1979

Dan C. Worrall v. Ogden City Fire Department & Ogden City, A Utah Municipal Corporation : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

DAN C. WORRALL, Plaintiff/Appellant,	:	
vs.	:	Case No. 16375
OGDEN CITY FIRE DEPARTMENT & OGDEN CITY, a Utah Municipal Corporation, Defendants/Respondents.	:	

BRIEF OF APPELLANT

Appeal from a judgment of no cause of action [illegible] plaintiff in the Second Judicial District Court, [illegible] Weber, State of Utah, the Honorable John F. [illegible]

Timothy W. Blackburn
Assistant Corporation Counsel
Attorney for Respondents
Municipal Building
P.O. Box 9699
Ogden, Utah 84409

IN THE SUPREME COURT OF THE STATE OF UTAH

DAN C. WORRALL,

Plaintiff/Appellant,

vs.

Case No. 16375

OGDEN CITY FIRE DEPARTMENT & OGDEN CITY, a Utah Municipal Corporation,

Defendants/Respondents.

BRIEF OF APPELLANT

Appeal from a judgment of no cause of action against the plaintiff in the Second Judicial District Court, County of Weber, State of Utah, the Honorable John F. Wahlquist presiding.

Timothy W. Blackburn
Assistant Corporation Counsel
Attorney for Respondents
Municipal Building
P.O. Box 9699
Ogden, Utah 84409

John T. Caine of
RICHARDS, CAINE & RICHARDS
Attorneys for Appellant
2568 Washington Boulevard
Ogden, Utah 84401

TABLE OF CONTENTS

CASES CITED

STATUTES

OTHER LEGAL TREATISES

IN THE SUPREME COURT OF THE STATE OF UTAH

DAN C. WORRALL, Plaintiff/Appellant, vs. OGDEN CITY FIRE DEPARTMENT & OGDEN CITY, a Utah Municipal Corporation, Defendants/Respondents.	Case No. 16375 BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Dan Worrall appeals from a judgment rendered against him and in favor of the defendant by the Second Judicial Court, Weber County, State of Utah.

DISPOSITION IN THE LOWER COURT

On October 31, 1978, trial was held in the Second Judicial Court of Weber County, State of Utah, the Honorable John F. Wahlquist, Judge, sitting without a jury, presiding. Following a hearing in which witnesses were called, counsel for appellant and respondents submitted briefs to the Court, and on November 30, 1978, the Court ruled that the plaintiff had not met the burden of proof in establishing that Ogden City's fire departmental Order #160 had no rational or reasonable relationship to a bona fide public purpose, and also, that the Ogden City Civil Service Rule requiring that an appeal of a departmental removal to the Civil Service Board must be filed within 5 days was valid, that plaintiff did not file his appeal within that time, plaintiff was not entitled to the trial afforded him by the Court.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Court's Order remanding the case for hearing by the Ogden City Civil Service Commission, and if necessary, a new trial and eventual reinstatement as an Ogden City fireman.

STATEMENT OF FACTS

On November 29, 1976, Charles J. Hansen, Chief of the Ogden City Fire Department, signed a letter to Fireman Second Class, Dan C. Worrall, giving him official notice that his employment with the Ogden City Fire Department was terminated as of November 28, 1976, due to his refusal to comply with General Order 160, relating to the wearing of moustaches by Ogden City firemen. The Order reads as follows: (In pertinent part). "To provide the best possible safety conditions, both from flash fire and respiratory aspects and to project the best possible public image of his uniform and Fire Department. The following rules will be in effect immediately....For moustaches: Moustaches will not extend beyond the lower part of the upper lip nor will any part of the moustache be more than one-half inch in length." Worrall wore a handle-bar type moustache, neatly trimmed, which extended below the upper lip. (T-13). The notice to fireman Worrall included no reference to any procedure available to him for further review or appeal of the chief's decision, or the time period in which an appeal should be taken. (T-10). On December 29, one month later, the appellant by and through his attorney, C. Gerald Parker, filed a Notice of Appeal with the Ogden City Manager and a

further notice with the Ogden City Civil Service Commission. On January 12, 1977, R. L. Larsen, Ogden City Manager, advised counsel for fireman Worrall that his appeal to the City Manager was denied because it was not filed within 5 days following appellant's discharge. On January 26, 1977, appellant and his attorney appeared before the Ogden City Civil Service Commission to show cause why the appeal should not be dismissed as not being timely under Section 10-10-21, Utah Code Annotated (1953), and under the rules and regulations of the Ogden City Civil Service Commission. Said hearing was limited to only one question, to-wit: Whether the appeal should not be dismissed as not having been filed timely. On March 9, 1977, the Ogden City Civil Service Commission denied appellant's appeal on the basis that it had not been filed in a timely manner. The Civil Service Commission was advised at that time by Ogden City Corporation counsel, Timothy Blackburn, that the Civil Service Commission need not concern themselves with the problems raised by Mr. Worrall's grievance and did not need to consider the effect of their denial based on the 5 day limitation because Worrall would have a remedy at law through the Court to resolve this dispute. See Memorandum filed by defendant in support of Motion for Summary Judgment. On June 23, 1977, appellant filed suit against the respondent in the District Court. At the beginning of the trial on October 31, 1978, defendant moved for Summary Judgment on the basis that appellant was not properly before the Court, as his appeal to the Civil Service Commission was not timely filed. The Court took the matter under advisement

but allowed the trial to proceed. (T-1). The evidence adduced at trial demonstrated that appellant had worn a handle-bar moustache for approximately 8 years prior to 1976, while an employee of the Ogden City Fire Department. That he had kept it neat and well trimmed and had never had any difficulty in fighting fires, in sealing his face masks, or having his facial hair catch on fire. (T-5). Rule 160 was promulgated by the Chief of the Ogden City Fire Department in 1976, and appellant immediately voiced his concern to the chief, indicating he felt his moustache was attractive, was a part of his personality and personal appearance, and did not interfere with his work as a fireman. (T-4). That at no time was a determination ever made that appellant's particular moustache had ever interferred with his safety or the safety of others. The chief's principal concern seemed to be with the image of firemen and the effect of Worrall's continued wearing of a handle-bar moustache would have on that image. (T-50-51). Evidence was further produced by other firemen indicating that there were no health or safety problems with the wearing of a moustache, (T-24, T-33), although, some individuals felt there could be a problem with the sealing of face masks in fighting a fire with certain facial hair, and that this was the reason for the promulgation of the rule, (T-53). Evidence was also adduced that indicated that other individuals were also in violation of Rule 160, but were not disciplined as was the appellant, (T-10, T-27, T-33). The trial Judge, in evaluating the evidence, determined that the appellant had not met his burden of a proponderance of the evidence in

showing that the regulation had no rational basis or reasonable relationship to a bona fide public purpose, and therefore, the order was presumed valid. The Judge also ruled that the trial of this matter should never, in effect, have taken place, in that the failure of the appellant to perfect his appeal within 5 days to the Ogden City Civil Service Commission voided any further proceedings, and that had the city's Motion for Summary Judgment been filed timely, Judgment would have been granted and the matter would have never proceeded to trial. The Judge made no ruling regarding appellant's equal protection argument, in that others were not treated and disciplined as he was for a violation of the rule. On December 18, 1978, appellant filed a Motion for New Trial pursuant to Rule 59 of the Utah Rules of Civil Procedure, challenging the Court's ruling on the basis that it did not address the appellant's equal protection argument, and also in ruling as a matter of law, that appellant's claim was barred for failing to file a claim within the 5 day appeal period. Appellant's motion was heard on February 13, 1979, and the Judge denied the motion for the same reasons enunciated in the original findings. From that denial plaintiff appeals.

ARGUMENT

POINT I

THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT APPELLANT HAD NOT PROPERLY APPEALED TO THE OGDEN CITY CIVIL SERVICE COMMISSION WITHIN THE APPROPRIATE TIME AND SHOULD HAVE GRANTED APPELLANT'S MOTION FOR A NEW TRIAL AND REMANDED THE CASE BACK TO

THE CIVIL SERVICE COMMISSION FOR FURTHER PROCEEDINGS.

In reviewing the Trial Judge's decision in this case, this Court, must of necessity, grapple with Section 10-10-21, Utah Code Ann. (1953), which concerns the time limits for appeals from administrative decisions, and more particularly, serves as the basis for the time period established by the Ogden City Civil Service Commission, in which an employee of the Ogden City Fire Department, who is terminated, must appeal that decision to the City Manager or the Ogden City Civil Service Commission. The predecesor of Section 10-10-21 was Section 15-9-21, Utah Code Ann. (1943), which is an identical statute, and which this Court considered in Vetterli v. Civil Service Commission of Salt Lake City, 145 P. 2d 792 (1944). In this case a Salt Lake City police officer left the State of Utah and failed to report for duty on the morning of June 1, 1941. On June 3, 1941, the Chief of Police wrote a letter to the City Commission and sent a copy to the Civil Service Commission in which he stated, "That the officer in question was dismissed from service, effective May 31, 1941." The officer in question learned of the discharge prior to June 11, 1941, and on June 30, 1941, he filed an appeal with the Civil Service Commission. The appeal was clearly not filed within the 5 day period required by the provisions of the code. In spite of this, the Civil Service Commission heard the appeal over the objections of the Police Chief that the appeal had not been perfected within the time allowed by law and that the commission was without

jurisdiction. The decision of the Civil Service Commission was appealed to the Utah Supreme Court, which did not over-rule the Civil Service Commission's decision to hear the case even though the 5 day appeal period had expired. Thus, it is clear that this Court does not intend that the limitation periods prescribed by statute be so rigid that no exceptions can be made in reasonable cases. There are many other cases in the United States holding that when there has not been such a lengthy period of time between the time of discharge of a public employee and his reinstatement as to prejudice the employing department, then a reasonable delay in seeking reinstatement will not be a bar thereto. The Court should note 145 ALR 773 as follows:

> "Generally, it must be shown that prejudice to the appointing power has resulted in order to make their delay a bar to an action by a discharged public employee for reinstatement. Thus, it has been said in a case of this kind that if, because of his delay in seeking his remedy without offering a satisfactory explanation for the delay, prejudice results to his adversary, one will be precluded from enforcing his demand. It is not so much a question of the lapse of time as it is to determine whether prejudice has resulted. If the delay has caused no material change in statu quo ante, that is no detriment suffered by the party pleading the latches, his plea is in vain."

There has never been any evidence in the instant case showing that Ogden City or the fire department was in any way prejudiced by defendant's actions. In fact, no prejudice has resulted, the only one who has been damaged is the appellant himself, as he has been unable to work as a fireman, a vocation which he

followed for eight years, for a period of three years. The entire problem with this case essentially rests with the Civil Service Commission's initial decision not to hear Mr. Worrall's Complaint. It should be carefully noted that Mr. Worrall did file a Notice of Appeal 30 days after he was fired. This Court is well aware that this is a normal period for filing appeals in most judicial matters. All of the individuals required to be present for the Civil Service Commission to make a decision, to-wit; the fire chief, firemen, other experts, etc., could have been present at any of the Civil Service Commission hearings in December, 1976, or January, and March of 1977, when the decision was being made. They were all present at the trial which took place in October, 1978, almost two years later. Therefore, it is difficult to understand how the city was or could have been prejudiced by the Civil Service Commission reviewing Mr. Worrall's case. The unfortunate problem is that this is the type of matter which should be resolved at the administrative hearing level, not one which should be tried in the District Court and now be reviewed by this Court. Had a hearing on the merits been granted by the Civil Service Commission, the case may never have reached this level as it undoubtedly would have been ascertained that Mr. Worrall's moustache, while not directly complying with the order, was not interferring with his duty as a fireman, was not creating a hazard, and therefore, some exception or compromise, as is allowable in administrative proceedings could have been reached! This Court is now faced with the dubious task some three years

later of substituting its Judgment for that of an administrative body. Appellant recognizes the position in which he has placed this Court, but also recognizes that this Court must, as the final arbiter of these matters, intervene when justice requires, to guarantee that fundamental fairness is achieved.

There are other factors which this Court must examine in reviewing the 5 day statute of limitations in this particular case. One concerns notice. The facts are abundantly clear. At the time Chief Hansen fired the appellant, no notice was given to appellant, that he must appeal the chief's decision within 5 days. Some vague reference was made during the course of the trial, that the 5 day appeal provision is contained within a handbook of rules and regulations passed out to all employees by the department, but clearly, on the termination letter, no notice was given to appellant of the requirement that the appeal must be filed within 5 days. Appellant was not trained as a lawyer and was not represented by legal counsel at the time the termination notice was issued on November 29. He was not aware that any further review action or appellant procedure must be filed within 5 days. Due process of law requires that appellant should have been advised either as a part of the termination notice of November 29, or by other suitable means of his right to a further hearing and the procedure required therefore. This requirement is set forth in the Utah case of Entre Nous Club v. Toronoto, 287 P. 2d 670 (1955), wherein this Court stated as follows:

"While hearings before administrative

> bodies need not have all the formality of a judicial procedure, but may be informal and if suited to the matter involved, rather summary...If there are certain elements of fair play required by the constitution which are necessary in any character of hearing affecting personal or property rights. In respect to hearings before administrative bodies (as well as judicial tribunals), those elements include (1) a reasonable time and place for hearing where interested parties may attent with effort. (2) Reasonable notice to interested parties, and (3) reasonable opportunities for presentation of such evidence and argument as are appropriate to the proceedings."

The right of a civil service employee to be notified of his right to appear before the commission is further set forth in 15 Am Jur 2d, Section 40, wherein it is explained that when a governmental agency is seeking to discharge a veteran who is a member of the classified civil service, the veteran "has the right to personally be present to present his side of the case to the appropriate official of the agency, and not being notified of his right of personal appearance at the agency level, he must take such action that will constitute a clear assertion of his right or it will be waived." In the instant case, fireman Worrall was entitled to be notified of his right of personal appearance at the agency level. There are numerous examples in administrative law of advising an individual of his rights of review and appeal from the decision of a governmental agency. When a person receives his property tax assessment, he is clearly informed in writing that if he does not agree to the determinatic of valuation made by the assessor, he has the right to appear on

a certain date and state his objections to appeal the assessment. Likewise, when a person's income tax return is audited and additional taxes are levied, a notice of deficiency clearly sets forth the date by which additional steps for review must be taken and the exact procedure involved. In the area of workman's compensation at the state level, social security disability at the federal level and other administrative hearings, the claimants are notified at every stage of the proceedings at such time as decisions are made, that the decisions may be appealed and the time frame in which the appeal must be taken. Recently, this Court has spoken clearly regarding the effect of notifying an individual before a statutory period of limitation can run. The case is Rose Marie Hume v. Small Claims Court of Murray City, #15634, filed January 10, 1979, in which Justice Wilkins, writing for the majority, stated as follows: "Similarly, where a defendant has only 5 days to appeal, it is particularly important and due process requires that notice of the Judgment be given to defendant of his right to appeal, or his right to appeal is abridged severely. Despite the fact that Section 78-6-10 does not provide that notice must be given a defendant in a Small Claims Court action, we hold that Rule 73a applies to procedure in that Court as in other City Courts, and the time for appeal from the Court commences from Notice of Judgment." This was a case in which Default Judgment was taken in a Small Claims Court. The defendant was not notified of the Judgment. The Judgment was docketed and filed and the 5 day appeal time ran before defendant

discovered that the appeal had been taken. Justice Wilkin's primary concern is that notice to the party is the critical requirement when evaluating whether a statute of limitations has tolled, no matter how short. Appellant concedes that a 5 day statute is not in and of itself arbitrary and capricious and unconstitutional, as this Court has ruled in Larsen Ford v. Silver Utah, 551 P. 2d 133 (1976). It is clear, however, that when statutes of limitation are of short duration that this Court will carefully review the circumstances surrounding the failure to comply with the statute by the aggrieved party. In this case, the city has, from the moment this dispute arose, attempted to use the 5 day appeals statute as a complete bar and has succeeded in blocking Mr. Worrall from any effective review of his case at the level where it should have been reviewed, the Civil Service Commission.

The entire intent of civil service laws which involve employee-employer relations is to bring the largest number of employees within the operation of the law and, thus, should be construed liberally to obtain that goal. The purpose of Civil Service Review Boards and administrative hearings is not to deny or to unduly prejudice claimants who have legitimate grievances, but to open the door for them and to remove this burden from the courts. The city's actions have completely frustrated this process. The Court should note 15 Am Jur 2d, p. 473, which states "The purpose of the civil service law being to secure effective public service, the widest range is given to the application which should be liberally construed to bring employees within

its operation unless a clear exclusion is manifested by specific listing of the unclassified positions."

The failure of the Civil Service Commission to allow the appellant to fully present the merits of his case at that level has had a detrimental effect on all proceedings subsequent thereto. Under normal circumstances had the trial Court been faced, as it should have been, with a review of the Civil Service Commission's findings, the issue would have been clearly defined, to-wit: Did the commission act arbitrarily and capriciously in either sustaining or reversing the departmental action. Unfortunately the commission was not allowed and did not act on the merits of the case. The Court was thus faced with a confusing situation and allowed the case to proceed to trial, but then ruled that the case should have never been tried as the appeal was not properly perfected. Appellant believes strongly that the Judge's ruling on the 5 day appeal procedure casts doubt upon his consideration of the evidence in the case as the trier of fact. The most reasonable interpretation of the Judge's ruling is that the Court is saying to the appellant, "I am not impressed with the evidence you presented, in that it does not sustain your position, but even if I was, you shouldn't be here anyway because your case is procedurally deficient and, therefore, I should never have had to consider the evidence in the first place." Obviously, this Court should be concerned with that reasoning.

The Judge had the duty, at the beginning of the trial after a review of the pleadings at that time to sua espoute,

remand the case back to the Civil Service Commission and direct that a full hearing be held before judicial review of the case could take place. In the absence of the Court taking affirmative action in that regard, the effect of the Court's decision to proceed with the trial was to allow an evidentiary hearing as a trial de novo, at which the specter of a dismissal on procedural grounds was present throughout and which finally compelled the Court to rule thereon almost as an afterthought to the main decision. Thus, the Court erred in not remanding the case for a full hearing at the Civil Service Commission, compounded the error by allowing the trial to proceed even though a motion had been made for Summary Judgment based upon a procedural deficiency, and completed the error by ruling as a matter of law after the presentation of evidence, that appellant should never have been afforded a trial. Such a scenario demands a reversal and a remand for a complete evidentiary hearing by the Civil Service Board.

POINT II

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR A NEW TRIAL ON THE BASIS THAT THE COURT DID NOT CONSIDER EVIDENCE OF ARBITRARY AND CAPRICIOUS APPLICATION OF RULE 160 AGAINST THE APPELLANT AS A DENIAL OF EQUAL PROTECTION OF THE LAW GUARANTEED BY THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Trial Court's Memorandum Decision in the instant case considered only two issues raised by appellant's case. The first which was discussed in Point I infra concerned the 5

day statute of limitations. The second, concerned the Court's ruling that the appellant did not present sufficient evidence to meet the proponderance test that Rule 160 had no rational public purpose and, therefore, should not be enforced against him. Unfortunately, the Court ignored in its ruling, the other issue raised by appellant, which was presented at trial concerning whether Rule 160 was being enforced equally and fairly throughout the Ogden City Fire Department. Appellant concedes that this issue was not specifically raised in initial pleadings, but in subsequent Interrogatories and at the trial, the issue was clearly set forth in the evidence that was presented. There was uncontested evidence that at least two other firemen were in violation of Rule 160. These individuals were Clem Merrill and Lt. Todd Maltby. Maltby testified at the trial and indicated that not only were these two individuals in violation of the order, but many others were also in violation and, that although, they initially failed to comply with the order, no action was taken against them until after the appellant had challenged the fire department and Ogden City on the issue. Prior to that time, no such action was taken against them. No temporary suspensions were issued and they were not dismissed as was the appellant. No action was taken until 1977, subsequent to appellant challenging the department on the issue of the moustache. Evidence further established that some firemen are still not in compliance with Rule 160 and no disciplinary action has been taken (T-33). It is clear from the evidence that the appellant was for some reason singled out. Although he had been an excellent employee and there

had never been any difficulty with the moustache, because of its appearance, and because of appellant's desire to keep the moustache, he was "made an example." Again, this is a matter that should have been reviewed by the Civil Service Commission so that this Court would not be burdened with having to review it here. Unfortunately, because of the city's misguided and rigid adherence to the 5 day statute, the Court must now consider whether or not appellant was denied equal protection of the law. The record is clear and the evidence was uncontroverted at trial that arbitrariness in enforcing Rule 160 existed, yet the Judge remained strangely silent on that aspect of the case in his ruling. The silence was called to his attention in the Motion for a New Trial, but the Court refused to consider the issue and did not address it in the ruling on that Motion. Appellant's contention is that the Judge clearly erred in not addressing this issue in the Memorandum Decision, and when requested to address it in the Motion for a New Trial, further erred in not considering the trial testimony or reopening the case to further explore the evidence. The Judge's failure again demonstrates that the focus of the Court drifted from the facts to the procedural problems of the 5 day notice, and once the Court determined that the case was not properly before it, all other issues were swept away. Appellant respectfully requests that this Court re-examine the record as it will find uncontested evidence of violations of the equal protection clause of the 14th Amendment and, therefore, the case should be remanded so that issue can be appropriately considered for the trier of fact.

CONCLUSION

Rigid adherence to short duration statutes of limitation has never been favored by this Court in the interest of justice. The facts of each individual case are always carefully considered when determining if a statute of limitation should act as a bar to legal redress. Appellant's case cries out to be redressed. This Court now has the opportunity to say to the respondents, Ogden City, and Ogden City Fire Department, that administrative procedures are there, not only to protect the administrative agency, but to allow a legitimate grievance to be fully and completely explored and analyzed before the judicial system becomes involved. Appellant met the intent of the law in filing his appeal when he did and presenting and proceeding with his case expeditiously. No prejudice resulted from any of his actions except to himself. The Trial Court should have observed this in the proceedings and should have remanded the case for a full hearing at the administrative level. The Trial Court erred further in allowing the trial to proceed and then ruling as a matter of law that the trial should not have taken place. The error was compounded when the Court ignored uncontested evidence of failure to provide equal protection of the laws in the enforcement of Rule 160, by the respondents.

Appellant respectfully requests that this Court reverse the decision of the District Court and remand the case to the Ogden City Civil Service Commission for further proceedings with the direction that the entire matter be heard by them on the merits so that subsequent, judicial proceedings, if necessary, may be

based upon adequate administrative review.

Respectfully submitted this 12th day of July, 1979.

JOHN T. CAINE