

1980

Robert B. Hansen, Attorney General v. Utah State Retirement Board, Et al. : Respondent University Medical Center Trust Fund, First Security Bank of Utah, Trustee : Brief of Respondent University Medical Center Trust Fund, First Security Bank of Utah, Trustee

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

- - - - -

ROBERT B. HANSEN,
Attorney General,

Plaintiff-Appellant,

vs.

Case Nos. 16851
16714
16560

UTAH STATE RETIREMENT
BOARD, et al.,

Defendants-Respondents.

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BRIEF OF RESPONDENT
UNIVERSITY MEDICAL CENTER TRUST FUND,
FIRST SECURITY BANK OF UTAH, TRUSTEE

- - - - -

Appeal from the Decision of the Third Judicial
District Court for Salt Lake County, State of Utah
The Honorable Christine M. Durham, and
The Honorable Homer F. Wilkinson

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Thiokol Chemical Corp. v. Peterson,
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BRIEF OF RESPONDENT
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FIRST SECURITY BANK OF UTAH, TRUSTEE

STATEMENT OF NATURE OF CASE

This is a lawsuit filed by the Attorney General of the State of Utah against various state agencies and First Security Bank as Trustee for the University of Utah Medical Center Trust Fund, claiming that each of these entities has retained legal counsel and that such action improperly usurps the constitutional and statutory duties and functions of the Attorney General.

DISPOSITION IN LOWER COURT

On four different occasions, two trial court judges (Judge Christine Durham and Judge Homer F. Wilkinson) granted summary judgments to the defendants. Plaintiff appeals from these four orders. The appeals have been consolidated.

RELIEF SOUGHT ON APPEAL

The University Medical Center Trust Fund, First Security Bank of Utah, Trustee, seeks affirmance of Judge Christine Durham's Order of June 5, 1979, granting summary judgment.

FACTS

The University of Utah Medical Center (hereinafter "Hospital"), is a health care institution of the State of Utah. It is a "governmental entity" as that term is defined in the Utah Governmental Immunity Act. Utah Code Ann. §63-30-2(1) (1977). It is funded through receipts from patient care and federal sources (primarily Medicare). The Medical Center also provides educational services to the University of Utah, and to the extent of these services, funding is provided by the State of Utah.

On July 21, 1977, the University on behalf of the Hospital entered into an agreement with First Security Bank of

Utah, N.A. (hereinafter "Bank") as Trustee for the administration of a trust fund for the purpose of self-insuring against malpractice and other casualty claims. The Trust is funded by receipts from patients and Medicare based upon actuarial figures independently researched and evaluated. No State appropriated funds are placed into the Trust.

The Trust agreement, a copy of which is a part of the record, permits the Bank, with the approval of the Hospital, to employ attorneys to defend against malpractice claims. Attorneys have been employed for this purpose in accordance with the provisions of the trust document.

ARGUMENT

POINT I

THE FIRST SECURITY BANK, AS TRUSTEE, HAS SPECIFIC STATUTORY AUTHORITY TO EMPLOY ATTORNEYS.

Utah Code Ann. §63-30-28 (as amended in 1979), specifically authorizes governmental entities, supported in whole or in part by Federal sources, to self-insure and establish a trust account to pay the costs of investigation, defense, judgments and settlements, in connection with claims which may arise against the governmental entity. The statute specifically provides in material part as follows:

* * *

". . . Notwithstanding any law to the contrary, the trust agreement between the governmental entity and the trustee may authorize the trustee to employ counsel to defend actions against the entity and its employees, and to protect and safeguard the assets of the trust, to provide for claims investigation and adjustment services, to employ expert witnesses and consultants, and to provide such other services and functions necessary and proper to carry out the purposes of the trust."

The self-insurance trust agreement with the Bank authorizes the Bank, as Trustee, to:

"5. Make payments from the trust fund:

* * *

(c) For legal expenses, including expenses of litigation, witness fees, counsel fees, and other costs and expenses related to the investigation, settlement, trial or appellate proceedings involving such claims, or related to any legal questions or litigation relating to the validity or administration of this trust or any provision of this trust agreement;"

It also authorizes the Bank, as Trustee, to:

"6. . . . employ and pay solely from the trust funds such personnel, including but not limited to, attorneys, investigators, claims managers, actuaries, consultants and risk managers, together with related supporting services, as may be necessary and proper to effective administration of the self-insurance program. . . .

The Attorney General's argument that only he may represent the State or any of its agencies in any legal matter, in which the State has an interest, rests upon Utah Code Ann. §67-5-1 (1977), which provides that the Attorney General has the duty:

"(1) To attend the Supreme Court of this state, and all courts of the United States, and prosecute or defend all causes to which the state or any officer, board or commission thereof in an official capacity is a party; and he shall have charge as attorney of all civil legal matters in which the state is in anywise interested."

This statute does not create, nor attempt to create, an irrevocable assignment of duties in the Attorney General. The power by which the Legislature of the State of Utah adopted this statute also allows the Legislature to modify, amend or abolish it. The 1979 Legislature spoke clearly when it adopted Utah Code Ann. §63-30-28, which authorizes a trustee to employ counsel "notwithstanding any law to the contrary."

Even if the two statutes were in conflict, which they are not, the statute authorizing the trustee to employ counsel takes precedence over previously enacted more general or conflicting statutes relating to the duties of the Attorney General. Thiokol Chemical Corp. v. Peterson, 15 Utah 2d 355, 393 P.2d 391 (1964); Union Pac. R.R. v. Public Service Comm'n, 103 Utah 186, 134 P.2d 469 (1943).

POINT II

UTAH CODE ANNOTATED §63-30-28 (AS AMENDED 1979), IS NOT UNCONSTITUTIONAL.

Article VII, §18 of the Utah Constitution provides:

The Attorney General shall be the legal advisor of the state officers, and shall perform such other duties as may be provided by law.

The Constitutional duty of the Attorney General is, therefore, to serve as legal advisor to the State officers; all other duties undertaken by the Attorney General are subject to further definition by the Legislature.

This Court has held that the term "state officers" refers to the officers listed in Article XXIV, §12. Hansen vs. Legal Services Comm., 19 Utah 2d 231, 429 P.2d 979 (1967). These include: The Governor, the Secretary of State, State Auditor, State Treasurer, Attorney General, Superintendent of Public Instruction, Members of the Senate and House of Representatives, Supreme Court Judges, District Judges, and Representatives to Congress. Utah Const. Art. XXIV, §12.

Obviously there is a clearly defined difference between being the legal advisor of an "officer" and defending against malpractice and casualty claims filed against a State institution. The Constitution provides that the Attorney General will be the legal advisor of the "state officers" to insure consistency in directing and aiding the elected officers in resolving the problems of government. Defending casualty claims falls far outside of this constitutional requirement, but comes clearly within the "other duties" category which the Legislature is free to define. Most state agencies have for years been defended by counsel retained by insurance companies which insure the agencies. The program of self-

insurance adopted by a state agency is no different in concept. Certainly the Constitutional requirement that the Attorney General be the legal advisor of the State officers cannot logically be interpreted to mean that no other attorney can represent the interests of any state agency or employee on any type of claim. The Legislature has recognized that the State's interest can occasionally be best served by authorizing the employment of independent counsel.

Had the framers of the Constitution intended that the Attorney General's authority be as inclusive as argued by the appellant, it would have been a simple matter for them to have provided that the Attorney General was to be the "legal advisor of the State officers and all state agencies." Rather, the restrictive nature relative to his duties is defined in the constitutional language" . . . such other duties as are provided by law." In this case the Legislature has provided, by law, that a self-insurance trust fund may employ counsel to defend claims against the trust. This is a proper exercise of authority given to the Legislature by the Constitution.

The appellant claims that the separation of powers doctrine somehow prohibits the agencies of the State from employing counsel to represent their interests. We must go

to the actual Constitutional language in order to define the powers extended to the various officers within the three branches of government, if we are to accurately assess the function of each, and not rely simply upon the philosophical concepts upon which the Constitution has its foundation. The fact that the Attorney General is an elected officer suggests his independence from other executive officers; however, it does not establish that he is to have any other duties than those assigned him by the Constitution. His primary Constitutional duty is to be the legal advisor to the state officers. In addition, the Constitution has permitted the Legislature to define his "other duties." There is nothing in the philosophical concept of the separation of powers which prevents the Legislature from authorizing a state agency to be advised by someone other than the Attorney General. The Constitution strictly defines the duties of the Attorney General. The philosophy concerning the provisions of the three departments of government does not override the specific constitutional provisions which form the very cornerstones upon which our form of government is built and structured.

Furthermore, the fact that the Attorney General may have common law powers does not restrict the Legislature from changing these powers under the clear mandate of the

Constitution. The common law must always yield to statutory change. The authority cited by the Attorney General itself clearly acknowledges this principle:

The exclusive right of the Attorney General to represent the state agency . . . was derived from that official common law status as the legal representative of the sovereign and historic identification with the public interest. Therefore, he exercises "all such power and authority as the public interest may from time to time require," in the absence of "express legislative restriction to the contrary."

Keenan v. Board of Chosen Freeholders of the County of Essex, 101 N.J. Super. 495, 244 A.2d 705 (1968) (Cited by appellant at p. 14). (Emphasis added).

CONCLUSION

The State Constitution provides that the Attorney General will act as the advisor of State officers and perform such other functions as required by law. In response to this constitutional mandate the Legislature has "required" him to perform certain additional duties. The Legislature has also provided, in unmistakably clear language, that notwithstanding any law to the contrary, a trust fund, such as that administered by First Security Bank, may employ counsel for the purpose of defending claims and preserving the trust assets.

In any event, the Bank, as Trustee, is not a "state officer" within the meaning of the Constitution. Allowing

the Trustee to retain its own attorneys does not in any manner violate either the spirit of the separation of powers doctrine or the language of the Constitution. Rather, such action is expressly authorized by statute.

The trial court's order dismissing appellant's Complaint should be affirmed.

DATED this 12 day of May, 1980.

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APPENDIX

Utah Constitution, Article VII, §18

[Duties of attorney general.]

The Attorney General shall be the legal adviser of the State officers, and shall perform such other duties as may be provided by law.

Utah Code Annotated §63-20-28.

Liability insurance--Purchase or self-insurance by governmental entity authorized--Establishment of trust accounts for self-insurance.--Any governmental entity within the state may purchase commercial insurance or self-insure against any risk created by this act or by sections 63-48-1 through 63-48-7.

A governmental entity supported in whole or in part from federal sources may self-insure with respect to specified classes of claims, in accordance with applicable federal regulations, by establishing a trust account under the management of an independent private trustee having authority with respect to claims of that character to expend both principal and earnings of the trust account solely to pay the costs of investigation, discovery, and other pretrial and litigation expenses including attorneys' fees, and to pay all sums for which the governmental entity may be adjudged liable or for which a compromise settlement may be agreed upon. The monies and interest earned on said trust fund shall be subject to investment pursuant to the State Money Management Act [51-7-1 to 51-7-2] and shall be subject to audit by the state auditor. Notwithstanding any law to the contrary, the trust agreement between the governmental entity and the trustee may authorize the trustee to employ counsel to defend actions against the entity and its employees and to protect and safeguard the assets of the trust, to provide for claims investigation and adjustment services and functions necessary and proper to carry out the purposes of the trust.

Utah Code Annotated §67-5-1.

67-5-1. General Duties.--It is the duty of the attorney general:

(1) To attend the Supreme Court of this state, and all courts of the United States, and prosecute or defend all causes to which the state or any officer, board or commission thereof in an official capacity is a part; and he shall have charge as attorney of all civil legal matters in which the state is in anywise interested.

(2) After judgment on any of the causes referred to in the preceding subdivision, to direct the issuing of such process as may be necessary to carry the same into execution.

(3) To account for, and to pay over to the proper officer, all moneys which may come into his possession belonging to the state.

(4) To keep a register of all cases in which he is required to appear, which must show the court in which the cases have been instituted and tried, and whether they are civil and criminal; if civil, the nature of the demand, the stage of proceedings, and, when prosecuted to judgment, a memorandum of the judgment and of any process issued thereon, and whether satisfied or not, and if not satisfied, the return of the sheriff; and if criminal, the nature of the crime, the mode of prosecution, the stage of proceedings, and, when prosecuted to sentence, a memorandum of the sentence and of the execution thereof, if the same has been executed, and if not executed, of the reason of the delay or prevention; and he must deliver the same to his successor in office.

(5) To exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business entrusted to their charge.

(6) To give his opinion in writing and without fee to the legislature or either house thereof, and to any state officer, board or commission, and to any county attorney, when required, upon any question of law relating to their respective offices.

(7) When required by the public service or directed by the governor, to assist any district or county attorney in the discharge of his duties.

(8) To purchase in the name of the state, under the direction of the state board of examiners, any property offered for sale under execution issued upon judgments in favor of, or for the use of, the state, and to enter satisfaction in whole or in part of such judgments as the consideration of such purchases.

(9) Whenever the property of a judgment debtor in any judgment mentioned in the preceding subdivision has been sold under a prior judgment, or is subject to any judgment, lien or encumbrance taking precedence of the judgment in favor of the state, to redeem such property, under the direction of the state board of examiners, from such prior judgment, lien or encumbrance; all sums of money necessary for such redemption must, upon the order of the state board of examiners, be paid out of any money appropriated for such purposes.

(10) When in his opinion it is necessary for the collection or enforcement of any judgment hereinbefore mentioned, to institute and prosecute in behalf of the state such actions or proceedings as are necessary to set aside and annul all conveyances fraudulently made by the judgment debtors, and the cost necessary to the prosecution must, when allowed by the state board of examiners, be paid out of any money not otherwise appropriated.

(11) To discharge the duties of a member of all official boards of which he is or hereafter may be made a member by the Constitution or by the laws of the state, and such other duties as may be prescribed by law.

(12) To report to the governor, on the first day of October preceding the regular biennial session of the legislature, the condition of the affairs of his department, stating the number, character, condition and result of the actions prosecuted or defended by him on behalf of the state, and the amount of fines and penalties collected. He shall include in his report copies of the reports of district and county attorneys, and shall also direct attention to any defect in the practical operation of the laws relating to revenue and criminal offenses, and suggest such amendments as in his judgment are necessary to subserve the public interests.

(13) To institute and prosecute proper proceedings in any court of the state or of the United States to restrain and enjoin corporations organized under the laws of this or any other state or territory from acting illegally or in excess of their corporate powers or contrary to public policy, and in proper cases to forfeit their corporate franchises, dissolve such corporations, and wind up their affairs.

(14) To institute investigations for the recovery of all real or personal property which may have escheated or should escheat to the state; and for that purpose he may cite any and all persons before any of the district courts to answer inquiries and render accounts concerning such property, and may examine all books and papers of any and all corporations. When any real or personal property is discovered which should escheat to the state, the attorney general must institute suit in the district court of the county where such property is situated for its recovery, and to escheat the same to the state.

I hereby certify that I served the foregoing Brief of Respondent by mailing two copies thereof, postage prepaid, to the following this 22 day of May, 1980:

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