

1953

Otho R. Murphy v. Grand County, Utah : Brief of Appellants

Utah Supreme Court

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Supreme Court of Utah

CIVIL NO. 7998

OTHO R. MURPHY,
Plaintiff and Respondent,

vs.

GRAND COUNTY, UTAH,
a body corporate and politic and
MARGIE M. SHAFER, County
Clerk of Grand County, Utah,
and Ex-Officio County Auditor,
Defendants and Appellants.

APPEAL FROM THE DISTRICT COURT
OF GRAND COUNTY, UTAH

BRIEF OF APPELLANTS

FILED MITCHELL MELICH,
Moab, Utah
Attorney for Defendants
and Appellants.
JUL 31 1953

rk, Supreme Court, Utah

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SUPREME COURT OF UTAH

CIVIL NO. 7998

OTHO R. MURPHY,
Plaintiff and Respondent,
vs.

GRAND COUNTY, UTAH,
a body corporate and politic,
and MARGIE M. SHAFER,
County Clerk of Grand County,
Utah, and Ex-Officio
County Auditor,
Defendants and Appellants.

APPEAL FROM THE DISTRICT COURT
OF GRAND COUNTY, UTAH.

BRIEF OF DEFENDANTS AND APPELLANTS.

STATEMENT OF FACTS

On April 3, 1950, the Board of County Commissioners of Grand county, Utah, hereinafter referred to as "Board," at a meeting regularly held, fixed the salary of the county attorney of Grand county, Utah, for the term commencing January 1, 1951, at \$10.00 per annum. The fixing of the salary was done pursuant to Section 19-13-15 U. C. A. 1943, now being section 17-16-15 U. C. A. 1953. Notice that the

salary had been so fixed was given in the Times-Independent, a weekly newspaper published in Moab, Utah, and which has general circulation in Grand county. No one protested the action of the board in so fixing the salary.

The general election for the election of county officers for the year 1950 was held in Grand county on November 7, 1950, so that the salary of the county attorney was fixed more than six months prior thereto as required by law. Within the time required by law for the filing for county offices no person filed for the office of county attorney, an office which was to be filled at the general election to be held in November of that year, and on the ballot which was prepared and used at said general election no name appeared thereon for the office of county attorney for Grand county.

On the day of the election the name of Otho R. Murphy, the plaintiff herein, was written in on the ballot for the office of county attorney and he received a total of 44 votes for that office, which was the highest number of votes received by anyone for the office of county attorney. The total vote cast in Grand county at that general election was 870 votes.

On or about January 1, 1951, the plaintiff, pursuant to such "write-in" vote, qualified for the office of county attorney by taking his oath and furnishing his bond as required by law. On November 5, 1951 the plaintiff presented to the Board his claim for salary as county attorney for the months of January through October, 1951, based on the rate of \$1,000 per annum, which was the salary previously fixed and paid to the county attorney of Grand county and whose term had expired on January 1, 1951. The Board refused to pay said claim for the reason that the salary of the county attorney had been fixed by the Board at its meeting of April 3, 1950 at \$10 per annum and not at \$1,000 per annum. After the refusal of the Board to approve plaintiff's claim, he brought action in the District

Court of Grand county. Utah, to recover his salary based on the rate of \$1,000 per annum. The District Court upheld plaintiff's contention that he should be allowed the salary of his predecessor in office, namely, \$1,000 per annum, and hence this appeal from that decision.

STATEMENT OF POINTS

I. THE TRIAL COURT ERRED IN FINDING THAT THE BOARD, IN FIXING THE SALARY OF THE COUNTY ATTORNEY OF GRAND COUNTY AT \$10 PER ANNUM, FAILED TO EXERCISE A FAIR AND REASONABLE DISCRETION AND THAT THE AMOUNT SO FIXED AMOUNTED TO NO COMPENSATION AT ALL, AND THAT SUCH ACTION OF THE BOARD WAS CALCULATED TO DISCOURAGE ANYONE FROM SEEKING THE OFFICE OF COUNTY ATTORNEY.

II. THE TRIAL COURT ERRED IN STRIKING FROM DEFENDANTS ANSWER THE THIRD AND FOURTH DEFENSES, NAMELY:

(A) THAT THE PLAINTIFF SHOULD BE ESTOPPED FROM MAKING ANY CLAIM AGAINST THE DEFENDANTS FOR ANY SALARY OTHER THAN THE ANNUAL SALARY OF \$10 PER YEAR AS FIXED BY LAW.

(B) THAT THE DEFENDANT COUNTY AUDITOR IS PREVENTED BY SECTION 17-19-23 U. C. A. 1953 FROM DRAWING A WARRANT ON COUNTY FUNDS EXCEPT WITHIN THE LIMITS OF THE BUDGET PASSED AND ADOPTED BY THE BOARD.

ARGUMENT

I

ONLY BOARDS OF COUNTY COMMISSIONERS ARE AUTHORIZED BY LAW TO FIX SALARIES OF COUNTY OFFICERS.

The office of county attorney in this state is an office created by Section 10, Article VIII of the Constitution of Utah. And the powers and duties of the county attorney are set forth in Chapter 18, Title 17, U. C. A. 1953.

The power to fix salaries of county officers in this state is given to the boards of county commissioners by Sections 17-16-14 and 17-16-15 U. C. A. 1953. At the time the salary of the county attorney was fixed by the Board on April 3, 1950, Grand county was a class 4 county. The maximum salary for the county attorney of a class 4 county at that time was \$1800. The statute places no minimum as to salaries; this resting within the discretion of the boards of county commissioners.

Section 17-16-14 U. C. A. 1953, as amended, provides that "The annual salaries of the officers of all counties in the state shall be fixed by the respective boards of county commissioners at not to exceed the following amounts;" and the section then sets forth the various amounts. Our Supreme Court in the case of *Johnson v Bankhead*, (Utah 1951), 232 P 2d 372, said this about Section 17-16-14:

"There is no ambiguity or uncertainty in the language of Section 19-13-14 (now Section 17-16-14) above quoted. It expressly fixes only the maximum within which the board of commissioners are limited in fixing the salary and expressly places on such boards the duty to fix such salary within such limits."

Under the ruling of *Johnson v Bankhead*, *supra*, it has been established that the boards of commissioners have the authority to fix the salaries of county officers, including that of county attorney, within the limits of Section 17-16-14.

The time when salaries of county officers are to be fixed is provided for in Section 17-16-15, U. C. A. 1953, as amended, which section reads as follows:

"The board of county commissioners shall biennially, at a meeting held at least six months prior to the election of county officers, fix and determine the salaries of county officers, for whom maximum salaries are fixed, for the term next succeeding; provided, that the salaries of such officers shall not be diminished or increased for the term for which they were elected and shall have qualified; and provided further, that should any board fail to fix the salary of any of the county officers as provided in this section, the salary of the predecessor of said officer whose salary has been fixed shall apply; provided, however, said boards of county commissioners may within six months of the effective date of this act fix the salaries of county officers in amounts which in their opinion will establish sufficient and proper salaries for services rendered or to be rendered by officers whose salaries are so fixed; and provided further that the maximum salaries for county officers shall not exceed in amount the maximum salaries as set forth in section 17-16-14 hereof."

The defendants, through its Board, having fixed the salary of the county attorney within the limits and within the time allowed by the above quoted section, by what right then had the trial judge to hold such action a nullity and thus attempt to compel the defendants to pay to the plaintiff a salary of \$1000 per annum?

II

THE ACTION OF THE DEFENDANT BOARD IN FIXING THE SALARY OF THE COUNTY ATTORNEY CANNOT BE SET ASIDE UNLESS THE EVIDENCE CLEARLY SHOWS AN ABUSE OF DISCRETION.

In this action the plaintiff at no time presented any evidence to the trial court upon which the court could support its finding number 6, which reads:

"That in fixing the salary for the office of coun-

ty attorney of Grand county at \$10 per annum the Board of County Commissioners of said county failed to exercise a fair and reasonable discretion in that the sum so fixed was so small as to amount to no compensation at all for the duties imposed by law upon the office of county attorney and was calculated to discourage anyone from seeking said office, or to limit aspirants to those willing to render service gratuitously, in violation of the provisions of Section 10, Article VIII of the Constitution of the state of Utah as amended, that 'A county attorney shall be elected by the qualified voters of each county . . . ' "

No authority need be cited in support of the rule which requires that findings must be supported by the evidence.

The burden in this case was upon the plaintiff to prove that the defendant Board at the time it fixed the salary of the county attorney at \$10 per annum abused its discretionary power. The plaintiff having failed to introduce any evidence whatsoever in this action cannot now recover, for the rule is that in the absence of evidence to the contrary, there is always a presumption that the official acts of county and other officers have properly been performed.

See 31 C. J. S., Section 146, pages 798-826.

In *Cawsey vs Brickey*, 82 Wash. 653, 141 P. 938, an action was brought to enjoin the enforcement of an order creating a game preserve and it was contended that the powers exercised by the body creating the preserve were arbitrarily exercised. The court failed to find sufficient evidence of arbitrary action to warrant interference with the order creating the preserve and on the question of abuse of power, the court said:

"It is also true that any discretionary power may be abused, but an abuse will not be assumed in the absence of clear and convincing evidence. Every reasonable presumption will be indulged in favor of the regularity and good faith of official action. *Tainter v. Lucas*, 29 Wis. 375; *Quigley v. Phelps*.

74 Wash. 73, 132 Pac. 738.”

“It will be presumed, in the absence of proof to the contrary, that the board of county commissioners did its duty and informed itself of the facts, and that the statements contained in its resolution, with respect to the warrant indebtedness to be funded, are true.” *Lloyd Corporation v. Bannock County et al*, (Idaho, 1933), 25 P. 2d 217.

“County Commissioners are presumed to do their duty and to exercise fairly their discretion. If they abuse their discretion, the people have a remedy at the polls, if no other be provided.” *State v. Mills*, (Mont. 1927) 261 P. 885.

“The county commissioners are public officers and are presumed to properly discharge the duties which the law imposes upon them.

“In the case of *Bonaparte v. Nelson*, 142 Okl. 54, 285 P. 100, 102, this court said: ‘The excise boards, like municipal boards and other public officers, are presumed to discharge the duties which the law imposes upon them, and the same is true relative to the board of county commissioners * * * and in the absence of proof it will be presumed that the officers, upon whom acts and duties are enjoined by law, performed those duties. This presumption continues in favor of the acts of such officers until it is affirmatively shown by competent evidence to the contrary.’ ” *Jackson v. Sadler et al*, Okl. 1935. 44 P. 2d 838.

The reading of the above authorities can lead to but one conclusion, that is, that unless the evidence shows an abuse of discretion on the part of the county commissioners, it will be presumed that they have discharged their duty according to law and that they have acted fairly, impartially and in good faith. In the case at bar, the plaintiff failed to introduce any evidence whatsoever with respect to an abuse of discretion or lack of good faith on the part of the county commissioners in fixing the salary and

having so failed to introduce any evidence, his case must fail for it will then be presumed, in the absence of such evidence, that the commissioners acted in good faith and did not abuse their discretionary power granted to them by law. In the absence of any evidence that the commissioners abused their discretionary power the court, in order to find such an abuse of discretion in the instant case, would be compelled to substitute its opinion and judgment for that of the board of county commissioners which, it is submitted, the court can not do.

In *Reynolds v Board of Commissioners*, 6 Idaho 787, 59 P. 730 (1899) an action was brought by certain officers of Oneida county against the Board of Commissioners for lowering certain salaries. The salaries fixed by the commissioners were as follows: Clerk of the District Court, \$900 per annum; Sheriff, \$900 per annum; Superintendent of Schools, \$500 per annum and the Treasurer, \$500 per annum. The District Court rendered judgment modifying the order of the Board and increased the salaries above the figures fixed by the Board. From this judgment the Board appealed to the Supreme court which, on appeal, reversed the lower court and had this to say:

“It is a well-settled rule that a power or function vested solely in one department, body, board, or tribunal by express constitutional provisions cannot be delegated by such department, body, board, or tribunal to another department, body, board, or tribunal. The legislature cannot delegate the functions expressly vested in it by the constitution to boards of county commissioners or to the judiciary. . . . The duty which devolves upon the county commissioners under the act in question is a delicate, and will generally be found to be a difficult, one. They are called upon to exercise a judicial discretion, and to act so as to carry out the intent of the statute, with due regard for the rights and interests of both officeholder and taxpayer. Their action involves judicial discretion. They act, not as a legislative

body, but quasi judicially. More or less trouble will grow out of their actions under said statute. They have conflicting interests to consider and determine. On the one hand, officeholders will desire large salaries, while the taxpayers will desire the salaries fixed as low as possible. But the interests of all — both officeholder and taxpayer — demand that salaries should be fixed at such sums as will reasonably compensate each officer for his time and labor, taking into consideration the qualifications necessary to be possessed by each county officer, and the responsibilities of his office. All of these matters should be carefully investigated and determined by the board of commissioners. The board should exercise the discretion vested in it with due regard for the rights of all parties concerned.

“The action of the board should not be disturbed unless there is a clear abuse of discretion shown, which cannot be shown merely by the opinion of the district court.”

“Appellants argue that no law was violated by the board, and that the respondents had no legal rights to be violated at the time the salaries were fixed; that whatever legal right they have to compensation was created by the order appealed from. We do not agree with this contention. The act in question vests in each county officer in the state the right to compensation which is, within the maximum and minimum prescribed, reasonable, considering the circumstances surrounding and affecting each office. Each taxpayer and officeholder has the right to have the board of commissioners in his county exercise its discretion in the matter of fixing such salaries as will afford to each officer reasonable compensation, thus protecting public interests. Each taxpayer also has a legal right to have the county treasury protected against an abuse of the discretion vested in the board, by way of profligate extravagance. If the theory of the appellants be correct, that the action of the board is final and cannot be reviewed by the courts, the taxpayer in one of the smaller counties may see the salaries fixed

at the maximum, without regard to the amount of labor to be performed, or other circumstances, contrary to public interests, and be powerless to remedy the wrong. No such thing was contemplated. The theory upon which the case of *Stookey v. Board* (Idaho) 57 Pac. 312, — which is hereby affirmed, — was decided, is that the boards of commissioners must, within the discretion vested in them, allow reasonable compensation by way of annual salaries, when acting under the provisions of the act in question. It was only upon the theory that we could hold said act to be general and not special legislation. Under this theory, the act is uniform in its operation throughout the state. Under any other theory, we would be compelled to hold it local and special, and inhibited by the constitution. While it seems that the board of commissioners fixed the salaries in question very low, and while the amounts fixed by the district court do not seem extravagant, yet it does not sufficiently appear from the record before us that the board of commissioners abused its discretion in making the order appealed from.”

See also *Criddle v Board of Commissioners*, 248 P. 465 (Idaho 1926); *Etter v Board of Commissioners* 255 P. 1095 (Idaho 1927); *Dygert v Board of Commissioners*, 129 P 2d. 660 (Idaho 1942); *State ex rel Yeargin v Maschke, et al.*, 155 P. 1064 (Wash. 1916); *Benham v McLaughlin*, 204 P. 1050 (Wash. 1922); *State, ex rel v Hinkle*, 206 P. 942 (Wash. 1922).

There is no evidence in this case to show what motivated the Board in fixing the salary of the county attorney at \$10 per annum. The trial judge without any evidence before him found that the action of the Board was “calculated to discourage anyone from seeking said office, or to limit aspirants to those willing to render service gratuitously.” The plaintiff is not now and at no time has he been a member of the bar of this or any other state. If we are to speculate, as the trial judge did, on what motivated the Board in fixing the salary at so low a figure, can it not be said

that the Board had in mind the protection of the forgotten taxpayer. It is possible that the Board anticipated that one not qualified to fulfill the office of county attorney would attempt to be elected, as was the plaintiff. The Board was under no obligation, legal or humanitarian, to provide out of the taxpayers money a large salary in the nature of a gift to one not able to perform the duties of county attorney.

In the absence of evidence showing an abuse of discretion the trial court cannot set up its judgment against the judgment of the Board as to what is a reasonable compensation for services to be performed by a county attorney. It is to the judgment and discretion of the boards of county commissioners, and not to trial judges, that the legislature of this state left the decision and power in such matters.

We quote from the leading case of *Dillon v Whatcom County*, 41 P. 174 (Wash. 1895):

“It would seem that absolute discretion could not be vested in a tribunal if it has not been vested in the board of county commissioners by this section, so far as the hiring of extra help for county officers is concerned; and, outside of the construction which we would be compelled to place upon it from the language of the law itself, the authorities, it seems to us, are uniform on this proposition. Before proceeding to their investigation, in view of some authorities which have been cited by the respondent, it is well to notice this distinction, which we think is frequently lost sight of in the discussion of such cases, viz. that the courts will interfere to compel inferior tribunals to act or to exercise their discretion in proper cases, when such tribunals claim that under the law they have no right to act, the question of whether or not they have a right to act being a legal question which the courts will solve for the tribunals; but this must be distinguished from a case where the legislature has

empowered the tribunal with discretion, and such tribunal has exercised that discretion.

“In such a case the courts have no right to substitute their judgement for the judgement of the tribunal in which the discretion has been vested; and we think an investigation of the authorities will show that in all well-considered cases this distinction has been steadily kept in view. In this case, this discretion having been vested by the legislature in the board of county commissioners, and the question as to the necessity of this extra help having been submitted especially to their judgement, and, as shown by the answer, they having exercised their judgement and arrived at a conclusion, such a conclusion is final, and not subject to review by the courts.”

What is arbitrary or capricious action or an abuse of discretion?

“... The most that can be said of their action, even from the respondent's point of view, is that they erred in judgment. But this is not arbitrary or capricious action. These terms, when used in this connection, must mean willful and unreasoning action, action without consideration and in disregard of the facts and circumstances of the case. Action is not arbitrary or capricious when exercised honestly and upon due consideration, where there is room for two opinions, however much it may be believed that an erroneous conclusion was reached.”
Sweitzer v. Industrial Commission of Washington.
199 P. 724 (Wash. 1921).

In Criddle v Board of Commissioners, 248 P. 465 (Idaho 1926) the court in discussing “abuse of discretion” said:

“The discretion in the matter is specifically vested in the board, and an abuse of the board's discretion is not shown by the fact that the able trial judge would have exercised the discretion differently had it been reposed in him. Sullivan v. Board of

Com'rs, 22 Idaho, 202, 125 P. 191. On the contrary, an abuse of discretion occurs when the tribunal or board, charged with its exercise, 'exceeds the bounds of reason, all of the circumstances before it being considered.' Independent Steel & Wire Co. v. New Mexico Cent. R. Co., 25 N.M. 160, 178 P. 842; Sharon v. Sharon, 75 Cal. 1, 16 P. 345; Root v. Bingham, 26 S.D. 118, 128 N. W. 132. An 'abuse of discretion' * * * is really a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence.' Murray v. Buell, 74 Wis. 14, 41 N. W. 1010. The Supreme Court of Wisconsin, in Northern Trust Co. v. Snyder, 113 Wis. 516. 89 N. W. 460, 90 Am. St. Rep. 867, said:

" 'Where it rests in the discretion of the county board to determine what is a reasonable compensation, the court should not revise their action in the absence of clear evidence of such manifest abuse of power and disregard of the statute as to show that the board failed to exercise a legal discretion.
* * * ' "

With no evidence before the trial court wherein can it be found in the record before this court that the defendant Board "exceeded the bounds of reason" or acted "without consideration and in disregard of the facts and circumstances of the case" when it fixed the salary of the county attorney on that 3rd day of April, 1950, its action being within the limits and power fixed and authorized by law?

If the defendant Board erred in judgment or did not fix the salary sufficiently high enough to satisfy the plaintiff then as the Supreme Court of Washington said in *Dillon v Whatcom County*, *supra*:

"If it eventuates that the board has not exercised its discretion in a sensible way, or in such a way as to subserve the best interest of the county, the only remedy that the people have is the exercise of an intelligent choice at the polls."

In *Miles v Wells*, 22 Utah 55, 61 P. 534, at page 537, it is said:

“The court has no jurisdiction to direct, by mandamus, how the discretionary power, in the premises, vested in the board by the statute, shall be exercised.”

In this action the trial court found that the action of of the Board was a nullity and ordered that the defendants pay to the plaintiff a salary of \$1000 per annum, which was the salary of plaintiff's predecessor in office. We submit that the court is without power to substitute its judgment for that of the Board and increase the salary from \$10 to \$1000 per annum. If the Board abused its discretion then it should be compelled to exercise it within reason and not be required to accept the judgment of the court as to what is a reasonable salary for the office of county attorney of Grand county. In *Merwin v Board of Commissioners*, 67 P. 285 (Colo. 1901), the Board fixed the salary of the deputy district attorney at \$1.00 per annum and he brought action to recover compensation for services rendered. In denying plaintiff's claim the court said:

“* * * Another contention of plaintiff in error, either in this or another case between the same parties (67 Pac. 1129), is that this is an equitable suit on the part of the plaintiff, not to review a discretionary action of the defendant in error, but for appropriate relief where the board has absolutely refused to exercise the power vested in it; that is to say, the fixing by the board of the plaintiff's salary at \$1 a year is equivalent to no action at all, and therefore the judgment should be vacated, and another one rendered for a reasonable sum in his favor. This contention is not good. If the action taken by the board is in legal effect, no action at all, then the proper remedy is mandamus to compel action, not an action to recover on a quantum meruit. The court, might, in such a case, compel the board to

take action, but not to act in a particular way. And this leads us to remark that, as a conclusive reason why plaintiff is not entitled to maintain this action, the legislature has not attempted to confer upon the courts jurisdiction to determine the amount of the compensation to which he is entitled. The general assembly itself has not fixed for deputy district attorneys, as such, any fees, or prescribed any definite salary, but, on the contrary, has conferred upon the county commissioners power to fix the salary of the class to which plaintiff belongs at a sum not exceeding \$1,500 a year. So that while, if the matter could properly be brought before us for review, we might agree with the counsel that the action of the commissioners in fixing plaintiff's salary at \$1 a year was wholly inexcusable, and entirely inadequate, still the fact that our judgment was different from theirs would not authorize us on this hearing to substitute our judgment for theirs, and enter judgment in an amount which we deemed a reasonable compensation. Where one enters into a public office for which no compensation has been provided by law, he is presumed to give his services; and where such compensation is conditional, as here, his right thereto does not attach until the condition is fulfilled or performed. 13 Cent. Law J. 444, and cases cited; *People v. Superior Ct. of City of New York*, 5 Wend. 115; *Garfield Co. v. Leonard*, 26 Colo. 145, 57 Pac. 693. * * *

"In the absence of a statute to the contrary, or an abuse of discretion, an order of a county board or other tribunal fixing or allowing compensation is not subject to review by the courts. Furthermore, under some statutes, even though an appeal can be taken, the court cannot itself fix the compensation, the only question for its determination being whether the board in making the order abused its discretion, and the court must affirm, modify, or reverse the order, make findings and conclusions, and remand the matter with instructions to the board to make an order accordingly." 20 C. J. S. page 935.

We submit there is no statutory authority in our state

by which the courts in such cases as the one at bar can substitute their judgment for that of the board of county commissioners in the fixing of salaries of county officers. Such power is given only to the boards by law, and in the absence of proof showing an abuse of discretion, bad faith or arbitrary and capricious action on the part of the board, can the courts set such action aside. No such proof being shown by the plaintiff his case must fail.

“The general rule of law is that public officials can only claim compensation for services rendered where the compensation is provided by law, and that where no compensation is so provided the rendition of such services is deemed to be gratuitous.” State ex rel. Matson v O’Hern, 65 P. 2d 619 (Mont. 1937).

See also Maricopa County v Rodgers, 78 P. 2d 989, (Ariz. 1938); McAuliffe v Kane, 128 P. 2d 932, (Cal. 1942); Board of Commissioners v Leonard, 57 P. 693 (Colo. 1899); Hillman v Chmelka, 195 P. 2d 945 (Colo. 1948); Merwin v Board of Commissioners, 67 P. 285 (Colo. 1901).

III

THE PLAINTIFF SHOULD BE ESTOPPED FROM MAKING ANY CLAIM AGAINST DEFENDANTS FOR ANY SALARY OTHER THAN THE SUM FIXED ACCORDING TO LAW BY THE DEFENDANT BOARD.

The salary as fixed by the Board at \$10 per annum was given notice by the Board to the public in the Times-Independent, a weekly newspaper published in Moab, Grand county, in the April 6, 1950 issue. This was notice to the general public, including plaintiff, what the salary of the county attorney would be for the term commencing January 1, 1951. The plaintiff being charged with such notice of the salary so fixed permitted his name to be written in on the ballot at the general election of November 7, 1950, for the office of county attorney. It is submitted that under such circumstances that the plaintiff should be estop-

ped from making demand for a salary of \$1000 per annum on the ground that the action of the Board was a nullity and was calculated to prevent persons from seeking the office. At the time the salary was fixed the plaintiff nor any one else protested the action of the Board. It is therefore assumed, in absence of evidence to the contrary, that the salary so fixed met the approval of the people of Grand county and that the Board acted within its authority. Plaintiff, knowing what the salary was, should not now complain about bad faith or abuse of discretion on the part of the Board.

IV

THE DEFENDANT COUNTY AUDITOR IS PREVENTED BY SECTION 17-19-23, U. C. A. 1953 TO DRAW ANY WARRANT IN FAVOR OF THE PLAINTIFF EXCEPT AS WITHIN THE LIMITS OF THE BUDGET PASSED BY DEFENDANT BOARD.

Section 17-19-23, U. C. A. 1953 reads as follows:

“County auditors shall not draw warrants on county funds except in accordance with and within the limits of the budget duly passed by the board of county commissioners.”

The budget of the defendant for the year 1951, as adopted according to law, appropriated the sum of \$10 as salary for the office of county attorney. Under the above quoted section the defendant auditor is prevented from drawing a warrant in favor of the plaintiff in excess of such amount.

In *Williams v Board of Commissioners*, 282 P. 867, (Idaho, 1929) the court said:

“The conclusion is inevitable that the salary which respondent is attempting to recover not having been included in the budget for the year April

1, 1928, to April 1, 1929, and not being emergency or mandatory charge *** could not lawfully have been paid by the board."

CONCLUSION

It is submitted that the trial court should have denied plaintiff relief for the reason that the record in this case contains nothing to warrant the conclusion that the action of the defendant Board was tantamount to the destruction of the office of county attorney.

In the absence of a showing by the plaintiff of fraud, bad faith, abuse of discretion or arbitrary or capricious action on the part of the defendant Board to whom the power to fix county officers salaries is given, the courts cannot consider the matter of the Board in so fixing such salaries and thus substitute their judgment for that of the Board.

Respectfully submitted

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