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A. Pharis Johnson v. David Bankhead : Brief of Respondents

Utah Supreme Court

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7657

In the Supreme Court of the State of Utah

A. PHARIS JOHNSON,
Plaintiff and Appellant

vs.

DAVID BANKHEAD, Auditor of Tooele County, Utah,
Defendant and Respondent

Case No. 7667

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Plaintiff, as county attorney of Tooele County, brought this action to get a judicial declaration that as a matter of law he was and is entitled to the sum of $3500 per year as the maximum salary allowed for the office of attorney in counties of the second class under the provisions of Section 19-13-14, Utah Code Annotated 1943, as amended by Chapter 34, Laws of Utah 1945, rather than the sum of $1800 per year,

the salary fixed for that office by the board of commissioners of Tooele County, and also to receive the difference for the years 1947, 1948, 1949 and 1950.

Because the issues involve matters of vital public concern, and raise certain constitutional questions as well as the fact that the plaintiff, as county attorney of Tooele County, has an interest in the matter adverse to that of other county officials, the Attorney General, at the request of the Auditor of Tooele County, has undertaken to represent the defendant.

The defendant moved to dismiss the complaint on the grounds that it did not state a claim against defendant upon which relief could be granted, and also because it failed to join certain indispensible parties. Upon argument of the motion it was stipulated that the matter go immediately to pre-trial, and upon pre-trial it was stipulated that the issues be narrowed to the following questions of law:

(1) Can the county commissioners of a county fix a salary for a county officer at a figure less than the maximum shown in Section 19-13-14, Utah Code Annotated 1943, as amended?

(2) If the answer to the above is "No," then can plaintiff recover additional salary for the years 1947, 1948, 1949, and 1950, or for any part thereof?

Upon the formulation of these issues, each party moved for judgment on the pre-trial order and after argument the court denied plaintiff's motion, granted defendant's motion and dismissed the complaint with prejudice. It is from this order that plaintiff appeals.

It was stipulated by and between the parties, and so set forth in the pre-trial order that the plaintiff is and ever since January, 1947, has been the county attorney of Tooele County, that during all of this time Tooele County was a county of the second class, and that plaintiff's salary as county attorney as fixed by the board of county commissioners for the year 1946 and subsequently has been the sum of $1800 per year. No issue has been raised as to any technical defects in the action of the board of commissioners in fixing the annual salary of plaintiff, as county attorney, at $1800 as was the situation in the case of *Miller v. White,* 70 U 145, 258 Pac. 565 and *Price v. Tuttle,* 70 U 156, 258 Pac. 1016. Abuse of discretion by the Board of County Commissioners in fixing the sum of $1800 per year as the salary for the county attorney is not an issue in the appeal of this case.

STATEMENT OF POINTS

I. The action of the board of county commissioners of Tooele County in fixing the salaries for the various county officers was proper and in accordance with the constitution and laws of the state.

II. If the action of the board of county commissioners of Tooele County in fixing the salaries of the various county officers was not authorized, then the plaintiff, as county attorney, is not entitled to a salary because none has been prescribed.

ARGUMENT

I

THE ACTION OF THE BOARD OF COUNTY COMMISSIONERS OF TOOELE COUNTY IN FIXING THE SALARIES FOR THE VARIOUS COUNTY OFFICERS WAS PROPER AND IN ACCORDANCE WITH THE CONSTITUTION AND LAWS OF THE STATE.

It is generally recognized that in the absence of some constitutional prohibition or limitation the power or duty to fix the compensation of county officers may be vested in the governing body of the county. See 43 Am. Jur. 138, where a concise statement of the general rule is as follows:

> The power to fix the compensation of public offivers is not inherently and exclusively legislative in character. Unless the Constitution expressly or impliedly prohibits the legislature from doing so, it may delegate the power to other governmental bodies or officers, as, for example, to the governor, to counties, to cities, to courts or judges, or to other officers or official boards.

Also, in 20 CJS 917 the general rule is said to be:

> Subject to any limitations imposed by the state constitution, the power or duty to fix the compensation of county officers or agents may be vested in the county board or similar body, and in some jurisdictions, compensation or salaries not fixed by law should be fixed by the county board.

It is respectfully submitted that appellant, in citing various cases in his brief to the effect that the legislature alone is authorized by the constitution to fix salaries of county officers,

and that an attempted delegation of this power is of no force and effect, has failed to note the differences in the constitutional provisions of the various states. The Arizona cases cited by the plaintiff involve an interpretation of section 4 of Article 12 of the Constitution of the State of Arizona providing as follows:

> * * * The board of supervisors of each county is hereby empowered to fix salaries for all county and precinct officers within such county *for whom no compensation is provided by law,* and the salaries so fixed shall remain in full force and effect until changed by law. (Italics added.)

The power of the board of supervisors to fix salaries under this section has been interpreted by the Supreme Court of Arizona as being temporary and exercisable only during the period between admission to statehood and proper action by the state legislature. See *Patty v. Greenlee County,* 14 Ariz. 422, 130 Pac. 757; *Hunt v. Mohave County,* 18 Ariz. 480, 162 Pac. 600; *Santa Cruz County v. McKnight,* 20 Ariz. 103, 177 Pac. 256, *Board of Supvs v. Stephens,* 20 Ariz. 115, 177 Pac. 261; *State Consol. Pub. v. Hill,* 39 Ariz. 21, 3 P 2d525; and *Ross v. Cochise County,* 20 Ariz. 167, 177 Pac. 931.

The applicable constitutional provision of the State of Utah in section 1, Article XXI, does not provide that the compensation of county officers shall be *"provided by law"* as does the provision of the Arizona constitution, but merely that "All * * * county officers * * * shall be paid fixed and definite salaries * * ." The constitution of the State of Utah on the other hand does provide in section 10, Article VIII that " * * * The powers and duties of County Attorneys * * * *shall*

be prescribed by law." (Italics added.) However, it is the salary and not the powers and duties of the county attorney with which we are concerned in this case. Furthermore, *Burgess v. Apache County,* 20 Ariz. 140, 177 Pac. 269; *Graham County v. Alger,* 20 Ariz. 147, 177 Pac. 272; and Graham *County v. Smith,* 20 Ariz. 145, 177 Pac. 271; cited by the appellant are not in point at all because they deal with the statute of limitations applicable to a claim for back salaries of officers rather than the question of the delegation of power to fix the salaries.

Again, in the California cases cited by appellant, the courts were dealing with a constitutional provision entirely different from the one in the State of Utah. Section 5, Article XI of the Constitution of the State of California provides:

> The legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of * * * and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their term of office. *It shall regulate the compensation of all such officers* * * * . (Italics added.)

In interpreting the above quoted constitutional provisions in *Arnold v. Sullenger,* 200 Cal. 632, 254 Pac. 267, which held invalid an attempt to delegate to the board of supervisors the power to fix the compensation of the county surveyor, the Supreme Court of California had this to say:

> Section 5 of Article 11 of the Constitution provides that the Legislature by general and uniform law shall "regulate the compensation of all such officers," which includes county officers. * * * An examination of

> the cases in this state, and particularly those above cited, clearly indicates that the word "regulate" has always been deemed to mean "to fix" or "to establish," and no other signification may now properly be attached to that word in the connection in which it is so employed in this section of the Constitution.

Thus, because of the vast differences in constitutional provisions, the California cases likewise are of no help to appellant in support of his unqualified assertion that the legislature alone is authorized by the constitution to fix salaries of county officers and that an attempted delegation of this power is of no force and effect. The cases cited by appellant are in line with those wherein constitutional provisions require the legislature to prescribe the compensation of county officers and the courts uniformly hold that under such provisions the legislature cannot delegate its power to any individual, officer or board. See also in this connection section 27, Article 3 of the constitution of the State of Florida wherein it is provided "The Legislature shall provide for the election * * * of all state and county officers * * * and fix by law their duties and compensation." And Section 4, Article 16 of the Constitution of Arkansas wherein it is provided that "The General Assembly shall fix the salaries and fees of all officers in the state * * * " together with the cases of *State v. Spencer,* 81 Fla. 211, 87 So. 634 and *Pulaski County v. Caple,* 191 Ark. 340, 86 SW 2d 4, interpreting those constitutional provisions.

Where there are no constitutional prohibitions or limitations, as is the case in the State of Utah, the power and duty to fix the compensation of county officers may be and is generally delegated to the governing body of the county. In addi-

tion to the general authorities cited above, see also *Huffaker v. Board of County Comm'rs,* 54 Idaho 715, 35 P 2d 261; *Dygert v. Board of Commissioners of Caribou County,* 64 Idaho 161, 129 P 2d 660; *Reynolds v. Board of Comm'rs.,* 6 Idaho 787, 59 Pac. 730; *Dew v. Ashley County,* 199 Ark. 361, 133 SW 2d 652, citing RCL; *State v. Nolte,* 351 Mo. 271, 172 SW 2d 854; *Arnett v. State,* 168 Ind. 180, 80 NE 153, 8 LRA (NS) 1192; *Throckmorton County v. Thompson,* 131 Tex. 543, 115 SW 2d 1102; *Sarlis v. State,* 201 Ind. 88, 166 NE 270, 67 ALR 718; *State v. Darby,* 345 Mo. 1002, 137 SW 2d 532; *Coleman v. Jackson County,* 349 Mo. 255, 160 SW 2d 691; *Stephens v. Mills County* (Tex. Civ. App.) 113 SW 2d 944; Nacogdoches County v. Winder (Tex. Civ. App.) 140 SW 2d 972.

It is also generally held that the power to pay salaries not exceeding a certain prescribed maximum necessarily implies the power to pay less than the prescribed maximum. In Coleman v. Jackson, 349 Mo. 255, 160 SW 2d 691, the Supreme Court of Missouri said:

> The last clause of the quoted portion of the section forbidding the court to pay such county employees more than the rates fixed by statute obviously implies the power to pay them less than the statutory rate * * * .

In Stephens v. Mills County (Tex. Civ. App.) 113 SW 2d 944, the Supreme Court of Texas had this to say:

> The language is also within the rule announced by the decisions, that the commissioners' court may fix the maximum fees to be returned by the county treasurer at a sum less than the statutory maximum * * * ."

Also in Throckmorton County v. Thompson, 131 Tex. 543, 115 SW 2d 1102, the Supreme Court of Texas said:

> The order of the commissioners' court fixing the compensation of the County Treasurer of Throckmorton County on a commission basis for a maximum amount of less than that fixed by a statute is a valid exercise of authority conferred on such court by the Constitution and statutes of this state.

The Supreme Court of Idaho in *Reynolds v. Board of Comm'rs.*, 6 Idaho 787, 59 Pac. 730, upheld the action of the Board of Commissioners even though it felt the board had fixed the salaries in question extremely low. In the course of its opinion the court had this to say about the amount of compensation to be paid county officers:

> It is not the policy of the law, the wish of the people, or in the interest of public economy that the compensation of county officials should be placed on a niggardly footing, totally inadequate to the decent administration of public affairs. Neither is it the policy that these officials should be allowed extravagant salaries, beyond all reason. But the intention of the legislature was that the boards of county commissioners in the various counties should take into consideration the work and time consumed in the various offices, the expense connected with the same, the self-sustaining revenue therefrom, the responsibilities attached thereto, the bonds under which the parties are placed, and all the circumstances and conditions connected therewith, and from all these determine what would be a proper and just compensation for their services.

In holding that the exercise of discretion of the board of commissioners in fixing the salaries of county officers is not sub-

jetc to review except in those cases when a clear abuse of discretion is shown, that same court had this to say in *Huffaker v. Board of County Commissioners,* 54 Idaho 715, 35 P 2d 261:

> The responsibility of determining a just and sufficient salary, taking into consideration the laudable desire for legitimate economies, adequate service to the county and public, just compensation to the employee and due regard for the rights and interest of the taxpayer, rests on the board, subject to control by the courts for abuse, and the evidence herein does not show the board has in this case overstepped the bounds of a reasonable discretion.

In the case of Hall et al v. Beveridge, 81 Ill. Rep. 128, Section 10 of Article 10 of the constitution of 1870 of the State of Illinois, authorized the county board to fix the salaries of county officers at not more per annum than $1500 in counties not exceeding 20,000 inhabitants; $2,000 in counties between 20,000 and 30,000 inhabitants; and $2500 in counties between 30,000 and 50,000 inhabitants. In a county containing more than 30,000 and not exceeding 50,000 inhabitants, the board had fixed the clerk's salary at $1500. It was contended that the board had no lawful authority to fix the salary at less than $2,000 and hence the action of the board was void. The contention in that case is similar to the contention inferred by the appellant in this case. In disposing of the matter, however, the Supreme Court had this to say about the power of the board to fix the salary of the clerk:

> No minimum is imposed by the express words of the section, and we find nothing in the section from which it can properly be regarded as implied. Full

power to fix the compensation of county officers is given to the county board, with certain limitations expressed in the section. We find nothing in these limitations forbidding the fixing of the salary of this clerk at $1500.

In view of the constitutional provision in section 10, Article VIII of the Constitution of the State of Utah, providing that

> * * * The powers and duties of County Attorneys, and such other attorneys for the State as the Legislature may provide, shall be prescribed by law. * * *

appellant urges that the county attorney is a state rather than a county officer and that his salary must, therefore, be fixed by the State Legislature. However, the Constitution does not so provide and section 19-13-2 Utah Code Annotated 1943, provides as follows:

> The officers of a county are: Three county commissioners, a county treasurer, a sheriff, a county clerk, a county auditor, a county recorder, *a county attorney,* a county surveyor, a county assessor, and such others as may be provided by law; *provided,* that in counties having an assessed valuation of less than $20,000,000 the county clerk shall be ex officio auditor of the county and shall perform the duties of such office without extra compensation therefor. (Italics added.)

It is respectfully submitted that the county attorney is a "county officer," rather than a "state officer," who by performing his duties, serves the state as well as the county. In this connection see *Ogle vs. Eckel,* 49 Cal. App. 2d 599; 12 P 2d 67; *Pelaez v. State,* 107 Fla. 50, 144 So. 364; *Clark vs. Tracy,* 95 Iowa, 410 64 NW 290, *Finley vs. Ludwick,* 137 Ohio St. 329, 29 NE 2d 959.

II

IF THE ACTION OF THE BOARD OF COUNTY COMMISSIONERS OF TOOELE COUNTY IN FIXING THE SALARIES OF THE VARIOUS COUNTY OFFICERS WAS NOT AUTHORIZED, THEN THE PLAINTIFF, AS COUNTY ATTORNEY, IS NOT ENTITLED TO A SALARY BECAUSE NONE HAS BEEN PRESCRIBED.

Respondent respectfully submits that Section 19-13-14 Utah Code Annotated 1943, as amended by Chapter 34, Laws of Utah 1945, is not a legislative declaration fixing the salaries of the officers of all counties in the state, but is merely authorization for the respective boards of county commissioners to fix the said salaries at not to exceed the prescribed maximums. Should it therefore be determined that the board of County Commissioners of Tooele County had no authority to fix the salary of appellant as county attorney under the aforesaid statutory provisions, he would be entitled to none because none had been prescribed, and it is the universally recognized rule that unless compensation is by law attached to the office, none can be recovered by the officer holding such office. 43 Am. Jur. 134-5; 46 CJ 1014, 1015; Mecham on Public Officers, Sections 855, 856, p. 577; Throop on Public Officers, Sec. 446, p. 432.

CONCLUSION

It is respectfully submitted that the action of the board of county commissioners of Tooele County in fixing the salary

of appellant as county attorney at a figure less than the maximum prescribed by the provisions of Section 19-13-14, as amended, for the office of attorney in a county of the second class was proper and in conformity with the Constitution and Statutes of the State of Utah. The order of the district court on pre-trial granting defendant's motion for dismissal of the complaint, and dismissing the complaint with prejudice, should therefore be affirmed with costs to respondent.

Respectfully submitted,

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