

1980

Robert B. Hansen, Attorney General v. Utah State Retirement Board, Et al. : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT B. HANSEN,
Attorney General,

Plaintiff-Appellant,

-vs-

UTAH STATE RETIREMENT BOARD,
et al.,

Defendants-Respondents. :

:
:
:
:
:

Case No. 16851
(Consolidated with
Nos. 16714 and 16560)

BRIEF OF RETIREMENT RESPONDENTS

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT B. HANSEN,
Attorney General,

Plaintiff-Appellant,

-vs-

UTAH STATE RETIREMENT BOARD,
et al.,

Defendants-Respondents. :

Case No. 16851
(Consolidated with
Nos. 16714 and 16560)

BRIEF OF RESPONDENTS RETIREMENT BOARD AND RETIREMENT FUND

STATEMENT OF THE NATURE OF THE CASE

These Respondents assert that the nature of this case, contrary to the statement of the Appellants on this question, is the right, power, authority, and exercise thereof, of the State Legislature to create a trust which is not subject to the same restrictions or controls which are inherent in the general operation of government, where the purpose is a State wide administration, funded from general tax levies (the General Fund) and for the benefit of all citizens of the State, as opposed to a function or purpose of government where a segment, but substantially less than all of the State's citizens are beneficiaries, and the funding is from the trust res - not the General Fund. The authority of the Attorney General, both constitutionally, statutorily and common law, as to the first, is not in issue, but as to the trust, has been made so by the filing of the complaint in this proceeding by Appellant.

DISPOSITION IN LOWER COURT

The Retirement Respondents take no issue with the statement as to disposition as made by Appellants as it relates to them, except to note that they asked for affirmative relief which was also granted; and otherwise adopts the same.

RELIEF SOUGHT ON APPEAL

Retirement Respondents (Board and Fund) respectfully request this Court to sustain the judgment of the lower Court in all particulars as it relates to them.

STATEMENT OF FACTS

This action was commenced by Appellant as a condition imposed by a sub-committee of the Utah Legislature and urged by the Legislative Analyst's Office in approving the Attorney General's budget in 1979. Appellant had previously issued a formal opinion (78-007) (R-284-289), holding that the Retirement Fund was not a "State fund" but a public trust fund, and that as such, the fiduciary responsibilities of the Retirement Board ". . . would be in conflict with control exercised by the State auditor or other public official" (emphasis added). Subsequently, inquiry was made by the Appellant, the Attorney General, as to the propriety of that office subsidizing these Respondents by providing unreimbursed legal services from the General Fund. As a result thereof, a contract dated November 22, 1978 was negotiated by Appellant with the Retirement Board and executed by those parties and by the Board of Examiners for the State of Utah. (R-39-41).

The facts relative to the filing of the suit and the actions of the lower court, as presented by Appellant, are essentially correct and not in dispute, except that other statutes than those cited and quoted by Appellant are involved, as will be demonstrated hereinafter, both as to the issue raised by Appellant and the affirmative relief sought by these Respondents.

A R G U M E N T

POINT I

THE LEGISLATURE OF THIS STATE HAS AUTHORITY
TO CREATE A PUBLIC TRUST SUBJECT TO TRUST
LAW AS DISTINGUISHED FROM AN OPERATING ARM
OF GOVERNMENT AND HAS DONE SO IN THE CASE
OF THE RETIREMENT RESPONDENTS.

It is respectfully submitted that the entire argument of Appellant, as it appears in his brief, is founded upon an erroneous assumption, i.e.,: that any creature of the legislature must of necessity be co-extensive with the State and its citizens, subject to political control by each of the three independent branches of government, funded strictly from tax levies, and devoid of any and all authority to act or function independently as a public trust subject only to the terms of the trust and trust law. For purposes of this POINT we will assume the constitutional points raised by Appellant are legally correct as applied to such legislative creatures. Indeed, we agree for purposes of this argument, that political entities funded from General Fund appropriations, charged with the duty of operating in the direct interest of all of the State's citizens and performing an historical function of government, is constitutionally, if not statutorily, subject to legal direction from the

Attorney General. Again, for the purpose of this POINT only, it may be conceded that Hansen v. Legal Services Committees of the Utah Legislature, 429 P.2d 979, though on its face limiting "State Officers" over whom the Attorney General has direct authority to those named in Article XXIV, Section 12 of the Utah Constitution, should not be so narrowly construed, and that others may be deemed to be "State Officers." Nothing in that case, in the Utah Constitution, in the statutes, or in any other case decided by this Honorable Court, to the knowledge of the Respondent, prohibits the formation of a public trust whose principals are "trustees," whose beneficiaries are a body substantially less than or different from the State's citizens at large, and whose authority and responsibility is to be found within general trust laws as a "trust fund" and/or a "common trust fund," (49-9-10; 49-10-8; 49-11-10; 49-6a-6; 49-7a-5 and 8) (all statutory references herein are to U.C.A., 1953, as amended) and the statutes creating the trust.

Each of the statutes referenced immediately hereinabove purports to create a "trust fund" or a "common trust fund" and designate the Retirement Board as "trustees." It should be self evident that except as provided in the enabling legislation, these funds and this Board cannot be both "trust funds" and "State funds," and "trustees," and politically controlled "State officers." These terms are mutually exclusive. The inherent conflict in the fiduciary mandate that the Retirement Board invest the funds ". . . to insure the greatest return commensurate with sound financing adequately safeguarded" (49-9-11), and political control by any arm of government is so obvious that the enabling legislation has

exempted the trustees from the control of the board of examiners [49-9-12(2)]. It is difficult to conceive of a more clear cut recognition of the trust and trustee status of these Respondents in light of the legislative and legal interpretations of this Court mandating board of examiners authority where general fund monies were involved, (Bateman v. Board of Examiners, 322 P2 381). To equate these entities with "State officers" and these funds as "State funds" in light of this exemption, is to ignore reality and operate in the fictional world of fantasy or the prejudicial world of pre-conceived notions. It simply cannot be realistically argued that this is just another political arm of government. The statutory distinctions are numerous.

If the employees of the Retirement Board were deemed to be State employees, a specific provision authorizing such employees to be eligible for coverage under the system would be redundant. We are unaware of any "agency" or general fund supported element of State government where it was deemed necessary to specifically provide that "Employees of (that office) itself shall be entitled to membership . . ." [49-10-12(c)], in one of the State retirement systems. Indeed, the previous paragraphs of section 12, cited hereinabove, would mandate their coverage if the assumption of Appellant were correct. Read in the light of general rules of statutory construction, requiring meaning to be given to all of a statute where reasonably possible, and against redundancy (Peay v. Board of Education, 377 P2 490, Metropolitan Water District v. Salt Lake City, 380 P2 721), it is abundantly clear that the legislature recognized that it was creating a trust and not a standard political agency of government.

Further, the Retirement Board is not the administrator of a single system, but rather four separate systems with their own statutory base, distinct qualification standards, contribution rates, withdrawal rights on termination and pension benefits. (49-10; 49-7a; 49-6a; 49-11) Each of these acts mandate that the fund be used solely to provide death, disability, and/or pension benefits for its beneficiaries. Consistent therewith, the legislature has required that each fund pay its own costs of administering the act, specifically mandating that legal fees ". . . shall be paid directly from the respective fund involved (49-9-5). How are the trustees to comply with this mandate if all such fees and expenses are to be provided by the general fund supported office of the Appellant, Attorney General? Since each fund is separate, its employer and employee contribution rate is different, as well as the benefits and other noted particulars, how can trustees invade, for example, the judicial trust fund to pay expenses incurred in litigating the issue of firemen's withdrawal rights? (Bryson, et al. v. Utah State Retirement Office, 573 P2 1280) Clearly, the requirement for apportionment of general administrative costs and the direct attribution of "special costs," specifically noting "legal fees," where taken together with the retirement legislation in general, establish that the legislature did, in fact, create an entity separate and distinct from general fund units.

The provision of 49-9-5, with reference to funding of administrative costs, aside from the specific area noted above, are enlightening in this regard. The final sentences of that section reads:

Since the administrative funds are derived from the systems and programs administered by the retirement office, rather than an administrative appropriation from the general fund, any balance in the administrative fund at the end of a fiscal or biennial period shall remain in said fund, but shall be taken into consideration in preparing a subsequent budget recommendation.

In light of the foregoing some very serious constitutional questions, much more far reaching than those referred to by Appellant, are raised if, notwithstanding the whole statutory scheme and in direct derogation thereof, general funds are expended to support the functions and interest of a group of the State's citizens, much less than the whole. Clearly the legislature intended the various retirement funds to be entirely self-supporting, and it is difficult to detect any constitutional problems so long as this intent is honored.

Another clear distinction between these Respondents and general fund government entities is the authority specifically granted to the Board (49-9-4), to establish the compensation of the director. We have been unable to locate statutory authority for any of such entities so to do. On the contrary this authority appears to reside in the board of examiners and compensation of agency heads derives from the State pay schedule approved by that board and recommended by personnel and perhaps finance. Again, this is consistent with the trust and trustee relationship of the fund and funds and the Retirement Board. Indeed, the authority generally to hire ". . . actuaries, attorneys, medical examiners, investment counselors, accountants and such clerical and other assistants

as may be necessary . . ." appears unique to the retirement office, and generally to recognize the trust and fiduciary relationship since such authority is inherent in the law of trusts and for all practical purposes nonexistent in general fund governmental agencies. The latter operates on established numbers or head count authorization, and are not directly related, in any way, to funds or budget availability.

A cursory reading of the several retirement acts, including the office act (Chapter 9) clearly demonstrates that the legislature of this State did not intend to create or maintain a retirement system or systems patterned after the federal social security system which is not and has not been a trust fund, is not actuarially funded, and which has served historically as a large pool of money into which politicians could can and do dip freely without trustee accountability to the contributors. If the Appellant is to prevail herein, the result will inevitably be a judicially imposed system closely akin to the social security operation. This is so because if the Appellant, as Attorney General, is entitled to insist on political representation of the retirement board, then his own opinion (op cit.) that the fund is not a "State fund," but a "trust" fund, must be reversed, and the legislature deemed to be at liberty to appropriate from the several funds or the combined fund for whatever general State purpose it deems desirable. In such case it is obvious that the Board cannot be held to the requirement of the law (49-9-3), that it maintain actuarial soundness of the funds. It is significant that a legislative sub committee has considered doing just that

(R-282-283), but did not pursue the matter when informed of the trust nature of the funds and the prohibition against transfer or appropriation ". . . for any purpose other than that permitted by this act or the acts covering the individual participating funds" (49-9-10).

Since the Attorney General has formally ruled (78-007, op cit.) that the Retirement fund is not a public or State fund, the Supreme Court ruling in Chez v. Industrial Commission, 62 P2 549, and Gronning v. Smart, 567 P2 698, to the effect that the State Insurance Fund, as a trust fund, was not an arm of the State, are highly persuasive, if not controlling in this case. This apparent inconsistency is only reconciled when the factual background for this case, as heretofore noted, is recalled.

Appellant has cited no law, constitutional, statutory or otherwise, and made no argument relative to the authority or prerogative of the legislature to create a public trust and to designate trustees of that trust. While it appears that he has assumed a prohibition, no authority is cited for that assumption, and all of the law which we have studied is to the contrary. We thus conclude that Appellant has missed the real issue of the case and will deal in subsequent points with trustee powers and prerogatives as well as statutory and constitutional interpretation.

POINT II

TRUSTEES, AS FIDUCIARIES, MAY NOT BE
SUBJECTED TO POLITICAL OR OTHER DIRECTION
IN THE HIRING OR DISCHARGE OF PERSONNEL
OR THE PERFORMANCE OF THEIR TRUST DUTIES
GENERALLY.

Control of trustees may not be exercised except in the trust document creating the trust - in this case, the statutes creating the systems, the funds, and the Board (Second Restatement of Trusts § 186). It is clear that those powers conferred on trustees by specific language, as clearly appears in the statutes heretofore cited, and such as are necessary or appropriate to carry out the purpose of the trust, are, and must be held inviolate, where trustees are to be held responsible as fiduciaries for the management of a trust or trusts. To state the proposition is to answer the question raised by the parties in this proceeding. Either the members of the Retirement Board are trustees, entitled to exercise all of the powers and duties specifically conferred by the trust document--the statutes--and those necessary and appropriate to the trust, or they are political creatures directly subject to the control and manipulation of political entities, and hence, not subject to fiduciary responsibilities and liabilities. They cannot, reasonably, be held to both since to do so would be to render them liable for actions mandated by political heads over which they had no independent control. Either the statutes creating "trust funds" and the Defendant, Retirement Board "trustees," are in full force and effect, or they are a sham. No political entity may dictate to trustees who they may hire and at what rates they are to be compensated, if the trustees are to be held answerable for the management of the trust.

It is respectfully suggested that under the laws of this State respecting trusts, trustees and fiduciaries, the Court is without jurisdiction to interfere with the powers conferred upon the Retirement Board as sought by Appellant herein. It is clear from the Second Restatement of Trusts § 187, which follows the common law and is the general rule today, that powers conferred by the trust document are not subject to judicial control. That section states:

Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.

(e) If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of reasonable judgment. The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not sufficient reason for interfering with the exercise of the power by the trustee.

The Appellant has not asserted that the Retirement Board, as trustees have abused their discretion.

Case law supports the retirement position cited above. The case of In re Jacks Estate, 182 P.2d 605, held that where a trust instrument conferred discretion on trustees, the exercise of that power by the trustees could not be interfered with by the courts, even if a court

would have exercised the trustee power differently in the absence of a showing that the trustees acted dishonestly or from an improper motive, or acted beyond the bounds of reasonable judgment. To the same effect is Geron v. Kennedy, 112 A.2d 181.

It is respectfully submitted that even a legislative mandate to the retirement board in the trust document--the hiring of designated personnel, such as the Appellant--would be merely advisory, and not mandatory--if that board is one of trusteeship and not merely an "agency" of the state. [Restatement of Trusts, § 126(6)]. It is stated that a lawyer designated as attorney to the trustees cannot compel the trustees to employ him nor hold the trustees liable for damages for failure to employ him. Thus, even a direction to employ a specific person (the Attorney General) as counsel to the retirement board would not be enforceable since it would interfere with the proper administration of the trust, if that board--as trustees--were required to accept the advice of counsel not selected by, nor acceptable to them since the relationship of trustees to a trust is highly fiduciary in character.

It has been held that to enforce any direction to hire personnel upon trustees is against public policy. In re Lachmund's Estate, 170 P.2d 748, when the court held that a provision directing appointment of a named attorney was merely advisory and against public policy. To the same effect is Amalgamated Transit Union v. The Dallas Public Transit Board, 430 S.W.2d 120, where, among several other matters, the Dallas City Council sought to enforce by ordinance the representation of the City Attorney in all legal matters involving the Transit Pension Fund.

The court held such ordinance to be illegal and against public policy. A series of cases and authorities are in agreement (First Amden National Bank and Trust Company v. Broadbent, 168 A.2d 43; Carton v. Borden, 85 A.2d 257; 2 Scott, Trust - 2d ed. § 126.3). The authorities for the proposition here presented are too numerous to catalog further, but we submit that the law of trusts and trustees is clearly established in this State.

None of the foregoing should be interpreted to mean that, as trustees, the Retirement Board is immune from accountability. On the contrary the level of accountability is much higher as to trustees and fiduciaries than that required of political department heads. Thus, those provisions of the act mandating submission of a fiscal year budget ". . . to the governor and the legislature for their examination and approval," both as a condition or term of the trust, and as a general trust duty is unquestioned. As a matter of practice, interim reports on both fiscal and other matters are being made to legislative subcommittees on an ongoing basis, and is not considered to be in any manner negation of trust prerogatives, but on the contrary, a clear duty of the board and the executive director as trustees. Only in trust management, including hiring of personnel, establishment of compensation and general decisions deemed significant by the board and its executive director in the discharge of its fiduciary responsibility for the several trust funds is it asserted that no political or other outside control can be imposed so long as the trustees function within the

terms of the trust or trusts (the several acts), pursuant to the general law of trust, trustee-fiduciary responsibility, and within the bounds of sound discretion. Since the specific terms of the acts as heretofore noted grant this authority to these Respondents, it appears that no possible question can be reasonably raised thereupon unless some constitutional prohibition were found to be directly stated. As noted in POINT I, such a finding must, we respectfully urge, prohibit the establishment of a public trust in any form. No such prohibition exists in the Utah Constitution.

POINT III

NO CONSTITUTIONAL PROVISION--STATUTE--
OR RULE OF LAW EXISTS REQUIRING ATTORNEY
GENERAL REPRESENTATION OF A PUBLIC TRUST.

As cited by Appellant in his brief, Article VII, Section 18 of the Constitution of Utah renders the Attorney General legal advisor of State Officers. While in a general way it may be conceded that "State officers" may constitute a larger body than that specified in Article XXIV, Section 12, it can scarcely be interpreted as including all persons who are responsible for administration of a body which in any manner effectuates a public purpose. Specifically, it can scarcely be reasonably interpreted to include the officers of a fund which Appellant himself has ruled is not a "State fund" (78-007, op cit.).

It is respectfully urged that this Court need not reach the question as to whether or not entities other than those specified in Article XXIV, section 12, are "State officers," and thus, re-examine

Hansen (op cit.) since the cases and authorities cited by Appellant and his argument, on their face would exclude these Respondents. On page 11 of his brief, Appellant argues that the Attorney General's responsibility ". . . is ultimately to those who elect him . . ." The class of beneficiaries of the retirement trust funds is substantially different than "those who elect him." Acknowledging that this Court has determined that the Attorney General has common law powers in this State, the authority cited by Appellant on page 12 of his brief, as quoted by Appellant, acknowledges that this power may be--as in this case it clearly has been-- "restricted or modified by statute." Again, on page 14, the New Jersey authority cited, restricts Attorney General representation of a State agency in the face of contrary legislation.

On page 15 of Appellant's brief it is argued that the attorney general has power ". . . to proceed against public officers to require them to perform duties which they owe to the public in general . . ." We agree--but, therein lies the very point in issue, acknowledged by Appellant, but apparently unperceived. These Respondents not only do not represent--nor may they--the interests of the "public in general" but, on the contrary, represent a considerably smaller group, whose interests may, indeed be adverse to the public in general. The beneficiaries of the several retirement trust funds have unique differences as between themselves and their general interests are in no way identical to those of the public at large. Indeed, something over 80% of the beneficiaries of these trusts are not State employees, but, are employees of political

subdivisions whose interests can in no way be equated with those of the public at large. One system--the Firemen--have no State employees at all.

Further, notwithstanding the assertion emphasized by Appellant in his brief on page 19, the question is not the same. Not a single case cited by Appellant deals with a public trust. Indeed, we believe this present matter to be clearly one of first impression in this jurisdiction. The attempt to lump these Respondents with the other cases which are distinguishable on their face proves the paucity of law on the real question at issue.

To acquiesce in the position urged by Appellant on page 44 and 45 of its brief and hold that these Respondents may employ professionals, particularly including attorneys for ". . . in house administration or proprietary actions . . ." is to do a useless thing. How does an attorney function except to do legal work which Appellant would prohibit? True, some attorneys accept positions which are not law related, but when they do so, it is not pursuant to an authority which authorizes employment of "attorneys." It is clear that the authorization of these Respondents to employ attorneys contemplate that they will do legal work since their "legal fees," as heretofore noted are to be apportioned to the fund for whose interest they were incurred.

Further, the Texas liquor case cited by Appellant on page 44, favors the position of these Respondents since it defines a State officer as ". . . one whose jurisdiction, duties, and functions are co-extensive with the State . . ." As we have pointed out herein, and as we believe

is abundantly clear to this Court, the jurisdiction, duties and functions of these Respondents are in no way "co-extensive with the State." The Retirement Board, as trustees,, serves the public interest since, as declared by the legislature itself, it is found that it effects "... economy and efficiency in the public service . . ." However, an attempt to equate this with the definition of State officer as provided by Appellant is futile.

We believe Appellant has far over stated the consequences of sustaining the judgment of the lower court as it relates to these parties when he asserts at page 46 that it would result in ". . . authority to designate legal counsel for any of the Executive Branch of Government ..." Appellant adamantly refuses to acknowledge the unique character of these Respondents as trusts and trustees--hence not directly equatable with State officers generally.

POINT IV

CONTINUING AND CURRENT LEGISLATION AND EXECUTIVE ACTION RECOGNIZES THE TRUST AND TRUSTEE NATURE OF THE RETIREMENT FUNDS AND THE BOARD.

In the recent legislative session the Utah Legislature passed two bills which are particularly significant in light of the existence of this litigation and its status at the time, of which they were made fully aware. In an ongoing program of requiring various entities to provide funding from individual general fund budgets, Senate Bill 54 was introduced which would have required the department of finance to "withhold" from the Board budget such sums as were deemed necessary to

reimburse the State for general fund services. It was pointed out that the fund was a trust fund over which no custody or control was exercised by finance and the Bill was amended by its sponsor to simply provide that the Board would pay from its funds for all services acquired from general fund agencies. Thus, the legislature clearly recognized the distinctive nature of these Respondents and reaffirmed its intent. This is even more significant in light of the other bill passed by the legislature.

In his formal opinion 78-007 (op cit.) Appellant noted that although under Oregon law the State Treasurer was named as custodian of the retirement fund, in Spraug v. Straub, 451 P2 49, the high court of that State specifically noted that this did not render the fund a State fund since another entity could have been named as custodian. It is therefore, somewhat significant that the statutes of this State, until the last legislative session provided: "the State treasurer shall serve without charge as custodian of the fund or funds." (49-9-11) Consistent with legislative intent to make all expenses, including those specified particularly in the several retirement statutes, to which reference has been made herein, and all other operational and administration costs; and with the trust--trustee--fiduciary nature of the funds, that legislative session amended the law (House Bill 47) to give the Retirement Board full custodial responsibility for the fund or funds.

In light of the designation of each fund as a trust fund, or a common trust fund, the designation of the Retirement Board as trustees, the exemption of the Board from board of examiner approval, the grant

of specific powers and authority considerably in excess of that given to general "State agencies" and "State officers"; (all as heretofore cited from the law) the exemption of the fund or funds from the Money Management Act (51-7-4), the fact that a substantial majority (80%) of the beneficiaries are not State employees, and the general purpose and objectives apparent in all five retirement acts, all of these demonstrate that the statutes cited by Appellant designating the retirement office as ". . . an independent State agency . . ." was not intended to make its officers "State officers" in the constitutional sense as urged by the Appellant in his representative capacity, nor to negate all of the specific grants, inherent in State officer status. When read in para materia all of these provisions, including particularly the constitutional ones, can be given meaning without declaring any of them void or unconstitutional. The historical background of the several retirement acts and the continuing legislative action all serve to demonstrate that it was not the intent and is not the intent of the legislature to render the retirement fund or funds State funds, nor its officers, State officers. Since there is no constitutional provision prohibiting the legislature from creating trust funds, and designating the administrators thereof trustees, the constitutional language relative to "State officers," is simply not applicable when the legislature so clearly acts to create a trust and trustees, and to exempt them from controls common to "State officers."

In compliance with the legislative mandate and the clear intent that no general fund money is to be spent for the benefit of the several trusts administered by the Retirement Board, additional contracts have

been negotiated with the State Auditor, personnel and finance, copies of which are attached hereto as informational addenda. Considering the specific mandate of recent legislative action as noted in this POINT, any question of Retirement Board authority to pay for legal services by reason of prior legislation, if it be generally interpreted as prohibitive, is moot under established rule of legislative construction giving precedence to the later enactment where statutes may be interpreted as in conflict. The Retirement Board is required, under Senate Bill 54, to pay from its funds for "(a)ny general services provided . . . from general fund operations . . ." the contract at issue here between the Appellant and these Respondents, and those appearing in the addendum attached hereto all implement this legislative intent and, as heretofore noted, do not in any way violate constitutional requirements. All of these actions have been taken with full prior knowledge of the Governor and the other members of the board of examiners and with the Governor's specific approval and recommendation.

C O N C L U S I O N

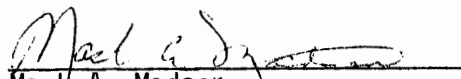
In the interest of lawful, efficient administration of designated trust accounts; in compliance with constitutional requirements; in implementation of legislative intent demonstrated over a period of almost twenty years; pursuant to executive approval, particularly including Appellant himself (by formal opinion and execution of a contract implementing it); and based on common sense - - these Respondents are entitled to all of the relief sought in their pleadings and granted by

the lower court. To hold otherwise is to render the various retirement funds wholly available for political appropriation and use and effectually to "disinherit" the public employees who now have vested rights in actuarially sound funds, but then must look to the benevolence of government. Further, the funds contributed both by the employers and the employees of units of government other than the State would be effectively confiscated by the State . . . as well as those of State employees. It is respectfully urged that this Honorable Court sustain in full the judgment of the lower court, thus preserving the retirement funds as trust funds, the Board as trustees and fiduciaries with the accountability this entails, and the beneficiaries reasonably secure in their mandatory contributions.

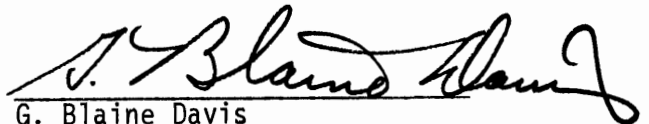
Dated this _____ day of May 1980.

Respectfully submitted,

ROBERT B. HANSEN
ATTORNEY GENERAL



Mark A. Madsen
Assistant Attorney General
Counsel for Respondents



G. Blaine Davis
Attorney at Law
Counsel for Respondents

ADDENDUM--

AGREEMENT

This Agreement made and entered into this 20th day of February, 1980, by and between the State of Utah, through Richard G. Jensen, Auditor, hereinafter referred to as "THE AUDITOR," and Bert D. Hunsaker, for and in behalf of the Utah State Retirement Board, as its Executive Director, hereinafter referred to as "THE BOARD."

WITNESSETH

WHEREAS, the Board, through its Executive Director, has authority as a quasi State agency to hire auditors (49-9-5(9), U.C.A. 1953, as amended); and,

WHEREAS, the Attorney General has heretofore determined that the Retirement Fund is not a State fund or public fund, but is a trust fund subject to administration by the Board for the exclusive benefit of the beneficiaries thereof; and,

WHEREAS, by reason of the foregoing, it has been determined by the Attorney General and by the Board that the General Fund of the State of Utah should not be responsible for the auditing services deemed necessary and essential to the Board, but that the Retirement Fund should assume full responsibility for expenses of auditing service; and,

WHEREAS, the Board is willing to contract for said auditing services with the Auditor within the limitations of law and the particular needs of the Board; and,

WHEREAS, the parties are therefore desirous of specifying a mutually satisfactory arrangement to achieve the mutual objectives of the parties;

NOW, THEREFORE, it is hereby agreed by and between the parties, in consideration of the premises and the several covenants and agreements hereinafter to be mutually and individually kept by the respective parties:

1. The Auditor shall, in an independent and professional manner and in accordance with generally accepted auditing standards, examine the financial statements and records of the Retirement Office for the period July 1, 1978, to December 31, 1979, and shall issue a report to the Board on that examination. In addition, the Auditor shall furnish to the Board a comprehensive management letter setting forth comments and recommendations generated during the course of said examination.

2. If, during the course of the audit, the Auditor shall find responsible indication of defalcation or other irregularities, he shall promptly inform the Executive Director of the Board or another responsible official of the Retirement Office of said indication of defalcation or other irregularities.

3. The Retirement Office shall furnish the following to the auditors upon proper and timely notice:

(a) All financial records, books of account, supporting documents, and other related records for and related to the period being audited.

(b) As requested and as practical--copies of minutes of meetings of all administrative boards or committees, policy directives, agreements, contracts, leases, budgets, laws and other pertinent documents or data relating to the Retirement Office and such other information as may be required and deemed necessary to complete the audit as indicated in Section 1.

(c) Adequate working space and other facilities for conducting the audit.

4. It is understood and agreed that the fees for the services of the Auditor set forth in paragraph 1 above shall, therefore, be computed according to the following schedule of hourly rates:

State Auditor and Chief Audit Manager	\$23.38
Managers	16.00 - 18.00
Seniors	12.00 - 15.00
Staff	8.00 - 11.00
Clerical	5.00 - 7.00

Reasonable expenses including, but not limited to, travel, typing, postage, printing, etc., shall be billed to the Board by the Auditor.

5. It is recognized that while there are certain training aspects of this audit which are important to the Auditor, the needs, requirements, and economies of the audit require substantial continuity of staff. In order to establish and maintain such continuity, the Auditor will permit only minimum personnel changes, and the audit manager and senior shall be assigned for the full period of the audit insofar as possible. Other necessary changes will be discussed with the Executive Director of the Board in advance, recognizing that the Executive Director's interest is solely the timely, efficient, effective and professional completion of the audit in the interest of the Board and for no other purpose.

6. The Auditor shall exert every effort to perform the services indicated in this agreement for not more than \$27,500. The Auditor further agrees to notify the Board, through its Executive Director, when the amount expended under this agreement has reached 75% of the total, if at that time or at any earlier time it is evident that the total cost will exceed \$27,500. Such notification shall include a statement of reasons why the Auditor will be unable to complete the audit for the sum of \$27,500, and a statement of the additional amount necessary to complete the services. It is understood that the amount payable pursuant to this paragraph of this agreement shall at that time be subject to revision pursuant to a mutually agreed upon amendment, but that in no event shall the amount payable exceed \$27,500, in the absence of a written amendment to the contrary.

7. Payment will be made to the Auditor by the Board upon receipt of the Auditor's itemized statement which shall include the actual hours worked, broken down by categories as indicated in paragraph 4, and other reasonable and definable expenses. Such payments are to be paid by the 15th of the month following performance and submittal of itemized statements.

8. It is expressly understood and agreed by both parties to this agreement, that in no event will the amounts be paid to the Auditor under this agreement exceed the rate and commission made a part of the agreement or contract.

9. In the event it is determined by the Board that additional audit is necessary or desirable for any reason, the Board retains authority to contract for the same with others as it is deemed in the Board's best interest.

10. Recognizing the political nature of the office of the State Auditor, the parties understand that there is pending before the Federal Congress, a Public Employees Retirement Income Security Act (PERISA) which, if passed by the Federal Congress, may in some measure affect the validity of this contract. In the event of passage of such Act, and the determination by the Attorney General that the audit proposed here is for any reason not acceptable, the parties agree to a rescission without obligation for further services on the part of either party or the payment for services rendered after such determination.

11. By reason of the nature of the retirement funds as an investment, it is recognized by the parties that confidentiality must be maintained. It is recognized that this audit is and shall be the property of the Board, and that at no point, either during or after the completion of the audit, will information concerning that audit be provided to third parties, except as previously agreed upon by the Board and the Auditor. In this connection, it is understood that the individual auditors involved in the audit, pursuant to this agreement, shall refrain from discussion of any aspect of the audit, except among themselves or when making a report to the Executive Director of the Board. The copies of the audit report that the Auditor retains shall be marked "confidential" and maintained in such a manner as to exclude the information from coming to the attention of third persons not involved in the audit or otherwise approved by the Board or by law to possess the information contained therein.

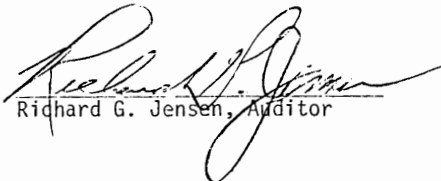
12. This agreement constitutes the sole and complete understanding between the parties, and there exists no other written document or oral commitments pertaining to the subject matter hereof, except as specifically provided herein.

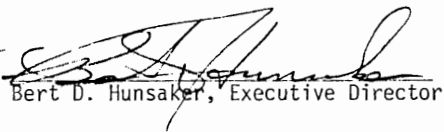
13. This agreement shall be binding upon the parties and their official successors.

IN WITNESS WHEREOF, the parties have hereunto affixed their respective authorized signatures this 20th day of February, 1980.

STATE AUDITOR'S OFFICE;

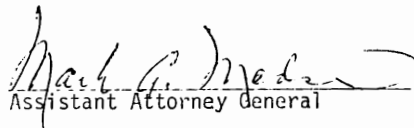
UTAH STATE RETIREMENT BOARD:


Richard G. Jensen, Auditor


Bert D. Hunsaker, Executive Director

APPROVED AS TO FORM:

Robert B. Hansen, Attorney General


Assistant Attorney General

SERVICE CONTRACT

THIS AGREEMENT, entered into this _____ day of _____, 1980, by and between the Utah State Retirement Board, hereinafter the BOARD, and the Utah State Office of Personnel Management, hereinafter, PERSONNEL.

RECITALS

It having been legislatively, legally and judicially determined that the BOARD, in its trustee and fiduciary capacity, is required to act solely in the interest of the beneficiaries of the respective trusts over which it has jurisdiction; and,

The BOARD is required to pay from its funds all expenses incurred and services provided from State General Fund and General Fund agencies; and,

Certain services are desired by the BOARD from PERSONNEL, and the latter is willing and able to provide the service hereinafter specified to the BOARD.

AGREEMENT

In consideration of the RECITALS and of the covenants hereinafter to be kept and honored by each of the parties, it is AGREED:

1. PERSONNEL WILL screen and provide to the BOARD a list of qualified job applicants (consistent with its general practice) for positions requested by the BOARD from time to time. It is contemplated that clerical and secretarial positions will generally be requested by the BOARD.

2. The BOARD may request PERSONNEL to assist in locating and qualifying personnel for professional and investment positions.

3. Classification and training may be requested from time-to-time by the BOARD and PERSONNEL will provide such services as services are requested.

4. The BOARD will compensate PERSONNEL as follows:

- a. For employees hired whose annual salary will be from \$6,000 to \$10,000 - 4% of beginning salary;
- b. For employees hired whose annual salary will be from \$10,000 to \$20,000 - 7% of beginning salary;
- c. For employees hired whose annual salary will be from \$20,000 to \$30,000 - 9 1/2% of beginning salary;
- d. For those employees hired whose annual salary will be \$30,000 and over - \$3,000.00 only.
- e. For classification, \$15 per person or position classified.
- f. For training, \$3-\$5 per person per hour.

The parties intend that PERSONNEL shall be compensated in full for any service rendered to the BOARD and, in the event the foregoing schedule proves inadequate to this end, the BOARD will honor any itemized statement even though it exceeds the foregoing estimated schedule.

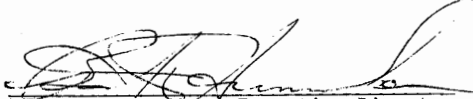
5. PERSONNEL agrees to initiate such procedures as are necessary to see that employees hired by the BOARD are fully processed into the payroll system.

6. The above payment shall include all costs incurred by PERSONNEL in finding a qualified job applicant.

7. It is understood that the services of PERSONNEL are not exclusive and the BOARD may acquire assistance of others or utilize its own or other resources to fill any position, clerical, professional, investment, or otherwise. In such event, the BOARD will compensate PERSONNEL for any expenditures made or expenses incurred until the time at which the latter is notified that the position has been filled.

OFFICE OF PERSONNEL MANAGEMENT

UTAH STATE RETIREMENT BOARD


Bert D. Hunsaker, Executive Director

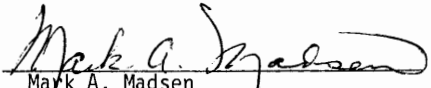
APPROVED AS TO FORM:

ROBERT B. HANSEN
Attorney General

By _____
Assistant Attorney General

APPROVED AS TO FORM:

ROBERT B. HANSEN
Attorney General

By 
Mark A. Madsen
Assistant Attorney General
Board Attorney

DEPARTMENT OF FINANCE:

Dale D. Williams
Director

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief to William Gibbs, Bernard M. Tanner, 236 State Capitol, Salt Lake City, Utah 84114, William T. Evans, 25 South Wolcott, Salt Lake City, UT 84112, Robert Moore, 10 Broadway Building, No. 400, Salt Lake City, UT 84101, Merlin Lybbert, 701 Continental Bank Building, Salt Lake City, UT 84101, Frank V. Nelson, 236 State Capitol, Salt Lake City, UT 84114, this 13th day of May 1980.

