points involving the testimony and the findings of the Commission.

STATEMENT OF ERRORS

The plaintiff, J. K. Piercey, contends:

1. That said Commission has assumed to exercise the powers of a court of equity to nullify the resignation of defendant Harold Fox upon the ground of duress, which powers are not by law or otherwise vested in said Commission.

2. That said Commission has assumed jurisdiction to adjudicate a matter that is not by law vested in said Commission to adjudicate, namely, whether the resignation submitted by defendant, Harold Fox, as hereinabove shown, was void or voidable or effective as of the date it was given and accepted by plaintiff.

3. That said Commission is by law vested with jurisdiction to entertain and adjudicate only appeals made by a member of the Civil Service from an order of discharge issued by the head of the department; that there is no finding or conclusion of law by said Commission that any order of discharge was ever finally issued or that an appeal was made from an order of discharge, or that the defendant, Harold Fox, was discharged, and without such finding or conclusion, supported by sufficient evidence, there appears upon the face of the proceedings a want of jurisdiction in the said Commission to adjudicate any issue involved in the proceedings attempted to be taken in an appeal to said Commission. That on the contrary the findings of fact and conclusions of law made by the Commission show that the appeal was not taken from an order of discharge, nor was it based upon an order of discharge but that the said appeal was taken from the action of the plaintiff in accepting the resignation of defendant, Harold Fox.

4. That in entertaining the appeal of defendant, Harold Fox, and in rendering its judgment thereon, the Civil Service Commission has wholly disregarded and completely nullified its own rules and regulations duly adopted by it relating to the matter of discharge and taking an appeal therefrom and has thereby exceeded its jurisdiction in entertaining said appeal and in rendering its judgment therein.

5. That the said Civil Service Commission has attempted to determine matters not legally before it for

consideration, and as to which it had no jurisdiction to determine, to-wit:

(a) Whether the said Harold Fox resigned under duress.

(b) Whether the resignation of Harold Fox was accepted before or after he attempted to withdraw the same.

(c) Who is the proper officer or body to accept the resignation of Harold Fox as a member of the Fire Department?

6. That the findings of fact of said Commission show on their face that there was in fact no such over-reaching perpetrated by Chief J. K. Piercey upon defendant, Harold Fox, as could legally be held to amount to duress or coercion, or that could or would destroy or control the free volition of said Harold Fox in submitting his resignation, or that would render his resignation as given involuntary and for that reason legally void or voidable.

7. That the findings of fact of said Commission show on their face that the resignation submitted by Harold Fox was not involuntary and was not induced or procured by the exercise of coercion or duress practiced upon Harold Fox by plaintiff or any one else.

8. That said Commission did not have jurisdiction to entertain and adjudicate said appeal, as the appeal was not taken within the time prescribed by law.

9. That the findings of fact of the Civil Service Commission do not support its conclusions of law or judgment.

10. That the uncontradicted evidence does not support the findings of fact or the conclusions of law or the judgment made herein by the Civil Service Commission.

11. That the Civil Service Commission arbitrarily or capriciously disregarded the uncontradicted evidence in making its findings of fact, its conclusions of law and its judgment herein.

12. That the findings of fact and conclusions of the Civil Service Commission that the resignation of Harold Fox was not accepted by Chief Piercey until after the receipt of the letter of withdrawal is wholly unsupported by and is contrary to the undisputed evidence and is wholly capricious and arbitrary.

13. That the conclusions of the Civil Service Commission that the letter or notice withdrawing Harold Fox's resignation voided his resignation is wholly unsupported by and is contrary to the undisputed evidence and is wholly capricious and arbitrary, and said conclusion is likewise contrary to law.

14. That the conclusions of law and decree of the Civil Service Commission herein are based upon wholly contradictory premises, to-wit, one that the resignation of the defendant, Harold Fox, was such a resignation as could be acted upon and accepted but was withdrawn before acceptance, and the other, that his resignation

was procured by duress and coercion and was therefore void or voidable and never binding upon him and needed no notice of withdrawal to be repudiated.

ARGUMENT

I.

DID THE CIVIL SERVICE COMMISSION HAVE JURISDICTION TO ENTERTAIN AND DETERMINE THE APPEAL TO IT BY DEFENDANT FOX?

A

Under this head we assert, first, that the Civil Service Commission had no right or power to assume jurisdiction of the appeal of Mr. Fox and to render judgment therein that his resignation be voided and he be restored to his employment in the Fire Department. This phase is covered by assignments of error one to five, inclusive.

The Civil Service Commission is a subordinate tribunal created by statute and can exercise only such powers as are given it by statute. "It is fundamental that jurisdiction must affirmatively appear on the face of the proceedings, and that no presumption will be indulged in favor of it, as is the case of a court of general jurisdiction." 2 McQuillan, Mun. Corps., Section 590, page 484.

In *Garvin vs. Chambers*, Cal., 232 P. 696, the court, speaking of the Civil Service Commission, says:

“The defendant board in the instant case is an inferior board or tribunal of limited jurisdiction exercising judicial functions. Its jurisdiction is limited to the determination of those questions which it is authorized to decide under the provisions of the charter of the city of Oakland. In other words, it has jurisdiction to proceed only when facts appear in a proceeding before it which show that it has jurisdiction.

“The jurisdiction of the civil service board, as previously indicated, is special and limited by the charter of the city of Oakland to the determination of the correctness of the order of discharge of the petitioner. The power of the board being special and limited, no legal presumptions or intendments may be indulged to uphold its order. *Petersen v. Civil Service Board* (Cal. App.) 227 P. 238. Facts must appear on the face of the record sufficient to sustain a finding that the petitioner was guilty as charged, otherwise the order of the defendant board sustaining the discharge was in excess of the power conferred upon the board, without the limits of its special jurisdiction, and not in the regular pursuit of its authority as contemplated by sections 1068 and 1074 of the Code of Civil Procedure.”

The Court further says:

“The fact that the authority of the board had been invoked by the taking of the appeal would not deprive the petitioner of the right to attack the final action of the board of transcending its powers.”

The only provision in the statutes of this state investing the Civil Service Commission with the power to

exercise judicial functions is Section 15-9-21, U.C.A. 1943. This section reads as follows:

“All persons in the classified civil service may be removed from office or employment by the head of the department for misconduct, incompetency or failure to perform his duties or failure to observe properly the rules of the department, but subject to appeal by the aggrieved party to the civil service commission. Any person discharged may within five days from the issuing by the head of the department of the order discharging him appeal therefrom to the civil service commission, which shall fully hear and determine the matter. The discharged person shall be entitled to appear in person and to have counsel and a public hearing. The finding and decision of the civil service commission upon such hearing shall be certified to the head of the department from whose order the appeal is taken, and shall be final, and shall forthwith be enforced and followed by him.”

It is apparent from the language of this section that the words “removed from office or employment,” in the first part of the section, are synonymous with the word “discharged” used in the rest of the section. This court in *Vetterli vs. Civil Service Commission*, 106 Utah 83, 145 P. 2d 792, said:

“That ‘remove from office’ and ‘discharge’ are synonomous expressions as used in our statute, is clear from a cursory reading thereof. The power to ‘remove from office’ conferred upon the head of a department means not a temporary

but a permanent removal from office or discharge.”

On the question of the limited powers of the Civil Service Commission, the court has this to say:

“That for infractions of the rules of conduct the department head might suspend a person for fifteen days, as a means of effecting discipline in his department. That in such sphere of discipline, he is in nowise subject to the supervision of the commission. That in aggravated cases and in cases where the disciplinary measures given exclusively to the department head prove inefficacious, the power to discharge is conferred; but because of the severity of the penalty, as well as because of the fact that it involves a permanent severance from the department, thus affecting the make-up of the personnel, over whose appointment the commission is given a limited control, a right to appeal to the commission is granted to the discharged officer or employee. The civil service commission is made the ultimate authority to determine whether the discharge should or should not stand. To this end the commission is given the authority and duty to ‘fully hear and determine the matter.’ That is, it is to accord a full hearing to the appellant and to the department head as to the truth or falsity of the charges made, and thereupon to determine whether to affirm or to set aside the order made. We do not find in our statute any phrase which grants the same jurisdiction on appeal as is conferred where the power on appeal is to ‘affirm, modify or reverse,’—an expression usually if not universally employed where such authority is actually conferred. The substitution of suspension for six

months without pay, in lieu of dismissal, was beyond the power of the commission.”

In speaking of a police officer, whose status under the statute is identical with that of a fireman, this court said in *Roe vs. Lundstrom*, 89 Utah 520, 57 P. 2d 1128:

“A police officer is responsible only to the head of his department, to whom has been given the power of appointment and removal from office. R. S. Utah 1933, 15-9-9 and 15-9-21.”

From the foregoing it is evident, first, that the Civil Service employee has a right to appeal to the Civil Service Commission only from an order of discharge issued by the head of the department, the plaintiff Chief Piercey in this case; and, second, that the Civil Service Commission can hear and determine only appeals from an order of discharge. The entire Civil Service statute is silent on the matter of resignation. It was not intended that the Civil Service Commission should have a right to review the reasons which might prompt an employee to resign, as his resignation is a result of his own act. The right of appeal is restricted by the very language of the section above quoted to a review of the act of the Chief of the department in discharging the employee, to determine whether the discharge should or should not stand.

The record now before this court shows conclusively on its face that the Civil Service Commission did not have before it an appeal from an order of discharge, and further that it did not inquire into or determine the

merits of a discharge. The notice of appeal itself states that “I, Harold Fox, . . . appeal to this Commission from the actions of Fire Chief J. K. Piercey, . . . and the Salt Lake City Board of Commissioners in *accepting my resignation from the Fire Department* . . . after my resignation had been withdrawn” and notice thereof duly given (R 1). We ask, where, under the language of Section 15-9-21, above quoted, is there any basis for such an appeal or any jurisdiction vested in the Civil Service Commission to entertain and determine such appeal?

The next step in these proceedings was taken when the Civil Service Commission “assumed” jurisdiction of the appeal pursuant to a resolution passed at one of its meetings, and served notice to that effect upon the plaintiff and ordered him to file his complaint of removal (R 15), meaning, of course, under the language of the statute, his reasons for discharging Fox. Notwithstanding the appeal was from the actions of the Chief and the City Commissioners in accepting Fox’s resignation, the Civil Service Commission attempted to proceed as if there had been a discharge, no doubt to give color to its “assumed” jurisdiction. This is evidenced by the fact that in the notice to the plaintiff that the Commission had assumed jurisdiction the Commission was careful to say that it assumed jurisdiction of the appeal of Mr. Fox only from the removal by the Chief of the Fire Department Piercey and said nothing at all about the action of the City Commissioners in accepting Fox’s resignation, although the notice of appeal

stated it was taken from that action as well as from the Chief's action in accepting the resignation. Apparently, the Civil Service Commission was aware that under the law the City Commissioners have no power to remove a civil service employee, that power being vested exclusively in the head of the department. So it affirmatively appears that in entertaining the appeal and assuming jurisdiction the defendant Commission excluded from consideration anything the City Commissioners did, relying solely upon what plaintiff, as head of the department, did.

The plaintiff filed a response to the order simply stating that Fox had not been removed from his employment except by resigning therefrom and so plaintiff had no specifications of complaint of removal to make (R 16). Fox answered setting up that his resignation was obtained under duress and had been withdrawn prior to its acceptance (R 17-A). When the hearing was held the Commission did not call upon plaintiff to proceed and show his reasons for removing Fox. Instead, the Commission declared that the burden was on Fox to sustain his claim of duress and withdrawal before acceptance and required him to be the first to proceed (T 8).

In its findings of fact the Civil Service Commission does not find that Fox was discharged and that the reasons for discharge were insufficient and hence Fox was entitled to reinstatement. The Commission finds that Fox submitted a letter of resignation but such action was involuntarily given "while he was frightened and

alarmed by and under the influence of fear, duress, and coercion caused and created by the statements of J. K. Piercey concerning the consequences to Fox and resultant publicity which the said Piercey stated would accompany the discharge.” (R 26).

The Commission concludes as a matter of law that such resignation so given was invalid and voidable and was voided by the letter withdrawing the resignation (R 27). In its decree the Commission declares that the letter of resignation dated August 6, 1948, be voided. Again we ask, under what language of Section 15-9-21, is the Commission vested with jurisdiction to so proceed and adjudicate matters involving the adjudication of pure matters of law properly and inherently vested in courts of equity?

We are not asserting that Fox has no right to be heard on the question of whether his resignation was void or voidable because it was obtained under duress. Courts of equity are open to give such hearing. What we do claim is that the statute does not vest jurisdiction in the Civil Service Commission to assume or usurp the powers of a court of equity and render a decision upon a matter not made cognizable by it under the terms of the statute and from which decision there would be no right of appeal, and thus oust the courts of jurisdiction to pass upon the question. It should be remembered that Section 15-9-21 makes the decision of the Civil Service Commission final and gives no right of appeal.

Simply because a resignation is claimed to have been procured under duress or misrepresentation or

other overreaching does not change it into a discharge. It still remains a resignation even though it may be a voidable one in a court of equity. It is admitted that Fox was not discharged. The only question before the Commission, and the only question decided by it, was whether Fox's resignation was binding. It is obvious that the right to hear an appeal from a discharge, involving the merits of the discharge, determining whether there has been such conduct or neglect of duty on the part of the fireman to warrant his discharge, does not include the power or the right to decide whether the fireman has, in law and in fact, resigned his office. The latter question does not in any way involve the fireman's conduct, fitness, or neglect of duty. The question of resignation can be determined only by applying the law to the facts. This is a judicial function not vested in the Civil Service Commission, composed, as it may very well be, of laymen. In passing on the merits of a discharge the Commission simply considers facts, the facts of misconduct, fitness, or failure to discharge the duties of the office specified by the Chief as his reasons for discharging the employee.

A resort to the findings of fact, conclusions of law, and decree of the Civil Service Commission discloses there is no finding of fact or conclusion of law or other adjudication that any order of discharge was finally issued, or that the appeal was from an order of discharge, or that Fox was discharged. Without such finding or adjudication, there appears upon the face of the proceedings a want of jurisdiction in said Commission

to adjudicate any issue upon said appeal except to determine it did not have jurisdiction. In making the decision it did the defendant Commission had to pass upon and decide purely legal questions, namely, what constitutes duress in law sufficient to vitiate an act, when is a resignation accepted, when can it be withdrawn, who was the proper person or body to accept Fox's resignation. There may be other legal questions involved, but the foregoing are sufficient to show to what extent the defendant Commission assumed judicial powers to entertain and determine the appeal to it. Certainly the statute did not contemplate investing a group of laymen with the right or responsibility to adjudicate such juridical questions.

The Civil Service Commission, by its own rules, and of which the Commission said it would take judicial notice, (R 2-3, 188) has given a construction to its powers on appeal at variance with its assumption of jurisdiction in the instant case. Rule 4-6 provides:

“Any employee under civil service discharged by the appointing power of the department wherein employed may within five days from the issuing by the appointing power of the order of discharge appeal therefrom to the Civil Service Commission.”

Rule 4-7 provides that the order of discharge *must* be served in a prescribed manner, by personal service, by leaving it at the usual place of residence, or by mail and posting on the department's bulletin board. Rule 4-8 provides that the order of discharge “shall have

issued and be complete as to start the time running from which an appeal can be taken to the civil service commission as follows:” from date of personal service of the order of discharge, or date it is left at the employee’s residence or at the expiration of ten days from the date it is mailed and posted. Rule 4-9 prescribes that the order of discharge *must* be in writing, properly dated on the stationery of the department issuing the same, addressed to the person discharged, and *must* advise him that he is discharged from the service and state the effective date of discharge and *must* be signed by the appointing power of the department issuing the same. Rule 4-11 provides that a return of service of the order of discharge *must* be endorsed on the order and the same transmitted to the secretary of the Civil Service Commission. Rule 4-12 provides that the person discharged may, by giving notice of appeal, appeal from the order of discharge to the Civil Service Commission for a hearing within five days from its issuance. Rule 4-13 prescribes that notice of appeal must be in writing and must be signed by the person discharged and *must* state in the body that the person appealing appeals from the order of discharge of the Chief and the notice of appeal *must* have attached thereto the order of discharge or a copy thereof.

Not one of these rules was complied with in the appeal to the Commission in the instant case. No order of discharge was made and consequently no service of an order of discharge appears in the record; the notice of appeal does not state that the appeal is taken from

an order of discharge; and finally no copy of the order of discharge is attached to the notice of appeal. If these rules are binding and mandatory upon the person appealing, then there is an entire failure to comply therewith in this case. If these rules mean anything, then no appeal to the defendant Commission was ever legally consummated for there was a compliance with none of them. The fact that no compliance could be made because of the lack of a discharge only emphasizes the point that there was no right of appeal in the first place and no jurisdiction in the defendant Commission to entertain an appeal in the second place.

We have made a diligent search of the authorities but have not been able to find any case where an appeal was taken from an acceptance of a resignation. We do not have, therefore, the benefit of legal precedent to assist the court in this case. However, this language from *State vs. City of Brazil*, Ind., 73 N. E. 2d 485, is pertinent:

“When city firemen and policemen elect to terminate their contracts, sometimes called resigning, and so advise the responsible head of the city government, their contracts of employment are at an end. They could not be compelled to work and their rights under the tenure act could be waived. They could voluntarily quit their employment at any time for any reason satisfactory to them. After doing so they could not claim any benefits under the tenure act. The tenure act was not passed for the benefit of those who quit their jobs but for those who are wrongfully dismissed.”

If the actions of Chief Piercey, in connection with the submission by Fox of his resignation, were the legal equivalent of a discharge, then there was a lack of jurisdiction in the Civil Service Commission to act upon said appeal as the same was not taken in time. (Assignment of error 8). Everything that plaintiff did was done on August 6, 1948. Fox's resignation was submitted that day, and by its terms was effective that day; the resignation was accepted by plaintiff that day and Fox turned in his City equipment that day and never thereafter reported for work, making a complete severance of his employment; and on that day plaintiff transmitted the resignation to his City Commissioner. Under the law the power of removal is vested exclusively in the head of the department. The City Commission could do nothing to effect a removal or discharge. The fact that it too acted upon the resignation could not in any way add to or detract from the severance of employment already accomplished by plaintiff in accepting the resignation or by plaintiff in removing Fox from his employment if what plaintiff did was in law a removal. The most that can be said of the action of the City Commission is that it was an approval of what had already been done.

The severance of employment, whether deemed a discharge or resignation, took place August 6, 1948. Under both the statute and the Civil Service Rules above referred to, Fox had five days thereafter in which to

appeal, if what was done that day be deemed a discharge. He did not file his appeal until August 19, 1948, thirteen days later, and thereby lost his right to appeal.

Later in the brief we shall cite authorities to show that the person having the power to appoint is the proper person to accept the resignation. But to show that the action of the City Commission in accepting Fox's resignation, under the suggestion of the City Attorney, contained in his letter, copy of which is attached to the notice of appeal (R 3), can be of no assistance to Fox, we refer to the case of *Shackett vs. Town of Island*, 146 Ky. 798, 143 S. W. 369, Ann. Cas. 1913 C. 602, where it was held that a resignation not tendered to one having power to appoint the resigning officer's successor is a nullity, the court saying:

“In our opinion the Board of Trustees had no power or authority to accept the resignation of members of the Board, so all the acts of the board in accepting resignations and filling vacancies may be treated as a nullity.”

The letter of resignation submitted by Fox, defendant's Exhibit “B”, (T 237), was addressed to plaintiff alone. Immediately upon its presentation to plaintiff it was accepted and Mr. Fox himself turned in his City owned equipment, left his station and never thereafter presented himself for duty. Since the City Commission, as such, had no power to discharge Fox, anything it did tending to have that effect was a nullity and a right of appeal from such action would not lie. The right of

appeal under Section 15-9-21 is only from an order of discharge issued by the head of the department, as the head of the department is the person who has the right to discharge. Even though it should be held that what Mr. Piercey did was tantamount to a discharge, we submit, therefore, that the appeal was not timely made and the Civil Service Commission had no jurisdiction to act upon it except to dismiss for lack of jurisdiction.

II.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE BY THE CIVIL SERVICE COMMISSION SHOW ON THEIR FACE THAT NO DURESS, SUCH AS WOULD VITIATE FOX'S RESIGNATION, WAS PRACTICED UPON HIM BY PLAINTIFF. ASSIGNMENTS OF ERROR 6, 7, AND 9.

A

It is alleged in Fox's answer, as the basis for avoiding his resignation, that Chief Piercey delivered an ultimatum that "if you do not resign from the Fire Department, I'll discharge you and blast you in every newspaper in Salt Lake City. I'll give you more publicity than you ever had before or ever wanted." It is further alleged that the resignation was submitted in fear of the adverse effect that the threatened bad publicity would have on his family and future employment opportunities. It is to be noted that the foregoing charges an avowed activity on the part of the Chief to

personally see that Fox was blasted and given unfavorable publicity in the newspapers.

The findings of fact, however, do not find any such threatened activity on the part of the Chief or anyone else. All that is found is that at a hearing before the Chief and the Board of Chief Officers, Fox “was informed that unless he tendered his resignation from the Salt Lake City Fire Department he would be discharged; that a discharge would be accompanied by extremely detrimental publicity and would seriously and detrimentally affect his opportunities for future employment.” There is no finding whatever that charges would be made against Fox if he refused to resign or the nature of any charges that might be made or that plaintiff would himself do anything to bring about detrimental publicity or do anything himself to effect Fox’s opportunities for future employment. The most that can be said of the findings is that the reference to bad publicity and adverse employment opportunities was merely an opinion of the plaintiff, given as his judgment of what would result from a discharge.

It is then found that the resignation was involuntarily given while Fox “was frightened and alarmed by and under the influence of fear, duress, and coercion caused and created by the statements of J. K. Piercey concerning the consequences to Fox and resultant publicity which the said Piercey stated would accompany a discharge.” Here is an express finding contrary to the charge of Fox’s answer that the Chief himself would blast him in every newspaper in Salt Lake City. In the

absence of any threatened action by Piercey relative to influencing unfavorable publicity, whatever publicity would result would depend entirely upon what the newspapers chose to print. Fox was in as good position as the Chief, or perhaps better, to guess what the newspapers would do. Certainly he could not assume that they would print falsehoods or would take a position adverse and detrimental to his interests. There could be, therefore, no compulsion or duress arise out of a mere statement by Piercey that detrimental publicity would result from a discharge, a mere matter of opinion only. And yet the finding of the Commission is that it was the statement of the Chief that unfavorable publicity would accompany the discharge that rendered the resignation involuntary. Apparently the statement that he would be discharged did not produce the duress for the Commission finds it was the statements concerning the bad publicity that was the duress producing element. We submit that that element so found is wholly insufficient to sustain the conclusion of law and decree that the resignation was procured by duress and was voidable for that reason.

B

The findings of the Commission themselves contradict the conclusion and judgment that the resignation was procured by duress. It is specifically found that Fox appeared before the Chief and the Board of Chief Officers at 11:00 A. M. and was there informed that unless he resigned he would be discharged and that detri-

mental publicity would result. Then it is found that Fox nevertheless refused to resign. This specifically negatives any idea that Fox's will was overpowered by what was there said.

Then it is found that a letter of discharge was prepared and at 1:30 P. M. it was delivered to Fox in plaintiff's office. So it appears at that time Fox was willing to submit to a discharge and would so submit rather than resign. The order of discharge had been issued and delivered and so far as both plaintiff and Fox were concerned that ended the matter. A few minutes later Fox, apparently, changed his mind as the Commission found that he came back and returned the letter of discharge, which return was accepted by plaintiff, and Fox signed the letter of resignation. We submit these findings not only do not sustain, but are contradictory to, the conclusion of the Commission that the resignation "was involuntarily given while he was frightened and alarmed by and under the influence of fear, duress, and coercion caused and created by the statements of J. K. Piercey" made at the meeting at 11:00 A. M.

III.

THE UNCONTRADICTED EVIDENCE DOES NOT SUPPORT THE FINDINGS OF FACT OR CONCLUSIONS OF LAW OR THE JUDGMENT. ASSIGNMENTS OF ERROR 10 AND 11.

Concerning what was said in the office of Chief Piercey at 11:00 A. M. August 6, 1948, Fox testified

(T 12) as follows: Chief Piercey said “you are through so far as the Fire Department is concerned. I have asked you to resign. Why don’t you resign?” Fox replied, “I am not going to resign.” Since the Civil Service Commission made no finding that the Chief threatened to blast Fox in every newspaper in Salt Lake City and make it so miserable for Fox he wouldn’t get a job, we assume the Commission did not believe this part of Fox’s testimony so that part is here omitted. Piercey asked Chiefs White and Ward if they did not think it better for Fox to resign and they both said, “Yes I do.” Then the Chief said: “I don’t know what’s going to become of you. You’ve got to work somewhere, but you aren’t going to work in this Fire Department.” Fox replied: “Well, I am not going to resign.” Piercey said: “All right, you be back in my office at 1:30.” When he returned Chief Piercey had Assistant Chief Ward hand him a letter of discharge, which stated he was discharged for misconduct. Fox said, “Well, is this all?” Plaintiff said “That’s all.” Fox then shook hands with Assistant Chiefs White and Ward saying it had been nice working with them and “if that’s all, I will go.” (T 13, 14). He then had been served with the order of discharge. He couldn’t, therefore, be frightened then by any threat of discharge. That it was not fear over the threat of discharge that caused him to resign is further evidenced by the following testimony: He was asked what he was worried about. He answered: “I figured if he (Chief Piercey) carried out his threats why it would be just like he said—it would be difficult for

me to find work. I figured the only thing to do was to resign.” After making up his mind to resign he returned and asked Chief Piercey if it was too late to resign. Piercey said he did not know but he would try his best. The letter of resignation was prepared by the secretary and was signed by Fox. Fox was asked again what was the impelling consideration that caused him to sign the resignation. He replied: “Well, knowing Chief Piercey was an influential high official I knew he would be very instrumental in my obtaining employment anywhere else. I was quite scared and quite worried, and I signed it because I did not want him to carry out his threats, for fear of my family going to go without.” When asked what threats, he answered: “When he said he would make it so miserable, smear me and make it so miserable it would be impossible for me to find a job.” (T 15).

We repeat the Commission in its findings of fact did not find that Chief Piercey threatened to smear Fox so he couldn't get a job. The Commission simply found that at the hearing before Chief Piercey and the Board of Chief Officers, Fox was informed “that a discharge would be accompanied by extremely detrimental publicity and would seriously and detrimentally affect his opportunities for future employment.” There is a total absence in such finding of any threat by Chief Piercey that he, the Chief, would see to it personally that Fox was smeared so he couldn't get a job and according to Fox himself it was only what Chief Piercey personally threatened to do that caused Fox worry.

Since the Commission studiously refrained from making any finding that the Chief threatened to smear Fox, it must have not believed that part of Fox's testimony as it was in direct conflict with the testimony of Chief Piercey and the four assistant chiefs who composed the Board of Chief Officers.

Chief Piercey, when asked whether he made the threats testified to by Fox, answered: "That is absolutely untrue. That was never said, he would be blasted in the newspaper. It was never said it would be so miserable he couldn't get work." (T 37).

Assistant Chief Thompson was asked if anything was said about blasting Fox in the newspaper, and he answered: "Never once was there any mention of a newspaper other than that in the event of a discharge Harold mentioned he would fight the discharge, and in event of a discharge in a Civil Service trial, all the information that came out of the trial would be public property and be detrimental to his character. That is the only thing that was mentioned. Nothing mentioned about newspapers at all. There was nothing said about making it tough for him. It was mentioned that the Chief and Chief Officers did not want to make it disagreeable for him to find other employment, and if he elected to resign when anybody called up for references, so far as the department records are concerned, he had resigned from the Fire Department." (T 85, 86).

Assistant Chief Smith was asked: "Was there anything said by the Chief if he (Fox) did not resign he

(Piercey) would blast him in the newspapers?" he answered: "Absolutely no." Q. "Was there anything said about making it miserable for him if he stayed on?" A. "No, sir."

Assistant Chief White testified as follows: Q. "Was there anything said by the Chief about blasting him in the newspapers?" A. "No, absolutely not." Q. "Was there anything said by the Chief about making it miserable for him if he did stay around?" A. "It was just the opposite." (T 132).

Assistant Chief Ward's testimony was as follows: Q. "Did you hear Chief Piercey say anything about blasting Mr. Fox in the newspapers?" A. "No, I did not." Q. "Did you hear Chief Piercey say anything about making it miserable for him if he did not resign?" A. "No, I did not."

Instead of there being any threat of blasting in newspapers and smearing Fox so he could not get a job, all that was said by Chief Piercey was to point out that, if Fox were discharged and he resisted such action, a hearing would be held at which the Chief would have to prove the charges against him by calling in witnesses, and that that procedure would result in publicity; also, if inquiry were made by prospective employers of Fox, the facts concerning his discharge might have to be explained and that would be unfavorable. (T 30, 35, 37, 39). This testimony is corroborated by Assistant Chiefs Thompson (T 85, 86), Smith (T 114), White (T 132), and Ward (T 158, 159). According to Fox's own testi-

mony, already referred to, it was not the threat of discharge and its attendant consequences relative to publicity or future employment that impelled him to resign, it was the personal malignant interest which Fox claims Chief Piercey threatened he would take to see that Fox was blasted in the newspapers and his chances for future employment impaired that impelled Fox to resign. But the Commission did not find the existence of such impelling facts. There is no evidence, therefore, to sustain the finding that Fox's resignation was given involuntarily while under the influence of duress and coercion.

IV

WAS FOX'S RESIGNATION LEGALLY EFFECTIVE? ASSIGNMENTS OF ERROR 12, 13, and 14.

The first question is, who was the proper person to accept the resignation? Under our statutes, Section 15-9-9 U.C.A. 1943, the Chief of the Fire Department is the only person vested with the right to appoint and to fill vacancies. Under Section 15-9-17 the Civil Service Commission shall certify the name of those eligible for appointment to "the appointing power." No one will contend that the "appointing power", to whom such certification is made, is anyone other than the Chief of the Fire Department, Mr. Piercey in this case. Section 15-9-21 provides for removal from office by the "head of the department" who, it must be conceded, is the same person, the appointing power.

In *Tooele County vs. De La Mare*, 90 Utah 46, 59 P. 2nd 1155, the rule is stated as follows:

“The law is well settled, in the absence of statutory provisions to the contrary, that when the authority to fill a vacancy is, by law, vested in a particular commission or officer, such commission or officer is the proper authority to accept the resignation from such officer.”

As stated in *Rockingham County vs. Luten Bridge Company*, 35 Fed. 2nd 301:

“It is well established law that, in the absence of express statutory enactment, the authority to accept the resignation of a public officer rests with the power to appoint a successor to fill the vacancy. The right to accept a resignation is said to be incidental to the power of appointment. 1 Dillon on Mun. Corp. 3d Ed., Sec. 413.

“The mere filing of the resignation with clerk of the superior court did not of itself vacate the office of Pruitt. It was necessary that his resignation be accepted. But, after its acceptance, *he had no power to withdraw it.*”

Fox submitted his resignation to Chief Piercey, the proper officer to accept it. We have already shown that the Chief accepted the resignation the day it was given and that Fox severed his employment that day. We have already shown, also, that the City Commission could not, by its action, assume jurisdiction which it otherwise did not have to act upon or accept the resignation. It had no power to appoint or to fill vacancies.

It is elementary that "after acceptance of a resignation effective immediately, one has no power to withdraw it." 43 Am. Jur. 25, Public Officers, Section 170. The rule is stated in 46 C. J. page 980, Section 135 as follows: "An unconditional resignation which has been made to the authority entitled to receive it cannot be withdrawn." Since Fox's resignation was accepted by the Chief and complete on August 6, 1948, he could not withdraw it thereafter, as he attempted to do in his letter of August 7, 1948, which was not received by the Chief until August 9, 1948.

The next question is whether Fox's resignation was voidable because of duress. The duress found by the Commission is that Fox was informed that unless he tendered his resignation from the Salt Lake City Fire Department he would be discharged; that a discharge would be accompanied by extremely detrimental publicity and would seriously and detrimentally effect his opportunities for future employment; that the letter of resignation was involuntarily given by Fox while he was frightened and alarmed by and under the influence of fear, duress, and coercion caused and created by the statements of J. K. Piercey concerning the consequences to Fox and resultant publicity which the said Piercey stated would accompany a discharge.

We submit that this finding does not sustain the conclusion of duress. That a resignation could be suggested and advised as an alternative to preferring charges, where there was no threat and the officer was not obliged to sign the resignation, and that a resignation

under such conditions would be upheld was decided in the case of *People ex rel Wallace vs. Diehl*, 63 N. Y. S. 367, affirmed in 60 N. E. 1118. In *State vs. Ness*, 139 Ohio St. 309, 39 N. E. 2nd 849, the rule of the Civil Service Commission provided that "acceptance by an appointing officer of the resignation of a person discharged before final action by the Civil Service Commission will be considered a withdrawal of the charges and the separation of the employee thus resigning shall be entered as a resignation and the proceedings shall be dismissed without judgment." It was held in that case that a resignation submitted by a police officer while charges were pending against him was not null and void under this rule. This clearly shows that resigning as an alternative to standing trial upon charges for dismissal does not necessarily imply or involve duress. Certainly it is not to be supposed that the Civil Service Commission would make a rule permitting something to be done which would involve duress as a matter of law.

Kramer vs. Board of Police Commissioners, 39 Cal. App. 396, 179 P. 216. In this case plaintiff, a member of the police department, was given a three months' leave of absence to go into business as a means of cutting down the cost of the police department being assured that the leave could be extended for one year. He purchased a stock of merchandise and engaged in business. Within three months he was ordered to return to duty. Upon his requesting additional time he was informed that he must either report for duty or resign. He protested this order but presented his resignation which was accepted. He

brought a suit for reinstatement claiming that his resignation was not voluntary but was induced by duress and coercion. The court holds that the resignation was not induced by duress or coercion but was voluntary saying:

“In order for the action of the board of police commissioners in presenting to the plaintiff the alternative of either resigning from or returning to his post of duty in the police department to have savored of duress or coercion, such action must have been unlawful under the long accepted definitions of these terms.

“In the case of *State v. Ladeen*, 104 Minn. 252, 116 N. W. 486, 16 L. R. A. (N. S.) 1058, which involved a resignation from office, it was held that the coercion or duress which would render such resignation either void or voidable must be such as would exist where one by the unlawful conduct of another was induced to resign his office under circumstances which deprived him of his free will.

“Measured by these definitions it must be concluded that the plaintiff’s resignation from the police department was not induced by either duress or coercion, but that the same was voluntary, and hence, upon its acceptance by the board of police commissioners, worked a final severance of the relation of the plaintiff as a police officer with the police department of the city and county of San Francisco.”

Board of Education vs. Rose, 147 S.W. 2nd 83, 132 A.L.R. 969. Here the plaintiff resigned as a county superintendent of schools pursuant to a compromise agreement between two factions of the board of education whereby litigation over the right of a member of the board to

hold office was discontinued and charges filed against plaintiff were to be dropped and he was to resign. Plaintiff claimed his resignation was obtained under duress under the law stated in 46 C. J. 980, as follows:

“A resignation signed as an alternative to having charges made against the signer cannot be said to be given by the party resigning of his own free will, and can be repudiated at any time.”

The court first points out that this text is based entirely upon the case of *People ex rel O'Connor vs. Hardy*, 224 Ill. App. 198, “in which a conditional resignation was obtained from a Civil Service employee by threat of a superior officer to file charges against him and the resignation was accepted three years after it was tendered under circumstances which did not justify a discharge of the employee.” The court held that the facts of the case before it did not bring it within the rule from *Corpus Juris* saying:

“No member of the county board made any threat of any kind with reference to filing charges against the appellee or any statement that appellee would be removed as a result of the hearing on the charges.”

It seems that plaintiff was fearful of an adverse decision on the charges filed against him and thought the decision thereon would be against him. The court points out he could have appealed from an adverse decision, but he chose rather to resign. “No such duress was

imposed upon him such as entitled him to withdraw his resignation which had been accepted.”

In 132 A.L.R. 975 is a note on the subject of duress as ground for withdrawing or avoiding resignation from public office. Some of the cases above cited are there cited. The other cases referred to in the note involved factors of duress which are not present in the instant case. The case of *People ex rel O'Connor vs. Hardy*, 224 Ill. App. 198, referred to in the case of *Board of Education vs. Rose*, supra, is referred to in said note. That case, however, is distinguishable from the instant case as is pointed out by the court in the case of *Board of Education vs. Rose*.

In the case of *State vs. Ladeen*, 104 Minn. 252, 116 N. W. 486, the evidence showed that the officer was threatened with personal violence and with the filing of charges of embezzlement against him and that his farm would be taken from him to cover his shortage unless he resigned.

In the case of *Kidd vs. State Civil Service Commission*, 55 P. 2nd 245, the resignation was obtained under false representations and promises as to reinstatement, the court saying that it appears “that appellant’s signature to the resignation was obtained by false representations in that he signed the same to protect his civil service standing believing the doctor’s statements to be true.”

The other cases cited in the note do not disclose the facts out of which the duress arose.

We respectfully submit that the Civil Service Commission was without jurisdiction to entertain and hear the appeal of Mr. Fox. We further submit that the findings of fact and conclusions of law show on their face that there was not such duress or coercion asserted upon Mr. Fox as would avoid his resignation. We further assert that the evidence is not sufficient to sustain such a conclusion. We maintain, therefore, that the judgment of the Civil Service Commission ordering the restoration of Mr. Fox to his employment with the Salt Lake City Fire Department should be set aside and vacated.

Respectfully submitted,

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