

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 Amicus Curiae, Utah Education association

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ROBERT B. HANSEN,  
Attorney General,

Plaintiff-Appellant

-vs-

UTAH STATE RETIREMENT BOARD,  
et al.,

Defendants-Respondents.

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

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BRIEF OF AMICUS CURIAE,  
UTAH EDUCATION ASSOCIATION

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STATEMENT OF THE NATURE OF THE CASE

The Utah Education Association as amicus curiae adopts the Respondent's, Utah State Retirement Board, State of the Nature of the Case.

DISPOSITION IN LOWER COURT

The Utah Education Association adopts the Respondent's, Utah State Retirement Board, statement as to the Disposition of the Lower Court.

RELIEF SOUGHT ON APPEAL

The Utah Education Association urges this court to sustain the judgment in the lower court as it relates to the Utah State Retirement Board.

## STATEMENT OF FACTS

The Utah Education Association adopts the facts as presented by Respondent's, Utah State Retirement Board, brief with additional emphasis on the fact that 80% of the members of the Utah State Retirement System are not employees of the state but rather employees of political subdivisions of the state, other governmental entities, or retired. Among these non-state employees are members of the Utah Education Association.

## A R G U M E N T

### POINT I

THE CONSTITUTION OF THE STATE OF UTAH PRECLUDES THE ATTORNEY GENERAL'S OFFICE FROM REPRESENTING THE STATE RETIREMENT SYSTEM.

Article 13, section 5 of the Constitution of the State of Utah provides, that, "the legislature shall not impose taxes for the purpose of any county, city, town or other municipal corporation, that may, by law, vest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation." As previously noted, 80% of the members of the State Retirement System are not state employees but are employed by city, county, school districts or other independent governmental entities. Included within these other political subdivisions of the state and independent governmental entities are counties, cities, towns and school districts.

The Attorney General's office is funded by state taxes appropriated for that purpose. If the Retirement Board is required to rely only on the Attorney General's office for legal counsel, then the costs of these legal services are borne solely by the

state. The State Retirement System was created for state employees and the employees of cities, counties, towns and other municipal corporations whose employees participate in the retirement system. The State Retirement System is therefore an entity composed of employees of state and local governments and is not a state agency. Utah Code Annotated, Section 49-9-5 (1953) as amended, provides that general administrative costs of operating the Utah State Retirement office shall be assessed to the Retirement System's funds administered on the basis of cost and service performed. Special costs, such as actuarial studies and service, investment counsel and legal fees, medical examiner charges, which are or can be directly attributable to a system of fund, shall be paid directly from the respective fund involved. This section requires that the State Retirement Systems pay their own administrative costs.

Since employees of counties, cities, towns and school districts are members of the State Retirement System, and the State Retirement System is managed both for the benefit of these employees and for the benefit of the counties, cities, towns and school districts involved, the services rendered by the Attorney General's office as legal counsel for the State Retirement Board inures to the benefit of these counties, cities, towns and school districts.

If the cost of legal services for the State Retirement Board is borne solely by the state and paid for solely by state taxes, then these political subdivisions and governmental would receive the benefits of the legal services rendered by the State Attorney General's office to the State Retirement Board, while not having to contribute to the payment for these services.



This results in the state legislature having to impose taxes for the purpose of these other political subdivisions and governmental entities which is in direct contravention of the clear meaning of Article 13, section 5 of the Utah State Constitution.

## POINT II

THERE ARE SOUND POLICY RESONS BEHIND THE LEGISLATURE'S DECISION TO ALLOW THE UTAH STATE RETIREMENT BOARD TO HIRE ITS LEGAL COUNSEL WITHOUT REGARD TO THE WISHES OF THE ATTORNEY GENERAL'S OFFICE.

The Utah Education Association agrees with and adopts the statement of the law as presented in the argument of the Utah State Retirement Board's brief but asserts that in addition to these legal reasons there are sound policy reasons for allowing the State Retirement Board to hire legal counsel independent of the State Attorney General's office.

The first of these reasons is that an attorney who was assigned to the Utah State Retirement Board by the Attorney General's office would be subjected to potential conflict of interest. This conflict of interest arises because as an employee of the Attorney General's office he would participate in the Utah State Retirement System and therefore would be subjected to conflicts between his personal interests and the interests of the Utah State Retirement System.

Approximately 80% of the members of the State Retirement System are not state employees and therefore, may have interests divergent from those of a state employee. An example of this is the retired employee. Retired employees are drawing from the system, while a member of the State Attorney General's



office would be contributing to the system. This creates a conflict of interest in that the concerns and policies urged on the State Retirement Board by a member of the State Retirement System who is paying into the system, would necessarily be divergent from those concerns of a member who is drawing benefits from the system.

A member of the Attorney General's staff would also have divided loyalty. It would not be clear whether he represents the Attorney General's office or the Utah State Retirement Board. Since the Utah State Retirement Board is required to pursue policies and make decisions which affect employees of other entities besides the state, potentially the attorney assigned to the board would be forced to choose between two masters; the Attorney General's office, to which he owes his job, or the State Retirement Board, which as his client, has a right to demand complete loyalty.

The Utah State Retirement System is presently set up as a trust with the Utah State Retirement Board acting as trustees managing the system for the benefit of members. These trustees have the traditional fiduciary duties and responsibilities of trustees and as such should be allowed to choose their employees. No employee will be of more potential value to the trustees in aiding them to carry out their responsibilities than their attorneys. If the trustees are not allowed to choose their own attorneys, it will leave them in the position of having the responsibility of trustees and not being able to control the decision as to whom they will rely on and confide in. Such a situation would be grossly unfair to those who serve as

a trustee and could result in inefficiency and perhaps even mismanagement of the retirement system to the detriment of the many members.

An additional consideration is that if the State Retirement Board is forced to rely on the Attorney General's office for their legal help, then they are necessarily precluded from having as wide a choice in the attorneys that they will employ than they would have, if they had freedom to choose from the bar at large. This will result in them not being able to hire the type of specialists that might be needed in their specialized area. This is not to assert that the attorneys on the staff of the Attorney General are not competent, but rather, that the potential exists that special problems may arise which are unique to the State Retirement System and that the Board should have the freedom to choose their legal counsel from a wide range of backgrounds and experience.

An additional policy reason for allowing the Utah State Retirement Board the independence to choose its own legal counsel rather than rely on a staff person from the Attorney General's office is that the office of Attorney General is a political as well as legal office and as such having an attorney assigned by the Attorney General's office to represent the State Retirement Board has the potential of moving the State Retirement System from its present position as an independent system serving employees of the state and other governmental entities towards becoming another branch of the state government.

In summary, the policy reasons behind allowing the State Retirement Board as trustees of the State Retirement System

Funds to hire their own legal counsel rather than rely on the State Attorney General's office are clear and convincing. Allowing the Attorney General to represent the State Retirement Board would subject whatever staff attorney was assigned to it to potential conflicts of interest.

If the State Retirement Board is not allowed the freedom to choose those in whom they have confidence and in whom they rely on in their role as trustees, then they are necessarily being subjected to the fiduciary responsibilities of trustees yet being denied the freedom and control over the arrangement of the trust that traditional fiduciaries are allowed.

Sound and proper management of the State Retirement System requires that the interests of the State Retirement System come before the interests of any branch of state government including the Attorney General's office. The purpose for which the State Retirement System was set up is better served by allowing the State Retirement Board to seek professional help wherever they may find it, and in not limiting their choice to whomever may be available on the Attorney General's staff.

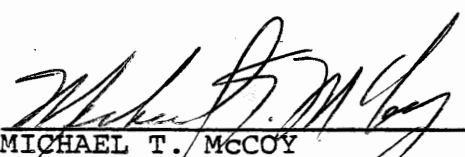
By maintaining the independence of the State Retirement Board, the interests of all members of the State Retirement System are protected. If the State Retirement Board is to be treated like any other branch of state government, it will become a branch of state government and as such, the interests of individual members of the system who are not state employees, could be jeopardized.

#### C O N C L U S I O N

1. There are sound policy reasons for permitting the Utah State Retirement System to hire its own independent legal counsel.

2. The Constitution of Utah prohibits state revenues from being appropriated for local purposes. To require the Attorney General or any other state agency to provide service to the Utah State Retirement System would be to require the expenditure of state revenues of a local purpose. The legislature could no more mandate that the Attorney General provide legal services for the Retirement System than it could require the Attorney General to provide legal services for Salt Lake City.

Respectfully submitted this 14<sup>th</sup> day of August,  
1980.

  
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MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing  
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