

1980

Lynn A. Jenkins v. Moroni C. Jensen, State of Utah,
Robert B. Hansen, Attorney General of The State of
Utah, David S. Monson, Secretary of State/Lt.
Governor of Utah : Brief of Respondent Moroni L.
Jensen

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LYNN A. JENKINS,)
)
Plaintiff-Appellant,)
)
-v-)
)
MORONI L. JENSEN, STATE OF)
UTAH, ROBERT B. HANSEN,)
Attorney General of the State)
of Utah, DAVID S. MONSON,)
Secretary of State/Lt.)
Governor of Utah,)
)
Defendants-Respondents.)

17240

BRIEF OF RESPONDENT MORONI L. JENSEN

APPEAL FROM THE JUDGMENT OF THE
THIRD DISTRICT COURT FOR
SALT LAKE COUNTY
HON. KENNETH RIGTRUP, JUDGE

VAN COTT, BAGLEY, CORNWALL
& McCARTHY
Kenneth W. Yeates
50 South Main Street, Suite 1600
Salt Lake City, Utah 84144
Attorney for Defendant-Respondent
Moroni L. Jensen

LYNN A. JENKINS, Pro Se
7386 Banbury Circle
Salt Lake City, Utah 84121
Plaintiff-Appellant

ROBERT B. HANSEN
Office of the Attorney General
Frank Nelson
State Capitol Building
Salt Lake City, Utah 84111
Attorney for Defendants-Respondents
Robert B. Hansen and David S. Monson

FILED

AUG 29 1980

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UTAH, ROBERT B. HANSEN,	:	
Attorney General of the State)	CASE NO. 17240
of Utah, DAVID S. MONSON,	:	
Secretary of State/Lt.)	
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Defendants-Respondents.	:	
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Kenneth W. Yeates
50 South Main Street, Suite 1600
Salt Lake City, Utah 84144
Attorney for Defendant-Respondent
Moroni L. Jensen

LYNN A. JENKINS, Pro Se
7386 Banbury Circle
Salt Lake City, Utah 84121
Plaintiff-Appellant

ROBERT B. HANSEN
Office of the Attorney General
Frank Nelson
State Capitol Building
Salt Lake City, Utah 84111
Attorney for Defendants-Respondents
Robert B. Hansen and David S. Monson

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Governor of Utah,	:	
)	
Defendants-Respondents.	:	
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BRIEF OF RESPONDENT MORONI L. JENSEN

NATURE OF CASE

The plaintiff, Lynn A. Jenkins, brought this declaratory judgment action seeking to remove the name of defendant Moroni L. Jensen from the 1980 primary election ballot. In this election, Mr. Jensen seeks the Democratic nomination for the office of Lieutenant Governor/Secretary of State.

DISPOSITION IN THE LOWER COURT

The Third District Court for Salt Lake County in an order dated July 30, 1980, dismissed the plaintiff's complaint with prejudice. Plaintiff's subsequent motion to reconsider was denied.

RELIEF SOUGHT ON APPEAL

Defendant-respondent Moroni L. Jensen seeks an affirmation of the district court's order which dismissed plaintiff's complaint with prejudice.

STATEMENT OF FACTS

Although the Statement of Facts in Appellant's Brief is generally accurate, it gives an incomplete picture of the facts upon which the district court's decision was based. Accordingly, defendant Jensen will restate the facts in their entirety.

Plaintiff, Lynn A. Jenkins, is a Republican Candidate for the Utah State Senate from Senate District Eight (R.). Like many other candidates for public office in Utah this election year, Mr. Jenkins faces a primary run-off on September 9, 1980.

Defendant Moroni L. Jensen, a Democrat, has been a member of the Utah State Senate. His term of office commenced January 1, 1977 and ends December 31, 1980 (R.). In April 1980, Mr. Jensen announced his intention to run for the position of Secretary of State (R.). He duly filed for the position, and came out of the Democratic Party Convention facing a primary election in September (R.).

On February 2, 1980, the 43rd Legislature enacted House Bill 60 which raised the salaries of State officers effective January 1, 1981, as follows:

	<u>From</u>	<u>To</u>
Governor	\$40,000	\$48,000
Attorney General	30,000	36,500
Secretary of State	26,500	33,500
State Auditor	26,500	33,500
State Treasurer	26,500	33,500

The increase for the Secretary of State, the State Auditor, and the State Treasurer of \$7,000 per year is equivalent to 26.4 percent. The Attorney General and the Governor received a slightly smaller percentage increase amounting to more than 20 percent. Each of these offices had also received a salary increase effective in 1978. With respect to the Secretary of State this prior salary increase amounted to \$4,500, from \$22,000 to \$26,500.

The 1979 Utah Legislature also passed a joint resolution (Senate Joint Resolution No. 7) which places before Utah voters in November 1980 several revisions of the Executive Article of the Utah Constitution. Among these revisions, the Resolution proposes that the name of the office of Secretary of State be changed to Lieutenant Governor and that the method of election to this position be changed so that the candidates for Governor and Lieutenant Governor of each party shall appear together on the ballot and a vote for the Governor of one party shall be deemed a vote for that party's Lieutenant Governor. The Resolution, of course, provides that this method of voting for Governor and Lieutenant Governor shall not take effect until the election in 1984, since there can be no election under the new constitutional provision for either office until then. Should the constitutional revisions be approved by the voters this coming November, the name of the office shall be changed to Lieutenant Governor effective January 1, 1981. Other than this change of name, the proposed constitutional revisions placed before the electorate by S.J.R. No. 7 will have no significant effect on the office of Secretary of State until the election of

1984. As of now, the changes in the Executive Article are a mere proposal, subject to the voter's approval in November.

Plaintiff Jenkins contends that both the salary increase and the modifications in the office of the Secretary of State proposed in S. J. R. No. 7 are prohibited by Article VI Section 7 of the Utah Constitution:

No member of the Legislature, during the term for which he was elected, shall be appointed or elected to any civil office or profit under this State, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected.

In the proceedings below, Plaintiff contended that he had standing to challenge Mr. Jensen's place on the Democratic primary ballot since he is a Republican candidate for the State Senate and certain voters who might otherwise vote in the Republican primary, and vote for him, would vote in the Democratic primary because Mr. Jensen was on that ballot.

As a remedy, Plaintiff asked that the district court issue an order restraining the incumbent Secretary of State, David S. Monson, from issuing a certificate for primary election in the name of defendant Jensen.

The district court rejected defendant Jensen's contention that the Plaintiff had not standing to bring this action and that his filing of this suit was untimely in view of Mr. Jensen's long-announced intentions to run for the office of

Secretary of State. However, the trial court granted Defendant's motion to dismiss because Plaintiff's claims are clearly governed by the case of Shields v. Toronto 16 Utah 2d 61, 365 P.2d 829 (1964). The uncontradicted affidavits from economic experts and judicial notice of generally known economic facts established that the salary increases given State executive officers during Mr. Jensen's term as a State Senator appeared to be an attempt to maintain their salary at a level consistent with current rates of inflation. The district judge also concluded that to deny defendant Jensen a position on the September primary ballot would be an interference with the democratic election of state officials. Finally, the court concluded that S. J. R. No. 7 does not "create a new office within the meaning of Article VI Section 7 of the Utah Constitution".

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT CONFORMED WITH THIS COURT'S RULING IN SHIELDS v. TORONTO.

In 1964 this Court held that three candidates for executive office were not disqualified from appearing on primary ballots even though they had been members of the 1963 Legislature which had enacted a general salary increase raising the emoluments of the offices they sought. The Court specifically held that their candidacy did not violate the provisions of Article VI Section 7 of the Utah Constitution. Shields v. Toronto,

16 Utah 2d 61, 395 P.2d 829 (1964).

Justice Crockett's comprehensive opinion considers the purpose and rationale of Article VI. The opinion states that the Article was not designed to prohibit legislators from running for office simply because they are members of a body which had voted a pay increase for that office. Rather, the purpose of the provision is to prevent connivance and manipulation among legislators to benefit themselves by creating offices or by voting themselves pay increases with the clear purpose of improperly enriching themselves.

When, however, the increases do not enrich the office holder, but merely keeps him approximately even with inflation, the mischief the provision is meant to prevent would not occur. As the opinion states:

"The important fact here is that the salary increases involved could not by any stretch of the imagination be regarded as partaking of the impropriety just referred to . . . [T]hese relatively small increases . . . should properly be regarded as just what they were, a moderate cost of living adjustment on an across the board basis in keeping with the steadily rising cost of living. Accordingly, it can be said with assurance that this is not a situation which would lend itself to any ulterior scheme by a legislator to set up a high paying sinecure to take advantage of which Section 7 of Article VI was designed to prevent." 395 P.2d at 831.

The pay increases at issue in this appeal are precisely of the kind approved in Toronto.

First, there is no suggestion, either in plaintiff's

pleadings or in the record before the District Court, that there was any improper motivation, manipulation, or attempt to benefit Mr. Jensen or any member of the legislature.

Second, the pay increases were enacted as part of legislative bills granting pay increases to other constitutional officers of the State. The Governor, the Attorney General, the State Auditor and the State Treasurer, all received similar, though not exactly equal, percentage increases (all in the 20 to 30 percent range).

Third, and most significantly, the record before the District Court was abundantly clear that the increases in question reflected a legislative attempt to maintain the salary level of the Secretary of State during a time of accelerating and severe inflation. Indeed, the record demonstrates that the real salary of the Secretary of State has been increased by only a fraction of a percent during the last ten years.

In support of his motion to dismiss, respondent submitted an affidavit (R.) prepared by Mr. Frank K. Stuart, an economic analyst and consultant. Attached to Mr. Stuart's affidavit, as Exhibit 1, was a table showing the effect of inflation on all pay increases granted to the Secretary of State since May of 1963 (R.). Mr. Stuart's analysis is most revealing. During Mr. Jensen's last term in the legislature, the dollar increase

at the Secretary of State's salary was from \$22,000 to \$33,500. During the same period, the adjusted real income increased only from \$17,178 to \$17,761 for a total of \$583.00.¹

Mr. Stuart determined that since 1973, the Secretary of State has, in real dollar terms, had a decrease in his salary. In January of 1972, the salary had a real dollar value of \$19,239; as of January of 1981, the value will be \$17,761.

Mr. Stuart's analysis also somewhat understates the actual amount of this salary decrease. The Secretary of State has no assurance as to when, if ever, his salary will again be increased. Thus, in a time of persistent inflation, his fixed salary will decrease in real dollar value.

Mr. Stuart also made a long term analysis of the effect of inflation on the Secretary of State's salary. The period covered was May, 1963 through January, 1981. This analysis showed that between 1963 and 1969, there was an increase in the salary's real dollar value.

¹ The analysis was made by using statistical indicators developed by the U.S. Department of Commerce Bureau of Economic Analysis. These indicators are published in the Department's Survey of Current Business. The effect of inflation is determined by using what is termed an "implicit price deflator index." 1972 dollars are shown by the index as having a value of 100. For years prior to 1972, when the value of the dollar was greater, the index is less than 100. For succeeding years the value is more than 100. Thus, in 1975, the deflator index was 128.07. The estimate for the deflator index for January of 1981 is 188.62. The difference in deflator index values will, of course, determine the actual percentage decrease in the value of the salary.

With the sharply rising inflation of the late 1960's, the real value of the Secretary of State's salary began to erode. Since that time, the overall trend has shown a decrease in salary value. For the entire eighteen year period between 1963 and 1981, the salary has shown a slight rate of real dollar increase. The Secretary of State experienced an actual dollar increase in salary from \$11,000 to \$33,500. This amounted to 204.5% increase which computes to an annual rate of 6.3%. Over the same eighteen year period the real dollar salary increased from \$15,413 to \$17,761, or a percentage increase of 15.2%. The average annual increase was only .8%.

At the hearing on the motion to reconsider, respondent submitted an affidavit of Steven J. Nicolatus. Mr. Nicolatus is a consulting economist employed by Mr. Stuart. Mr. Nicolatus compared the Secretary of State's salary increases with those given to professional level State employees. His analysis showed that the Secretary of State, between 1970 and 1981, enjoyed an annual growth rate in compensation of 6.1%. A professional employee at entry salary level had for the same period a 6.9% salary growth rate. Mr. Nicolatus also considered merit pay increases to which professional level employees would be entitled. When the increases are included, the typical professional level employee experienced an annual increase of 9%, or some fifty percent more than the rate of increase for the Secretary of State.

Mr. Nicolatus also analyzed the increase of the total compensation package paid to the Secretary of State. Included among these benefit items are F.I.C.A., federal withholding tax, insurance and the state retirement plan. Between 1977 and 1981, this total benefit package increased from \$29,558 to \$41,333, for a percentage increase of 39.8%. In real dollar terms, however, the entire benefit package increased from only \$20,860 to \$21,913. This is a percentage increase of only 5%, which yields an average annual growth rate of 1.2%.

The interesting point about this analysis is that these benefit items were not the result of specific legislative enactment. Federal withholding tax, F.I.C.A., insurance, and the state retirement plan were granted by either federal law or general legislative enactment. Nonetheless, the average rate of increase in real dollars during the period was very small indeed.

This economic data demonstrated that the pay increases in issue in this litigation in an amount and for a purpose consistent with the rule and rationale of Shields v. Toronto. Supra. Enacted in a time of persistent and often accelerating inflation, these increases reflect a legislative attempt to maintain the purchasing power of the Secretary of State's salary. Indeed, one could make a very strong case from the data presented to the District Court that the actual value of the salary has decreased during the period of Mr. Jensen's legislative term.

II. SENATE JOINT RESOLUTION NO. 7 DID NOT "CREATE"
A CIVIL OFFICE.

In point 5 of his otherwise generally commendable brief, plaintiff argues that Senate Joint Resolution No. 7 "is a creation of a new constitutional office." In fact, the 1979 legislature did nothing but place before the voters of Utah a proposal to modify certain aspects of the Executive Article of the Utah Constitution. As mentioned above, one of these modifications would change the name of the office of Secretary of State, wherever it appears in the Constitution, to "Lieutenant Governor" and would change the method of voting for this office. These modifications, even if they do amount to a "creation of office," are not the creation of the legislature. If they ever become effective, they will be the creation of the electorate of the State of Utah. Of course, no one has "created" anything yet. No one will know whether the so-called "created office" will come into existence at all until November, 1980.

A legislative act placing before the voters the decision of whether a new administrative or executive office will be formed does not constitute "creation" of office as contemplated by Article VI Section 7. State v. Gooding, 22 Idaho 128, 124 P. 791 (1912), is almost directly on point. There an appointment to the office of Commissioner of Highways was challenged because the appointee was a member of the legislature that authorized the voters and landowners of Idaho to organize a

highway district upon certain terms and conditions. The Idaho Supreme Court held that this was not the creation of an office. The Idaho Supreme Court said:

"The word 'create' means to cause to exist or to bring into existence something which did not exist. Said highway district law does not create or purport to create any highway district, but leaves the creation of such districts with the people. Then the question is directly presented: Did the Legislature create the office of highway commissioner of Shoshone highway district No. 2?

"At the time the Legislature which enacted said highway district law adjourned, there was no office of highway commissioner of Shoshone highway district No. 2, nor was there such an office in the state of Idaho. Said act authorized the electors and landowners in the state to organize a highway district upon certain terms and conditions, if they concluded best to do so.

"Had the act in question organized certain highway districts and provided that such district should have certain officers, then the Legislature would have created the office. But the Legislature by said act did not attempt to create any districts whatever. They left the creation of the district with the people. . . ." 124 P. 792-93.

The Gooding opinion is almost exactly analogous with the Utah Legislature's actions in S.J.R. No. 7. The Legislature has done no more than propose to the people of Utah that certain items of the Executive Article of the Utah Constitution be revised. These revisions will not take effect until the general election of November, 1980. If any office has been created, it will not have been created until then and it will not have been created by the Legislature, but by the vote of the people.

In fact, S.J.R. No. 7 does not create a new office at: It merely changes the name of an old office and modifies the method by which votes are cast for that office. In Westernport v. Green, 144 Md. 85, 124 A. 403 (1923), the Maryland General Assembly enacted a statute which, in effect, changed the method of electing a town clerk and made the clerk responsible for collecting municipal taxes (a duty that had previously been performed by a bailiff). The Maryland court held that in changing the duties of the clerk and in changing the method by which he was elected, the Maryland Legislature had not created a new office but merely modified the form and duties of an old one.

Nothing has been changed in the office of Secretary of State except its name and the method by which votes are cast for the office. No new office has been created.

III. THE RESULT URGED HERE IS CONSISTENT WITH JUDICIAL AUTHORITY FROM OTHER JURISDICTIONS.

Courts of other jurisdictions have construed constitutional provisions similar to Article VI Section 7, to permit the candidacy for public office of otherwise qualified candidates. Though challenges to candidacy have arisen in a variety of factual settings and under differing constitutional provisions, the courts repeatedly have found in the spirit and purpose of such provisions strong reasons for permitting candidates to be either approved or rejected by the electoral process.

Prominent among these decisions is the Florida case of State ex rel. West v. Gray, 74 So.2d 114 (Fla. 1954), where a special election was necessary because of the death of the governor during his term of office. A member of the state legislature who had voted to increase the governor's salary declared his candidacy for the office. In construing the Florida constitutional provision in issue, the Court reviewed the history and purpose of that provision.

The Court first noted that:

The Constitution is concerned with substance and not with form and its framers did not intend to forbid a common sense of application of its provisions.

Gray, supra, 7450 2d at 118. It also explained that:

All of the authorities are in agreement that such a provision as is involved in this proceeding is inserted in a constitution for the purpose of taking from a senator or representative "any personal motive which might operate upon him to create a new office or increase the emoluments of any office, new or old." Tucker on the Constitution, Vol. 1, p. 442. As the matter is stated by Mr. Justice Story, "The reasons for excluding persons from offices who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness." Story on the Constitution, 5th Ed., Vol. I, section 867, p. 633. (Emphasis in original).

The Court then considered changes in "public conditions" since the enactment of the constitutional provision in question.

Public conditions are vastly different today. Many of the offices which were appointive under the original Constitution of 1885 have now, by amendment thereto, been made elective. With the free dissemination of news and the close coverage given the legislative deliberations by press and radio, the people are much better informed concerning the actions of their legislators than they were in 1885, and they can express their approval or disapproval of such actions at the polls. We have no doubt that, as to elective offices, Section 5 of Article III was calculated to, and did, serve a useful purpose in the early days of this state's history; indeed, it still does, within the reasonable limits and for the plain purposes for which it was enacted. But what was then thought to be a shield can, if so strictly interpreted as to enlarge it beyond its purpose, become a sword -- a weapon which might easily eliminate capable men from offering for public office . . .

Gray, supra, 7450 2d at 117.

Since the pay increase for which the prospective candidate had voted as a legislator applied only to the term of the governor then in office, and since the governor's untimely death could not have been anticipated, the Court reasoned that there was no real possibility that the candidate had been influenced by improper motives when he voted on the matter as a legislator. Since the evil which the provision was designed to prevent did not occur, the provision did not prohibit the legislator's candidacy.

The Court also emphasized that the legislator would be required to run against formidable opponents in both the primary and general elections when his candidacy would be

submitted to the electorate. For those reasons, the Florida Court concluded that the emoluments of the office of governor were not increased by the legislature so as to render a legislator ineligible for the office.

In State v. Dubuque, 413 P.2d 972 (Wash 1966), the Supreme Court of Washington resolved a challenge to the eligibility of members of the state legislature to run for re-election after their members had voted to increase their own salaries. Washington's constitutional provision is virtually identical to that which is in issue here, and it was contended that since members of the legislature had voted to increase the emoluments of the office of legislator, they could not, during their term of office, run for re-election to that office.

In construing the section, the court noted that:

A strong public policy exists in favor of eligibility for public office, and the constitution, where the language and context allows, should be construed so as to preserve this eligibility.

Dubuque, supra, 413 P.2d at 981. The court proceeded to explain that the constitutional provision was designed, in part, to:

. . . prevent a member of the legislature from increasing the salaries of public officials and then, during the term for which he was elected legislator, maneuvering to obtain the increased salary without an intervening election.

The court observed that one of the purposes of the constitutional provision will be satisfied if the voters have an opportunity to pass on the legislator's actions in increasing public salaries. The court held therefore that:

. . . where the salary increase does not take effect during the term for which the legislator was elected to the legislature, he is not ineligible to stand for election to and serve in an office at a higher salary commencing with the expiration of his elected term as legislator, because no part of the increase will be earned during the legislator's incumbent term of office.

Dubuque, supra,

Explaining the basis of its holding the court concluded:

We favor an interpretation tending to unfetter the process of election as more in keeping with democratic ideals than a construction which inclines to curtail the freedom to stand for office. Despite the criticism and complaints frequently directed by the people toward their legislature, that body remains the single most democratic organ of constitutional government yet devised, reflecting with greater clarity and frequency probably than any of our institutions--save possibly the public schools--the will and aspirations of a free people. From this academy of free representative government have come some of our greatest presidents, ablest jurists, most capable members of the congress, and outstanding statesmen. Perhaps no greater school exists for the training of men to leadership in a democracy than service in a state legislature. The constitution ought, therefore, where its language is susceptible of many meanings, be construed to augment and foster rather than curb and curtail the elective process. Eligibility should be presumed rather than be denied.

The foregoing review of decisions from other jurisdictions reveals that the analysis and application of our constitution by this Court in Shields v. Toronto, supra, is in harmony with the decisions and rulings of other courts and, on the strength of the construction given the provisions in issue by other courts, as well as this Court, the trial court's ruling should be affirmed.

IV. PLAINTIFF HAS NO STANDING TO BRING THE PRESENT ACTION.

In addition to the other grounds stated in this brief, respondent submits that dismissal of plaintiff's complaint is proper because plaintiff did not demonstrate a sufficient interest in the outcome of this litigation to claim standing as a proper party plaintiff.

The District Court ruled on the following theory that plaintiff does in fact have standing: Plaintiff is a candidate for the Republican nomination for Utah State Senate from Senate District No. 8 and his name will appear on the September 9 primary ballot. Because it is possible that some voters, who might otherwise vote for him in the Republican primary, may choose to vote in the Democratic primary because they wish to cast ballots for Moroni L. Jensen, plaintiff's own candidacy may be damaged.

Plaintiff offered no evidence in support of his