

1979

Utah Public Employees Association; And, Larry Fields v. State of Utah; And, Scott M. Matheson, Governor, State of Utah : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

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UTAH PUBLIC EMPLOYEES'
ASSOCIATION; and, LARRY
FIELDS,

:

:

Plaintiffs-Appellants,

:

Case No. 16616

vs.

:

STATE OF UTAH; and,
SCOTT M. MATHESON, Governor,
State of Utah,

:

:

Defendants-Respondent.

:

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BRIEF OF APPELLANTS

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Appeal from a Summary Judgement of the Third Judicial
District Court in and for Salt Lake County, State of
Utah, Honorable Homer F. Wilkinson presiding.

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

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UTAH PUBLIC EMPLOYEES' :
ASSOCIATION; and, LARRY :
FIELDS, :

Plaintiffs-Appellants, : Case No. 16616

vs. :

STATE OF UTAH; and, SCOTT :
M. MATHESON, Governor, :
State of Utah, :

Defendants-Respondents. :

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BRIEF OF APPELLANTS

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STATEMENT OF THE NATURE OF THE CASE

The Governor of the State of Utah issued a policy prohibiting employees in the Division of Wildlife Resources (DWR), from participating in annual computer drawings for once-in-a-lifetime hunting permits. The appellants, representing employees in DWR, brought an action in Third District Court seeking injunctive relief against the policy and declaratory judgement relief declaring the policy unconstitutional.

DISPOSITION IN THE LOWER COURT

The Third District Court granted a motion for summary judgement to the respondents.

RELIEF SOUGHT ON APPEAL

The Appellants seek a decision of this court reversing the summary judgement entered by the lower court and an Order declaring the policy issued by the respondents unconstitutional and permanently enjoining the respondents from enforcing the same.

STATEMENT OF FACTS

Each year the Division of Wildlife Resources of the State of Utah conducts a special computer drawing for once-in-a-lifetime hunting permits. The drawing covers the Buffalo hunt for which 20 resident permits are awarded; the Big Horn Sheep hunt for which 20 resident permits are awarded; and the Moose hunt for which 90 resident permits are awarded. Residents of the State of Utah may submit applications and if successful in the drawing, receive a hunting permit. The permit may only be obtained once in a lifetime, whether the hunter is successful in harvesting the animal or not. Thus the name "once-in-a-lifetime" hunting permit.

On November 7, 1978, the governor issued a policy statement prohibiting personnel from the DWR, members of the Board of Big Game Control and the Director of the Department of Natural Resources from submitting applications for the annual drawings. His stated reason for issuing the policy was to "clear up any misunderstanding that may arise about the propriety of Wildlife personnel participating in a drawing of this kind."

Though the policy statement did not say so, apparently the governor believed that a disproportionately high number of DWR personnel had been successful in obtaining hunting permits in the draw. However, notwithstanding the governor's belief, the facts show that only one DWR employee received a permit in 1977, and three DWR employees received permits in 1978 (Affidavit No. 5). Furthermore, the governor's policy statement and the pleadings filed herein specifically admit that absolutely no evidence of impropriety or wrongdoing exists on the part of DWR personnel or anyone else connected with the drawings.

Finally, affidavits on file herein show that Utah is the only state among the Rocky Mountain States which has a policy prohibiting its public employees from participating in the drawings (Affidavit No. 6), and at least three less burdensome alternative approaches are available which would

allow the state to accomplish the purpose of the policy. These alternative approaches are: (1) to contract out the drawing to an independent third party computer firm (Affidavits No. 1 and 2); (2) to partially contract out the drawing by having it conducted and overseen by an independent third party (Affidavit No. 3); and (3) to limit the restriction against participating in the drawing to only the six DWR employees who are actually involved in conducting the drawing instead of all 350 DWR employees (Affidavit No. 4).

POINT I

THE POLICY VIOLATES EQUAL PROTECTION
BECAUSE THERE ARE SEVERAL LESS BURDEN-
SOME ALTERNATIVES AVAILABLE TO ACCOMPLISH
THE SAME PURPOSE.

The appellants submit that the policy promulgated by the governor violates equal protection because there are several less burdensome alternatives available to accomplish the same purpose.

A three-step test for determining the validity of a law or policy restricting fundamental constitutional rights was enunciated by the California Supreme Court in Bagley v. Washington Township Hospital District, 421 P.2d 409 (1966), a case which held unconstitutional a statute prohibiting public employees from taking an active part in any political campaign. The court said at page 411:

"A governmental agency which would require a waiver of constitutional rights as a condition of public employment bears the burden of showing the practical necessity for the limitation, and that it must demonstrate, (1) that the political restraints rationally relate to the enhancement of public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available. (emphasis added).

A subsequent California case, City of Carmel-By-Sea v. Young, 466 P.2d 225 (1970), held unconstitutional a statute requiring financial disclosure by public officials on the grounds that less burdensome alternatives existed to accomplish the purpose of the statute. The court said at page 228:

"The familiar rule is that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." (NAACP v. Alabama (1964) 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed. 2d 325; Griswold v. State of Connecticut (1965) 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510.) "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (Shelton v. Tucker (1960) 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231.) "Precision of regulation is required so that the exercise of our most precious freedoms will not be

unduly curtailed except to the extent necessitated by the legitimate governmental objective. [Citations.]" (Vogel v. County of Los Angeles (1967) 68 Cal.2d 18, 22, 64 Cal. Rptr. 409, 411, 434, P.2d 961, 963.)

The court in City of Carmel-By-The-Sea, supra, stated further at page 232:

"[W]here fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' [Citation.] The law must be shown 'necessary, and not merely rationally related to, the accomplishment of a permissible state policy.' [Citations.]" (Griswold v. State of Connecticut, supra, 381 U.S. 479, 497, 85 S.Ct. 1678, 1689). "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." (Sheldon v. Tucker, supra, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231.)

Fort v. Civil Service Commission, 392 P.2d 385 (1964), involved a civil service employee who was dismissed for violating a county charter provision restricting the political activity of county employees. In holding the charter provision unconstitutional for being overly broad, the court said the following at page 389:

"It would plainly be incumbent upon the state to demonstrate that no alternative forms of regulation would combat the asserted abuses without infringing on First Amendment rights."

Another case supportive of the proposition that a policy restricting fundamental rights cannot stand if there is a less restrictive alternative available to accomplish the same policy, is Mancuso v. Taft, 341 F.Supp. 574 (1972). There the court said in declaring unconstitutional a city charter provision restricting political activity rights:

"A regulation is invalid when there are less drastic means by which a statute restricting First Amendment rights could achieve its legitimate goal."

In the instant case, there are affidavits on file which show the existence of at least three approaches which are less burdensome on the fundamental right of the DWR employees to participate in the drawing and to hunt, while still allowing the accomplishment of the purpose for which the policy was implemented.

The first alternative, as set forth in affidavits no. 1 and 2, involves contracting out the entire drawing process to an independent third party. This would totally remove all DWR employees from the drawing process.

The second alternative, as set forth in affidavit no. 3, involves partially contracting out the drawing process to an independent third party with the computer

service and non-consequential support services being provided by DWR personnel as necessary. This independent third party could be an elected official, any civic minded individual selected by the governor, or indeed the governor himself. This approach would result in no expenditure of funds by the state.

The third alternative, as set forth in affidavit no. 4, involves limiting the prohibition to only those few DWR employees who are actually involved in the drawing process. Currently, the process is completely handled by eight DWR employees, and could conceivably be handled by six employees. Therefore, it makes little sense to prohibit all 350 DWR employees from participating in the drawing, when the prohibition could be limited to those employees actually involved in conducting the drawing. This third alternative is not totally acceptable to the appellants for obvious reasons, but is suggested simply because they find it less repugnant than a total prohibition. The six employees would have to be volunteers who simply elect not to hunt.

In the instant case it is clear that the right to participate in the annual computer drawing for once-in-a-lifetime hunting permits, and to engage in the hunt itself should they be successful in the drawing, is a fundamental right to DWR personnel. To say that hunting is a major

part of a DWR employee's life is a great understatement. Indeed, it is because of their love for hunting and outdoor recreation that most personnel in the DWR are employed in that agency. DWR personnel are the core of the hunting fraternity in the State of Utah, and to arbitrarily restrict their participation in that hunting fraternity is to deny them their First Amendment Right of Freedom of Association. To arbitrarily restrict their right to hunt and thereby restrict their right to harvest game to sustain themselves and their families, is to deprive them of property without Due Process of law. There is no justifiable reason to deny DWR employees, who are taxpayers of the state, access to the same program which is available to all other residents of the state. To do so is to violate the Equal Protection rights of the DWR employees.

This arbitrary prohibition is particularly repugnant in view of the fact that it is totally unnecessary. As set forth above, there are at least three alternatives available to the governor which would accomplish the same purpose without violating the rights of DWR employees. These alternative approaches should be utilized before infringing upon the above-mentioned fundamental rights of DWR personnel.

POINT II

THE LOWER COURT ERRED IN GRANTING THE
RESPONDENT'S MOTION FOR SUMMARY JUDGEMENT
IN VIEW OF THE COURT'S ADMISSION THAT MATERIAL
FACTS WERE IN DISPUTE.

The law is clear that summary judgement cannot be granted when material facts are in dispute. Rule 56(c), U.R.C.P. states:

"Motion and Proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. A summary judgement, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." (emphasis added).

Following that rule, the Utah Supreme Court in Hatch v. Sugarhouse Finance Company, 434 P.2d 758 (1967), and Burnham v. Bankers Life & Casualty Company, 470 P.2d 261 (1970) held summary judgements granted by lower courts inappropriate because material issues of fact remained in dispute.

In the instant case, the lower court issued a memorandum decision granting the respondent's motion for summary judgement. In that memorandum decision, the lower court stated:

Based on the assertions of counsel that there are no questions of fact but only questions of law, the court finds that the policy statement issued by the Governor was within the constitutional powers of the office and gives summary judgement to the Defendant.

However, the court wishes to note that the Plaintiff has alleged that the Governor's policy is too stringent and that the same thing can be accomplished in a "less burdensome and restrictive" way, and this may be so. Affadavits are provided that assert alternative methods of solving this problem but in the court's opinion they raise questions of fact which the court cannot consider on a motion for summary judgement.

The court feels that the only way to resolve the question on whether there is a less burdensome and restrictive way is at an evidentiary hearing.

In short, the lower court granted the respondent's motion for summary judgement notwithstanding the admission that there existed disputed issues of material fact. For that reason the lower court's decision was in error.

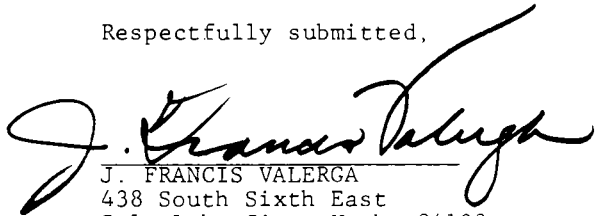
However, the appellants are not interested in "winning the battle only to lose the war." Therefore, unless this court agrees with the argument of the appellants in POINT I, the appellants are not interested in having the case remanded back to the lower court for the evidentiary hearing referred to in the lower court's memorandum decision.

CONCLUSION

The policy promulgated by the governor violates equal protection because there are several less burdensome alternatives available to accomplish the same purpose. These alternative approaches should be utilized before unnecessarily infringing upon the fundamental rights of DWR personnel.

DATED this 10th day of October, 1979.

Respectfully submitted,

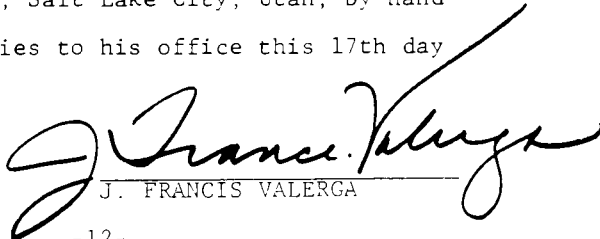


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CERTIFICATE OF SERVICE

I hereby certify that I served two (2) copies of the foregoing Brief of Appellant upon Michael L. Deamer, Deputy Attorney General, attorney for defendants-respondents, 236 State Capitol Building, Salt Lake City, Utah, by hand delivering two (2) copies to his office this 17th day of October, 1979.



J. FRANCIS VALERGA