

1954

Ralph V. Backman and Mathias C. Tanner v. E.
Allen Bateman and Board of Education of Ogden
City : Petition for Rehearing and Brief in Support
Thereof

Utah Supreme Court

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In the

Supreme Court of the State of Utah

RALPH V. BACKMAN,

Plaintiff,

VS.

E. ALLEN BATEMAN, State Superin-
tendent of Public Instruction, and
BOARD OF EDUCATION OF SALT
LAKE CITY, a municipal corpora-
tion,

Defendants.

and

MATHIAS C. TANNER,

Plaintiff,

VS.

E. ALLEN BATEMAN, State Superin-
tendent of Public Instruction, and
BOARD OF EDUCATION OF
OGDEN CITY, a municipal corpora-
tion,

Defendants.

Nos.
8052
and
8064

Petition For Rehearing And Brief In Support Thereof

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U.S. Supreme Court

TABLE OF CONTENTS

| | Page |
|--|-------|
| PETITION FOR REHEARING | 2, 3 |
| STATEMENT OF POINTS | 3 |
| ARGUMENT | 4-13 |
| POINT I. THE PREVAILING OPINION IS BASED UPON A MISINTERPRETATION OF THE FACTS | 4-7 |
| POINT II. THE PREVAILING OPINION ER- RONEOUSLY INTERPRETS THE PURPOSE OF THE STATUTE INVOLVED, AND THEREFORE ARRIVES AT AN INCOR- RECT CONCLUSION AS TO ITS CONSTITU- TIONALITY | 7-10 |
| POINT III. THE COURT ERRONEOUSLY HOLDS THAT PLAINTIFFS' RIGHTS IN PENSION FUNDS TO WHICH THEY HAVE CON- TRIBUTED ARE SUCH THAT THEY CAN- NOT BE DISCHARGED | 11-13 |
| CONCLUSION | 14-15 |

CASES CITED

| | |
|---|----|
| Allen v. City of Long Beach, 101 Cal. App. 2d 15, 224 P. 2d 792 | 12 |
| Allstot v. City of Long Beach, 104 Cal. App. 2d 441, 231 P. 2d 498 | 12 |
| Barton v. Alexander, 27 Ida. 286, 148 P. 471 | 9 |
| Hansen v. Public Employees' Ret. System, ... U. ..., 246 P. 2d 591 | 11 |
| Houston Chronicle v. Wegner (Tex., 1915) 182 S. W. 45 | 10 |

TABLE OF CONTENTS—Continued

| | Page |
|--|------|
| Kern v. City of Long Beach, 29 Cal. 2d 848, 179 P. 2d 803 | 12 |
| Newcomb v. Ogden City Public School Teachers' Ret. Commn., ... U. ..., 243 P. 2d 941 | 11 |
| Packer v. Board of Retirement, 35 Cal. 2d 212, 217 P. 2d 660 | 12 |
| Palaske v. City of Long Beach, 1949, 93 Cal. App. 2d 120, 208 P. 2d 764 | 12 |
| Palmerlee v. Nottage, 119 Minn. 351, 138 N. W. 312... | 10 |
| State ex rel. Robinson v. Keefe, 111 Fla. 701, 149 So. 638 | 8 |

STATUTORY REFERENCES

| | |
|--|---|
| Utah Code Annotated 1953: Sec. 52-3-1 | 4 |
| Laws of Utah 1953: Ch. 79 | 4 |
| Rev. Code of Montana 1947: Secs. 59-518 to 59-520... | 9 |

TEXTS CITED

| | |
|-----------------------|----|
| 54 A. L. R. 943 | 12 |
| 98 id. 505 | 12 |
| 112 id. 1009 | 12 |
| 137 id. 249 | 12 |

In the Supreme Court of the State of Utah

RALPH V. BACKMAN,

Plaintiff,

VS.

E. ALLEN BATEMAN, State Superintendent of Public Instruction, and
BOARD OF EDUCATION OF SALT
LAKE CITY, a municipal corporation,

Defendants.

and

MATHIAS C. TANNER,

Plaintiff,

VS.

E. ALLEN BATEMAN, State Superintendent of Public Instruction, and
BOARD OF EDUCATION OF
OGDEN CITY, a municipal corporation,

Defendants.

Nos.
8052
and
8064

Petition For Rehearing And Brief In Support Thereof

PETITION FOR REHEARING

To the Honorable the Supreme Court of Utah:

Defendants respectfully petition the court for a re-

hearing of the above entitled cases, and in support of said petition allege:

1. The prevailing opinion is based upon a misinterpretation of the facts.

2. The prevailing opinion erroneously interprets the purpose of the statute involved, and therefore arrives at an incorrect conclusion as to its constitutionality.

3. The court erroneously holds that plaintiffs' rights in pension funds to which they have contributed operate to make them immune from discharge.

STATEMENT OF POINTS

POINT I.

THE PREVAILING OPINION IS BASED UPON
A MISINTERPRETATION OF THE FACTS.

POINT II.

THE PREVAILING OPINION ERRONEOUSLY
INTERPRETS THE PURPOSE OF THE STAT-
UTE INVOLVED, AND THEREFORE ARRIVES
AT AN INCORRECT CONCLUSION AS TO ITS
CONSTITUTIONALITY.

POINT III.

THE COURT ERRONEOUSLY HOLDS THAT
PLAINTIFFS' RIGHTS IN PENSION FUNDS
TO WHICH THEY HAVE CONTRIBUTED
ARE SUCH THAT THEY CANNOT BE DIS-
CHARGED.

ARGUMENT

POINT I.

THE PREVAILING OPINION IS BASED UPON
A MISINTERPRETATION OF THE FACTS.

The prevailing opinion (that written by Mr. Justice Crockett) concludes that Sec. 52-3-1, U. C. A. 1953, as amended by Ch. 79, Laws of Utah 1953, is unconstitutional as applied to these plaintiffs because of its interference with rights which plaintiffs had in existing employment by the defendant Boards of Education. It appears that the factual basis for the opinion is the assumption that when the statute took effect and was sought to be applied to plaintiffs, they were employed by their respective Boards under contracts of hire covering the coming school year. The court states: “—under the facts here presented — Mr. Backman had a contract to work.” (second par., p. 3 of greensheet opinion). The basis of the opinion is that the statute operates to interrupt such existing employment: “* * * it [the statute] proposes to *interrupt and destroy* the employment of persons who *had been lawfully hired* and had continued to work under the identical conditions for years.” (first full par., p. 4; italics are those of the opinion). The opinion concludes that “* * * the retroactive effect of this statute which would prohibit employees from continuing in their erstwhile lawful employment * * *” renders it unconstitutional and invalid.

It appears to defendants that the court turned its opinion upon the assumed fact that plaintiffs were under contract when they commenced this action. In this point

of the argument it is respectfully urged that the opinion took as a fact that which is not a fact. If the opinion's assumption is incorrect, the court can and should reverse the opinion heretofore issued.

In point of actualities, neither plaintiff had a contract. Plaintiffs were not employed by defendants when they commenced these proceedings. That is why this action was brought. The prayers of the complaints ask this Court's order "* * * requiring the defendant Board of Education to enter into a contract of employment with plaintiff as a teacher, [or show cause why] defendant Board of Education should not enter into a contract with plaintiff." As exhibits attached to each pleading ("F" in the Backman Case; "D" in the Tanner Case) are letters from the superintendents of defendant Boards which inform each plaintiff that he is not employed for the 1953-54 school year.

Thus the court's assumption is contrary to facts pleaded by plaintiffs themselves. The opinion also states that the Attorney General agrees that plaintiffs had a "property right" in continued employment (second par., p. 3). This is contrary to the pleadings. Paragraph 4 of each answer denies the existence of such "rights." Counsel for defendants are disturbed at this reasoning employed by the opinion: that since an extraordinary action in this Court does not lie unless "rights" are in jeopardy, and since the propriety of this action was not contested, therefore the "rights" exist and are in jeopardy. Such a deductive process may yield invalid results, and has done so here. It was deemed appropriate not to raise jurisdictional objections in this case because of the administrative desirability

of getting an expression from this state's highest judicial authority on a problem of state-wide concern. No admission was intended to be made, or implied, as to the existence of "property rights" in present employment, and the pleadings so indicate.

The fact which emerges and which is of basic importance in view of the rationale of the prevailing opinion, is that at present in this state teachers enter a new, separate, different contract for each school year. This is clearly true upon the record here, and is so well known in the community as to be the subject of judicial knowledge. The truth of this is the more graphically indicated by the action of the special legislative session just concluded. The Legislature passed H. B. No. 12, First Special Session 1953, which when it takes effect will permit local boards to employ teachers for terms up to five years. This is a clear indication that heretofore the practice has been otherwise. It may be that after June 1954, some teachers in some districts will be in the position which the court assumes presently obtains as to plaintiffs. That, of course, depends upon future determinations by each board as to its policy. Plaintiffs, at this time, do not present such a case.

The court's erroneous factual interpretation led it into the error committed. What is involved is not a "right" to continued employment; what is at stake is simply plaintiffs' liberty to seek new employment. This means that, so far as this case is concerned, there is no basis for the distinction drawn by the prevailing opinion between retroactive applications of the statute (declared void), and its application to new employments (as to which the statute perhaps

can operate). In cases involving teachers in Utah schools, the retroactivity doctrine can have no bearing so long as the present system of one-year contracts obtains as the hiring method. The point above argued is important because large numbers of employees of the state and its subdivisions fit into many classifications as to method of hire, tenure, and so forth. It may be that defendants' counsel did not adequately bring to the court's attention the facts necessary for a correct decision. It would be unfortunate if, for that reasons, a large group of public employees should assume that they are immune from the statute only to discover one year hence, when they are not under contract, that the anti-nepotism statute still covers them. The court should face the difficult problem presented by the present one-year contracts under which teachers are employed, and adjudicate it.

POINT II.

THE PREVAILING OPINION ERRONEOUSLY INTERPRETS THE PURPOSE OF THE STATUTE INVOLVED, AND THEREFORE ARRIVES AT AN INCORRECT CONCLUSION AS TO ITS CONSTITUTIONALITY.

As defendants read the prevailing opinion, its rationale is as follows: private rights and liberties can be interfered with by police legislation if, but only if, (1) the legislation is directed at the cure of a "substantial evil" and (2) the evil is of comparatively greater magnitude than are such private rights or liberties. The epigram which is quoted — "It is unwise to burn a barn to get rid of a

mouse' " — reflects the theory of the opinion. Defendants urge, in this respect, first, that the theory is not correctly applied in this case; and second, that the theory is itself incorrect, being an over-reaching by the judiciary into a field of government which is legislative.

The reasoning of the opinion applies its theory to the facts in this fashion: the "evil" against which the statute is directed is the prevention of favoritism for unqualified relatives in public appointments. The next step is to conclude that since favoritism in hiring is not likely where teachers are concerned, the statute is without substantial effect in curing the evil. It follows, the opinion concludes, that in view of the gravity of the interference with the private rights of plaintiffs, and in view of the purposelessness of the statute, the enactment was beyond the legislative power as applied to these plaintiffs.

This reasoning is an elaborate restatement of the dictum of *State ex rel. Robinson v. Keefe*, 111 Fla. 701, 149 So. 638, which the opinion cites and quotes favorably. Defendants earnestly urge that the Florida case is theoretically incorrect, and that it holds possibilities which may thwart any anti-nepotism policy the state now has, or may hereafter adopt.

A close look at the reasoning of the Robinson case shows that its dictum is fallacious. The Florida court states that the statute involved was an "anti-nepotism" statute. The court then gives a dictionary definition of "nepotism" as the bestowal of political favor upon a relative because of kinship rather than merit. The court reasons that inasmuch

as the purpose of the statute is to discourage nepotism, it follows that, as to those whose qualifications are statutorily assured, an anti-nepotism statute is unnecessary and therefore unconstitutional.

This reasoning confuses labels with realities. Nothing in the Florida statute says anything about "nepotism". The statute before the court has nothing at all to do with qualifications of employees. What is prohibited is the employment of *any* relative, qualified or not. Throughout most states the declared legislative policy is the regulation or suppression, to some degree, of the practice of relatives working under relatives in public jobs. The existence of kinship ties is thought to be undesirable, as such, entirely aside from any consideration of whether the employee is qualified to do his job. This is true of every nepotism statute examined by counsel for defendants with the exception of the statute in effect in Montana. See secs. 59-518 to 59-520, Rev. Code of Montana 1947.

This is the fallacy of the Florida dictum. The purpose of nepotism statutes is to prohibit the employment of a relative even though he possesses the best possible qualifications for the job to be filled. Under the usual statute a public officer cannot, for example, employ his wife as his secretary, and her prize-winning ability at stenography would not change the effect of the law.

Thus viewed, nepotism statutes have been sustained. *Barton v. Alexander*, 27 Ida. 286, 148 P. 471. That the practice of nepotism is thought by many to be improper is all the more plain when it is considered that in a libel action

a charge of nepotism has been held libelous per se. *Palmerlee v. Nottage*, 119 Minn. 351, 138 N. W. 312 (charge of "favoritism, nepotism, and malfeasance in office"); *Houston Chronicle v. Wegner* (Tex., 1915) 182 S. W. 45. Its prohibition, should the Legislature deem it proper, is plainly within legislative power.

The important point, for this case, is that once the true purpose of anti-nepotism statutes is appreciated, plaintiffs' argument that teachers and other merit-rated employees are on such a plane as to be immune from the operation of an anti-nepotism statute, is without force.

The argument advanced above is theoretical, but it has practical importance in future legislation and enforcement. The Florida dictum opens a way by which any segment of public employees might avoid a general nepotism statute. Some branch could adopt a system of merit-hiring which would have to be met before an applicant could qualify for a job. The purported purpose of this system would be to assure qualified employees; the effect would be to immunize the employees of such a department from the operation of the general nepotism statute.

Defendants also urge the court that the theory here adopted of balancing harsh private effects of a statute as against its efficacy in suppressing "evil" goes rather beyond traditional limits which this court has in the past imposed upon itself. Decisions about what is wise are under our system left to legislative policy makers.

POINT III.

THE COURT ERRONEOUSLY HOLDS THAT PLAINTIFFS' RIGHTS IN PENSION FUNDS TO WHICH THEY HAVE CONTRIBUTED ARE SUCH THAT THEY CANNOT BE DISCHARGED.

It appears to defendants that the single point upon which a majority of the justices are agreed is that plaintiffs have rights in pension funds which cannot be interfered with by their removal, as this statute proposes to do. That is the burden of the Chief Justice's special concurrence. And mention is made of such rights in the prevailing opinion of Mr. Justice Crockett concurred in by Mr. Justice Wade (par. 2; p. 3).

A dilemma faces plaintiffs' argument here: if their rights in the retirement funds are "vested", they can demand delivery of money due. If the rights are not vested, then the statute does not impair their rights.

The general principles in the law of pension systems were settled in our Utah law. On retirement, the member's rights vest. *Newcomb v. Ogden City Public School Teachers' Ret. Commn.*, . . . U. . . ., 243 P. 2d 941. But prior to retirement, there is no right. *Hansen v. Public Employees' Ret. System.* . . . U. . . ., 246 P. 2d 591. These decisions make for protection of pensioners' rights and yet provide the flexibility which is requisite for continued actuarial improvement of retirement systems. Both rules are necessary. Experience has shown that improvement

is necessary to keep these valuable pension systems workable.

In this case two new steps are taken. The decision is that one has rights in the fund as soon as he contributes, and further, that such rights mean that he thereafter is assured a job because his rights cannot be interfered with. No case has gone so far. In the Hansen case, this court drew the limit so far as Utah law is concerned. And it may be observed that the Utah cases are as diligent as any in protecting the members of retirement systems. Many states are not as liberal. 54 A. L. R. 943; 98 id. 505; 112 id. 1009; and 137 id. 249. This decision is an extension beyond any case except *Kern v. City of Long Beach*, 29 Cal. 2d 848, 179 P. 2d 803, cited by the Chief Justice. The Kern case, decided upon its own peculiar hardship facts, has been disapproved in Utah by the Hansen case (246 P. 2d 591, at 596), and the Utah Supreme Court noted in the Hansen case that subsequent California decisions have discredited it at home, citing *Palaske v. City of Long Beach*, 1949, 93 Cal. App. 2d 120, 208 P. 2d 764; *Allstot v. City of Long Beach*, 104 Cal. App. 2d 441, 231 P. 2d 498; *Allen v. City of Long Beach*, 101 Cal. App. 2d 15, 224 P. 2d 792; and *Packer v. Board of Retirement*, 35 Cal. 2d 212, 217 P. 2d 660.

There is a further objection to the decision here. Whether or not plaintiffs possess rights in their pension funds is not a factor which should be permitted to determine that they cannot be removed from their jobs if the Legislature deems that necessary. A reading of the pension

cases in annotations shows that the cases are concerned with efforts of the employer to modify or abolish the pension system itself. No case goes to the extreme of holding that because an employee has contributed to a system he cannot thereafter be discharged, or that the qualifications for the job which he holds cannot be altered or raised. The notion is startling.

This holding of the court will be most difficult to apply in future cases. At the last special session the Legislature abolished the local retirement systems to which plaintiffs belonged. See S. B. No. 23, First Special Session 1953. Under the new law, which is now in effect, members may elect to withdraw contributions minus a two-year social security premium, or to remain as members of the state system, also drawing federal social security. See S. B. Nos. 22 and 23, First Special Session 1953. Under the new retirement law, the nepotism statute cannot be held responsible for the destruction of plaintiffs' rights in local funds; the local funds now do not even exist. The new retirement law has been in effect only three days at the time this brief is written, and the experience and accounting thereunder are not sufficiently advanced to give a definite statement as to plaintiffs' rights under it. It should be plain however that the present pension situation of plaintiffs is much more protected and advantageous than it was when the court's decision was handed down on this point. The effect of this change in the retirement laws upon the constitutionality of the nepotism statute is plainly a subject which requires a rehearing and a revision of the decision heretofore stated herein.

CONCLUSION

For the reasons stated above, defendants earnestly urge the court to reconsider the decision rendered. Plaintiffs had the initiative in bringing the lawsuits, and naturally chose two "hardship" cases. (That is of course entirely proper, and no criticism is meant by the mention of it). There is justification for pointing to the adage that "hard cases make bad law," and for urging that departure from proved rules of constitutional law may in time cause more trouble and litigation than this immediate result is worth. It is submitted that the reasoning of the dissenting opinions filed herein is inescapable.

Counsel for defendants confess to some puzzlement and concern as to the status of the statute at issue here. We are of course aware that the court cannot properly in this action decide the cases of all public employees affected by this statute. However, the divergence of the views of the justices does leave room to speculate as to the result of future litigation respecting the operation of this statute, even upon public employees whose situation is similar to that of plaintiffs. If the court can do so, it would be most desirable to have an expression of majority view as to future applications of the statute to teachers and other public employees. A rehearing is particularly appropriate now that the legislature has repealed the local retirement systems to which plaintiffs and many other teachers belonged. If defendants are correct in their belief that this point alone (membership in a local system) was what decided the cases for plaintiffs, and now is the holding of

the cases, the court should reconsider the cases in the light of new legislative developments which have occurred since the opinions were handed down. The cases should be re-argued and reversed.

Respectfully submitted,

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