

1956

University of Utah v. Board of Examiners of the State of Utah et al : Brief of Appellants

Utah Supreme Court

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E. R. Callister; H. R. Waldo, Jr.; Attorneys for Appellants;

Recommended Citation

Brief of Appellant, *University of Utah v. Board of Examiners of the State of Utah*, No. 8457 (Utah Supreme Court, 1956).
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In the
Supreme Court of the State of Utah

UNIVERSITY OF UTAH,

Plaintiff,

vs.

BOARD OF EXAMINERS OF THE
STATE OF UTAH, ET AL.,*Defendants & Appellants,*

STATE BOARD OF EDUCATION,

*Intervenor & Respondent.*Case No.
8457FILED
FEB 28 1958**BRIEF OF APPELLANTS**E. R. CALLISTER,
Attorney General,H. R. WALDO, JR.,
Special Assistant
Attorney General,*Attorneys for Appellants.*

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In the Supreme Court of the State of Utah

UNIVERSITY OF UTAH,

Plaintiff,

vs.

BOARD OF EXAMINERS OF THE
STATE OF UTAH, ET AL.,

Defendants & Appellants,

STATE BOARD OF EDUCATION,

Intervenor & Respondent.

Case No.
8457

BRIEF OF APPELLANTS

STATEMENT OF FACTS

This is an appeal from a judgment of the Third Judicial District Court in and for Salt Lake County, the Honorable Martin M. Larson presiding. This action was brought by respondent in the form of a petition for intervention in the case of *University of Utah v. Board of Examiners, et al.*, now pending before this Court. The motion to intervene

was granted. A judgment was entered settling the dispute between the University and the Board of Education. Thereafter, by stipulation of all parties, approved by the trial court, the matters between the University of Utah and Board of Examiners, on the one hand, and the State Board of Education and the Board of Examiners, on the other hand, were separately argued and separately determined. Thus, the two branches of the case are now in fact two separate cases independent of one another.

By their complaint, the State Board of Education sought a declaratory judgment as to certain issues which may be generally classed as follows:

(1) Whether the Board of Examiners has authority to examine and approve or disapprove expenditures previously authorized by the State Board of Education and, if so, whether the exercise of such authority is discretionary or ministerial.

(2) Whether the Commission of Finance has authority to examine and approve or disapprove expenditures previously authorized by the State Board of Education and, if so, whether the exercise of such authority is discretionary or ministerial.

(3) Whether the Commission of Finance has authority to approve or disapprove appointments of employees made by the State Board of Education.

(4) Whether the Budget Officer, in conjunction with the Governor, has authority to approve or disapprove work programs submitted by the State Board of Education.

(5) Whether the Attorney General has the right to disapprove the appointment of independent legal counsel to represent the State Board of Education in cases involving disputes with another department or agency of the State.

These issues were submitted to the court on the pleadings, stipulation of facts (R. 24-56) and documentary evidence introduced by respondent (R. 78) over the objection of appellants. No witnesses testified. Briefs were filed and oral argument was had. Thereafter, the trial court rendered its opinion (R. 57-68) and granted judgment to respondent (R. 72-73).

As we understand the opinion and judgment of the trial court, it was determined:

(1) That the Board of Examiners has no jurisdiction over expenditures for salaries but does have a limited ministerial authority over all other expenditures of the State Board of Education.

(2) That the Commission of Finance has only a limited ministerial authority over expenditures of the State Board of Education.

(3) That the Commission of Finance may disapprove the appointment of employees of the State Board of Education unless such employees are "experts or specially qualified personnel."

(4) That the Budget Officer and the Governor have no authority to disapprove work programs submitted by the State Board of Education unless such work programs exceed appropriated funds.

(5) That the State Board of Education may retain legal counsel, independent of the Attorney General, when the Attorney General represents another department with which the Board of Education has a dispute.

As can be seen, the results sought and the judgment granted relate primarily to supervision of the financial activities of the State Board of Education by other state departments and agencies. As the State Board of Education and the agencies it controls is one of the three largest departments of the State, spending from one fourth to one third of total State revenues, the result of this case is of great importance. We suggest, however, that because of the reasons advanced for the judgment, the judgment, if sustained, would also have far-reaching effects on the financial operations of all departments of the State as well as the State Board of Education. Furthermore, the theory and conclusion of the trial court that the State Board of Education is a fourth branch of government with constitutionally vested powers would alter the present relationship of the State Board of Education to the Legislative and Judicial as well as the Executive Branches of our State Government. We ask the Court to keep these broader aspects in mind when considering this case.

STATEMENT OF POINTS

POINT I

BY OUR CONSTITUTION, THE BOARD OF EXAMINERS HAS DISCRETIONARY AUTHORITY TO APPROVE OR DISAPPROVE

ALL EXPENDITURES OF THE STATE BOARD
OF EDUCATION.

POINT II

BY STATUTE, THE BOARD OF EXAMINERS
HAS DISCRETIONARY AUTHORITY TO AP-
PROVE OR DISAPPROVE EXPENDITURES
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POINT III

THE COMMISSION OF FINANCE, AS AGENT
OF THE BOARD OF EXAMINERS OR BY
STATUTE, HAS POWER TO APPROVE OR
DISAPPROVE EXPENDITURES MADE BY
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POINT IV

THE COMMISSION OF FINANCE IS AUTHOR-
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POINT V

THE DUTY OF THE BUDGET OFFICER,
UNDER THE DIRECTION OF THE GOVER-
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POINT VI

THE STATE BOARD OF EDUCATION IS NOT A FOURTH BRANCH OF STATE GOVERNMENT.

POINT VII

IN DISPUTES BETWEEN STATE DEPARTMENTS, THE ATTORNEY GENERAL HAS DISCRETION TO REFUSE TO APPOINT COUNSEL.

ARGUMENT

POINT I

BY OUR CONSTITUTION, THE BOARD OF EXAMINERS HAS DISCRETIONARY AUTHORITY TO APPROVE OR DISAPPROVE ALL EXPENDITURES OF THE STATE BOARD OF EDUCATION.

Article VII, Section 13, Constitution of the State of Utah provides:

“Until otherwise provided by law, the Governor, Secretary of State and Attorney General shall constitute a Board of State Prison Commissioners, which Board shall have such supervision of all matters connected with the State Prison as may be provided by law. They shall, also, constitute a Board of Examiners, with power to examine all claims against the State, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law; and no claim against the State, except for salaries and compen-

sation of officers fixed by law, shall be passed upon by the Legislature without having been considered and acted upon by the said Board of Examiners."

This or similar provisions are contained in the constitutions of only four states: Utah, Idaho, Nevada and Montana. In all these states, the Board exercises highly important functions commensurate with the position of the members of the Board who, as the highest elected officials of the respective states, are directly responsible to the people.

It is our contention that under the Utah Constitution, the Board of Examiners has the right and responsibility to approve or disapprove expenditures of state funds by all departments and agencies of the State, including the State Board of Education. This is not a mere ministerial function but an authorization to inquire into the advisability or necessity of a particular expenditure. It is obvious that the Board also has the authority to deny illegal expenditures of public funds. There is one exception to the jurisdiction of the Board—salaries or compensation of officers fixed by law. As will appear from the cases, this exception is limited to salaries or compensation fixed in a sum certain by the Legislature and does not include salaries or compensation fixed by a board, department or agency of the State other than the Legislature.

The primary check on the power of the Board is by appeal to the Legislature whose decision is final. A second check on this power is through the courts who can (1) prevent arbitrary action by the Board, (2) require the Board to take some action on a claim, to either approve or

disapprove it, but not control the discretion of the Board to either approve or disapprove, and (3) require approval of a claim where the *sole* reason for its disapproval was a misinterpretation of the legality of the claim by the Board (this third situation should be distinguished from disapproval of a claim where the Board regards it an unnecessary or unwise expenditure of state funds—in that event, a court can only inquire into the arbitrariness, if any, of the action taken, the claimant being left with an appeal to the Legislature on the question of the advisability of the expenditure).

A. *The Jurisdiction of the Board of Examiners.*

1. *Generally.*

A clear statement of the jurisdiction of the Board of Examiners is found in *State ex rel. Davis v. Edwards*, 33 Utah 243, 93 Pac. 720. There, a claim was made by a court stenographer, appointed by a district judge pursuant to statute, for mileage allowed him by statute for travel in the course of his official duties. The amount claimed had been approved and certified as correct by the District Judge, all in compliance with the applicable statute (Secs. 1 & 2, Ch. 72, Laws of Utah 1899). The statute in question required the Auditor to draw his warrant for the amount certified by the District Judge with no requirement that the claim be approved by the Board of Examiners. Notwithstanding, the Court held that the claim must first be submitted to the Board by virtue of Article VII, Section 13—a mandatory provision which could not be avoided by the claimant, the Legislature, or a court.

The Court stated (33 Utah at 250) :

“The attempt by the Legislature to require the Auditor to allow a claim which by the Constitution must first be approved by the Board of Examiners can avail nothing. *The Auditor is bound by the constitutional provision. The Legislature is so bound, and so are we.* The Legislature may make certain evidence conclusive with regard to a specific matter, but it may not interfere with powers conferred or duties imposed by the Constitution. This in effect is what is attempted to be done in section 2, c. 72, p. 112, aforesaid. To the extent that the provisions of that section are in conflict with the constitutional provision governing salaries and compensations of officers fixed by law, the Constitution must prevail. * * *” (Emphasis added.)

Uintah State Bank v. Ajax, 77 Utah 455, 297 Pac. 434, was an action seeking mandamus against the State Auditor to compel issuance of warrants in payment of bounty certificates. Admittedly, all the requirements of the bounty law had been met and the sole question was whether the bounty claims must be approved by the Board of Examiners before payment where the applicable statute made no such requirement. The Court held first that the bounty claims were claims against the State as they were claims for money “paid into the state treasury * * * subject to appropriation by the Legislature, and [payable only] by the state treasurer on warrant of the state auditor.” It was argued that the claims were fixed by law at so much per pelt, became liquidated demands when the county clerk certified the number of pelts, and thus did not come within the jurisdiction of the Board. The Court replied that the only exception to the jurisdiction of the Board is “salaries

and compensation of officers fixed by law." Furthermore, (77 Utah at 465) :

"If we should adopt petitioner's view it would follow that the Legislature might designate any officer other than the board of examiners as authorized in behalf of the state to settle, fix, or liquidate claims and agree upon the amount to be paid thereon, and thereby exclude the board of examiners from its duty and responsibility with respect to claims thus liquidated pursuant to legislative authority. We cannot agree to any such construction of the constitutional language, nor may we by construction interpolate the word 'unliquidated' into the Constitution so that it would provide that the board of examiners have power to 'examine all unliquidated claims against the State,' etc. The Constitution has vested in the board of examiners the power to examine and pass on all claims except those exempted, and the Legislature is without authority to delegate such power to any other board or officer."

It is obvious from the above quotation and by the Court's reliance on language from *State v. Edwards, supra*, that the Court was speaking of the authority of the Board of Examiners under the Constitution not merely its authority under statutes declaratory of the Board's constitutional powers.

The most recent case relating to the authority of the Board of Examiners is *State Board of Education v. Commission of Finance*, (Utah 1952), 247 P. 2d 435. It is true that the principal question in that case was the legality of the composition of the Board of Education which was raised as a defense to a claim for payment of the salary of the

State Superintendent of Public Instruction, but it is significant that more than one-third of the argument of the Board of Education was devoted to a discussion of the exclusive constitutional jurisdiction of the Board of Examiners. (See S. Ct. Briefs and Abstracts, Case No. 7785.) The validity of this argument was recognized when the Court said (247 P. 2d at 439) :

“At a meeting of the State Board of Education on October 5, 1951, the Board appointed Dr. Bateman to the office of State Superintendent of Public Instruction and fixed his salary at \$10,000 per annum. The Board of Examiners (composed of the Governor, Secretary of State and the Attorney General) *which must approve all salary claims against the state, except those fixed by law*, approved by a vote of two to one the request of the Board of Education to pay Dr. Bateman a salary of \$10,000 per annum.” (Emphasis added.)

See also *Wilkinson v. State*, 42 Utah 483, 134 Pac. 626; *Dall v. State*, 42 Utah 498, 134 Pac. 632; *Campbell Bldg. Co. v. State Road Comm.*, 95 Utah 242, 70 P. 2d 857, all of which held the Board of Examiners, not the courts, has exclusive jurisdiction of claims against the State.

The Idaho cases conform to the above decisions in Utah. In *Pyke v. Steunenbergh*, 5 Ida. 614, 51 Pac. 614, it was held that the Board of Examiners must approve a claim for supplies furnished the state insane asylum, a state institution created by the constitution (Art. X, Sec. 1, Idaho Constitution). This was so even though the board of directors for the insane asylum had audited and approved the claim. The court expressly recognized the discretionary powers of

the Board and refused to order it to decide in a certain way. The court did order the Board to take some action but refused to order a certain decision to be made.

Bragaw v. Gooding, 14 Ida. 288, 94 Pac. 438, presented the situation of disapproval by the Board of Examiners of the salary of certain employees of the State Auditor, a constitutional state officer (Art. IV, Sec. 1, Idaho Constitution). The court upheld the Board even though it was admitted that the employees were necessary for the conduct of the office, that without them the auditor could not perform the duties required of him by law, and that the salaries were just and within the appropriation made by the Legislature. The court held it was without power to set aside and annul the constitution and statutes of Idaho by overturning the Board's decision. The court stated:

"If the contention of the plaintiff be correct that it was the duty of the State Board of Examiners to allow the claims as he presented them, then there would be no necessity for a state board of examiners so far as the auditor's office was concerned, as he would be his own examining board and could allow such claims as he might deem proper so long as the same were within the appropriation made by the Legislature. This, in effect, would take from the State Board of Examiners the authority expressly given it by the Constitution and laws of this state." (94 Pac. at 440.)

In *State ex rel. Hansen v. Parsons*, 57 Ida. 775, 69 P. 2d 788, the court considered a statute appropriating money to cover expenditures from the state insurance fund incurred in excess of the appropriations for the previous biennium. These claims had not been approved by the Board

of Examiners before the Legislature enacted the subsequent appropriation. The court held this unconstitutional since the Constitution of Idaho prohibited the Legislature from passing upon claims which had not been considered and acted on by the Board of Examiners. The previous Idaho cases were discussed and the constitutional jurisdiction and authority of the Board of Examiners was reaffirmed.

In *State ex rel. Taylor v. Robinson*, 59 Ida. 485, 83 P. 2d 983, the court held individual claims for unemployment compensation must be passed upon by the Board of Examiners even though federal funds in the custody of the State Treasurer were used to pay such claims.

“No reflection upon the board or any of its employees is intended or asserted by this argument, but *the Constitution sets up what were considered by its framers as essential safeguards as to the expenditure of public funds generally*. All funds in the hands of and under the control of the State—the only exception being as to the coordinate constitutional body the State Board of Education—must be disbursed under the supervision and control of the State Board of Examiners, and the people by not amending the Constitution in these particulars have continued to sanction and leave effective these safeguards, and asserted expediency, if there be such, may not dissolve them.” (83 P. 2d at 985, emphasis added.)

In *Suppiger v. Enking*, 60 Ida. 392, 91 P. 2d 362, the court held that appropriations could not be used by any state agency to establish revolving funds without the approval of the Board of Examiners.

See also *Gem Irr. District v. Gallet*, 43 Ida. 519, 253 Pac. 128; *Curtis v. Moore*, 38 Ida. 198, 221 Pac. 133; *Davis*

v. *State*, 30 Ida. 137, 163 Pac. 373; *Epperson v. Howell*, 28 Ida. 338, 154 Pac. 621; *Kroutinger v. Board of Examiners*, 8 Ida. 463, 69 Pac. 279.

In Nevada, the case of *State v. Hallock*, 20 Nev. 326, 22 Pac. 123, is in point. A statute appropriated money and authorized counties to claim reimbursement for expenses incurred as agents of the state in the conduct of a special election. The claim was to be certified by the respective boards of county commissioners and the state controller was then required to draw his warrant for the amount certified. Mandamus was sought against the controller for refusing to draw his warrant for the full amount of such a claim. He defended on the ground that the Board of Examiners had approved a lesser amount than that certified by the county. The court upheld this contention even though the statute in question did not require approval by the Board of Examiners. Other statutes (similar to the Utah statutes listed in Stipulation, par. 5, p. 3, R. 27) required approval by the Board of Examiners. The court stated that these other statutes required submission to the Board of Examiners; and it added, assuming these general statutes were repealed as to claims under the election statute, the Constitution of Nevada itself required submission to the Board of Examiners and gave it the power to approve or disapprove such claims. The court further said in answer to the argument that a claim authorized by statute and appropriation was not within the jurisdiction of the Board:

"The most numerous and important claims against the state arise from the contingent expenses incurred in support of the government, and which

must be met as they arise. In view of the manifest purpose of the constitution to protect the treasury by requiring the board of examiners to adjust all claims, it cannot be held that the many and important claims arising against the state, and which, as claims, have never been acted upon by the legislature, are exempted from the investigation of the board. Without stating at length the various positions taken by relator, there is an insuperable objection common to all. Each contention involves an exemption of the claim of the county from the action of the board of examiners, and each is conclusively answered by the provisions of the constitution defining the duties of the board. *It is not within the power of the legislature to confer this authority elsewhere.*" (22 Pac. at 124, emphasis added.)

The Montana cases have restricted the authority and jurisdiction of Montana's Board of Examiners contrary to our contentions, but in doing so are contrary to the weight of authority as shown by the Utah, Idaho and Nevada cases.

2. *The Jurisdiction of the Board of Examiners Includes Claims of State Officers for Salaries Not Fixed by Law.*

The court below decreed that expenditures of all state departments and agencies were claims within the jurisdiction of the Board of Examiners (Par. 5, R. 70, 73). This is in accordance with the Utah cases of *State v. Edwards*, supra, and *State Board of Education v. Commission of Finance*, supra, as well as the Idaho cases cited. However, two exceptions were made: Compensation of officers fixed

by law, and salaries of state officers and employees whether fixed by law or not (Par. 4, R. 70, 73). With the first exception, we agree—with the last, we disagree.

The Board shall “examine all claims against the State except salaries or compensation of officers fixed by law * * * and no claim against the State, except salaries and compensation of officers fixed by law, shall be passed upon by the Legislature without having been considered and acted upon by the said Board of Examiners.” The trial judge reasoned correctly, we believe, that “salaries” and “compensation” are not synonymous terms. (See *Marion-eaux v. Cutler*, 32 Utah 475, 91 Pac. 355, where it was determined that “compensation” included mileage even though mileage might not be considered a salary.) But then, the court went on to state that the term “fixed by law” modifies only “compensation” and not “salaries,” concluding therefrom that all “salaries,” whether fixed by law or not, are excepted from the jurisdiction of the Board.

The State Board of Education has previously been before this Court in a mandamus action to compel the payment of the *salary* of the State Superintendent of Public Instruction, which salary had been “fixed” by the State Board of Education, *State Board of Education v. Commission of Finance*, supra*. Clearly the suit involved payment of a “salary” not “compensation,” a fact noted by the Court in stating that the Board of Examiners “which must approve all salary claims against the State, except those fixed by

*Note: The case arose prior to Chap. 80, Laws of 1953, by which statute the Legislature fixed the salary of the State Superintendent of Public Instruction.

law" had approved the disputed salary claim. In *State v. Edwards*, supra, the plaintiff state employee argued that his claim for mileage previously approved by the District Judge, as provided by statute, was fixed by law and thus within the exception. After stating the rule and citing authorities that the *salary* or compensation of public officers fixed by law could be enforced by mandamus, the Court stated (93 Pac. at 722) :

"* * * But all these authorities simply make it clear that the salary or compensation, of which payment may be compelled in such a proceeding, must be certain and fixed by law, and, further, that it must appear that it is the legal duty of the officer, upon whom the demand is made, to allow or pay the amount claimed. We have not been able to find any case where the compensation was fixed by contract, or where the amount is subject to change at the pleasure of the person authorized to agree upon and fix it, wherein it was held that such compensation is one fixed by law. The mere fact that the Legislature has, in effect, made the certificate of the judge the only evidence that is required to fix the amount due, cannot affect the conclusion that it is not fixed by law. It is the judge, and not the law, that determines and fixes the amount to be allowed under the particular contract under which the stenographer claims."

In *Bragaw v. Gooding*, supra, it was admitted by demurrer that the State Auditor could employ and fix salaries of clerks and assistants. The court had no difficulty in holding that the Board of Examiners had acted within its jurisdiction in disapproving the salaries thus fixed.

Thus, the proper interpretation of the exception limits it (1) to claims for salaries or compensation (2) fixed by

the Legislature in a sum certain (3) as an incident to a public office. For example, the salary of the State Superintendent of Public Instruction, a public officer, has been fixed by the Legislature in a sum certain. (Section 53-2-8, Utah Code Annotated 1953, as amended by Ch. 80, Laws of 1953.) But, by the same section, the Board of Education is authorized to appoint "assistant superintendents, directors, supervisors, assistants, clerical workers and other employees," most of whom would be considered employees rather than officers (*McCormick v. Thatcher*, 8 Utah 294, 30 Pac. 1091), and whose "salaries * * * shall be fixed by the board" rather than by the Legislature. As to the former, the Legislature has exercised the required supervision of public funds; as to the latter, the constitutional powers of the Board of Examiners must be called into play.

B. *The Discretionary Authority of the Board of Examiners.*

As previously noted, the trial court determined that all expenditures of the State Board of Education, with two exceptions discussed above, are claims which must be examined by the Board of Examiners. The court held, however, that the examination was limited to "auditorial supervision" and the Board "cannot exercise discretion or review the wisdom of the expenditures." (Par. 5, R. 70, 73, Opinion, R. 65.) This, we contend, is contrary to the Utah, Idaho and Nevada cases.

Thoreson v. Board of Examiners, 19 Utah 18, 21 Utah 187, 60 Pac. 982, was the first Utah case construing the authority of the Board of Examiners. The Court in that

case ordered the Board to approve a claim under a state of facts where the Board admitted the justness of the claim but denied its legality. The Court said (21 Utah at 189) :

“We do not hold, as intimated in appellant’s brief, that the Board of Examiners is a mere perfunctory body, not capable of exercising any judgment or discretion in matters of allowing or rejecting claims against the state, but hold that in the particulars mentioned in this case, *where the claim is admitted to be just*, the Board had no discretion, but their duties were mandatory.”

Thus, the case holds that the Board of Examiners exercises discretionary powers as to the justness of claims but where the justness of the claim is admitted, the Court can compel the Board to approve a legal claim. The case does not stand for the proposition that only ministerial functions are performed by the Board but holds where only a question of law is involved—the legality of the particular claim—a court can correct an erroneous interpretation of law by the Board.

State v. Cutler, 34 Utah 99, 95 Pac. 1071, enunciates the same principles as the *Thoreson Case*. The Court stated (34 Utah at 102) :

“Indeed there is no dispute with regard to any matter of fact, but the board justify their action in disallowing the claim entirely upon questions of law * * *.”

And further (34 Utah at 107) :

“In this case the essential facts entitling the relator to have his claim audited and allowed are

all admitted. The questions, therefore, are purely questions of law. If the claim, therefore, is one which is admitted to be just, and is authorized by law, and there is no dispute with regard to any fact involved, and the claim is presented to the board in due form as the law requires, we know of no law nor reason why respondents, although acting in a quasi-judicial capacity, should not be required to audit and allow the claim."

After determining that the Board had decided the question of law erroneously, the Court concluded by stating (34 Utah at 108) :

"In view of the conceded facts, there is nothing upon which the respondents can legally exercise any discretionary powers in this case, and therefore they should have audited and allowed the claims."

Thus, the Court expressly recognized the discretionary, quasi-judicial authority of the Board to deny claims it considers unjust, unnecessary, or unwise, but held that where the justness is admitted and only a question of law is involved, a court can review the Board's determination.

The same principle was involved in *Marionaux v. Cutler*, *supra*, the only difference being that the Board's interpretation of the law was sustained as correct.

In the Idaho cases of *Pyke v. Steunenberg*, *supra*, and *Bragaw v. Gooding*, *supra*, the discretionary powers of the Board of Examiners were discussed. Because of the discretion residing in the Board, the court held it was powerless to require the Board to decide in a certain way. The same rule has been consistently applied in the more recent

Idaho cases cited. For example, in *Suppiger v. Enking*, supra, the court said:

“The board of examiners has sole and discretionary authority to decide how and in what manner it will pass upon and allow or reject claims against the state.” (91 P. 2d at 366.)

It is the law in Utah, as well as in most other states, that the State Auditor has only ministerial powers. See *State Board of Land Commissioners, et al. v. Ririe*, 56 Utah 213, 190 Pac. 59. He can refuse to draw warrants for claims submitted to him only if the claim is unlawful and he will be subject to mandamus by a court if it is later determined that the claim is lawful. But, it is a Board of Examiners we are concerned with here, not an auditor or controller—examination of claims, not auditorial supervision of expenditures.

The distinction is pointed up in *Uintah State Bank v. Ajax*, supra, and *State v. Edwards*, supra, in both of which cases mandamus was sought against the State Auditor. The Auditor successfully defended both actions not on the ground that he, as Auditor, had discretionary authority to disapprove the claims, but on the ground that the claims had not been presented to and approved by the Board of Examiners. This Court, in holding the claims must be submitted to the Board of Examiners, was not requiring a mere formality—a gesture to governmental red tape. Would it have required the plaintiffs in those cases to submit their claims to the Board of Examiners if the Board had no discretion to examine and approve or disapprove the claims? This Court realized that the Board of Examiners is

a quasi-judicial body having power to exercise its own independent judgment and discretion as to the justness of the claims it examines.

The Board of Examiners was designed by our founding fathers as an agency to check on all expenditures of the State. The Auditor, on the other hand, was intended to act as an investigating officer as to the financial condition and expenditures of the State, to provide accounting information and to determine whether improper disposition of state money had been made. His functions are analogous to a certified public accountant who makes a periodic review of the accounts, expenditures and financial condition of a business. But greater protection is needed for public funds. A check on expenditures is necessary *before* the money is paid out. Revelations of improprieties after the money has been dispensed are often too late to allow recovery. Some check before money is disbursed is needed. This is the responsibility of the Board of Examiners. It is a constitutional duty which can only be restricted by constitutional amendment.

C. *The Constitutional Powers of the Board of Examiners Cannot Be Restricted by the Legislature.*

The trial court held that the Legislature may modify the constitutional powers of the Board of Examiners (Par. 6, R. 70, 73). This, we contend, is an erroneous interpretation of Article VII, Section 13, Utah Constitution, based on a faulty reading of the "until otherwise provided by law" proviso at the beginning of the section.

Article VII, Section 13, deals with two subjects, the Board of State Prison Commissioners and the Board of

Examiners. The “until otherwise provided by law” clause is contained in the first sentence of the section, which relates solely and exclusively to the composition and powers of the Board of State Prison Commissioners. The proviso in question is not repeated nor incorporated in the second sentence of the section dealing with the composition and powers of the Board of Examiners. To relate the clause to the second sentence, all rules of grammar and the meaning of words must be ignored, for to do so one has to consider the word “they” in the second sentence of Article VII, Section 13, as referring back to and including not only the named officials but also the proviso in question. Since the use of the personal pronoun normally, if not necessarily, refers only to previously named individuals, such an extension of language is not warranted.

But assuming this was the intention of the framers of our Constitution, the section would then read as follows:

“Until otherwise provided by law, the Governor,
 Secretary of State and Attorney General * * *
 shall, also, constitute a Board of Examiners, * * *.”

Following the quoted clause is the enumeration of the powers and duties of the Board of Examiners. Even read in this manner, it is clear that the “until otherwise provided by law” clause modifies only the clause stating who shall *constitute* the Board of Examiners. It has nothing to do with the powers and duties of the Board of Examiners. If the “otherwise provided by law” statement was intended to affect both the membership of the Board and its powers as well, there would be no reason for the term “other duties” nor for the clause “as may be prescribed by law.” That is,

the framers did not say the Board of Examiners should exercise certain specified duties and "such other duties as may be prescribed by law" "until otherwise provided by law." Thus, taking this rather far-fetched interpretation of the section, the most that can be said for the opening clause is that the Legislature may designate officials other than the Governor, Secretary of State and Attorney General to act as a Board of Examiners. Such an interpretation does not allow the Legislature to qualify the duties of the Board, however constituted, to examine claims against the State. The debates in the Constitutional Convention, though somewhat sketchy, support this interpretation. There were no debates on Article VII, Section 13, as such. However, the same committee drafted Sections 12, 13, 14 and 15 and all sections were considered by the Convention more or less as a whole. Thus, the principles discussed in the debates on Section 12, relating to the Board of Pardons, are relevant to Section 13.

The arguments on Section 12 of Article VII ran all the way from contending that the Governor should have the exclusive pardoning power to contending that the Justices of the Supreme Court and the Attorney General should not be members of the Board of Pardons. The question was, who should exercise the pardoning power, not what the powers would be. But, there was no suggestion that the Legislature itself exercise the pardoning power or be able to impose restrictions or qualifications on the power of whoever was given the authority to grant pardons.

On a reconsideration of the entire executive article, the "until otherwise provided by law" proviso was added to

Sections 12, 13, 14 and 15. (Vol. II, Proceedings Utah Constitutional Convention, 1152.) It is significant that *after* this proviso was added, the following substitute to Section 12 was offered but rejected. (II Ibid. 1153) :

“The governor, secretary of state, and attorney general shall constitute a board of pardons and shall have power to grant [pardons, etc.] * * * subject to such regulations as may be provided by law.”

It is apparent that had this substitute carried, the pardoning *power* could have been restricted and controlled by the Legislature. That a substitute to the section *as it now stands* was needed to accomplish this demonstrates that the ‘until otherwise provided by law’ proviso was not intended to qualify the powers granted by the Constitution but only to allow the Legislature to change the membership of these constitutional boards.

But, we need not rely solely on the constitutional debates, for the Supreme Court has expressly held in *Bishop v. State Board of Corrections*, 16 Utah 478, 52 Pac. 1090, that the Legislature could not deprive the Board of Pardons of its constitutional powers. The Legislature had empowered the Board of Corrections rather than the Board of Pardons to parole convicts under certain restrictions and limitations. This was held unconstitutional. Accord: *Carls v. Davis*, 91 Utah 323, 64 P. 2d 216. See also *In re Flint*, 25 Utah 338, 71 Pac. 531 (a court cannot exercise the pardoning power).

Consideration should also be given to the particular wording of Sections 12, 13, 14 and 15 of Article VII, Utah

Constitution. Consistent with the debates and cases above cited, the sections provide that the members of the various boards shall be certain named state officials "until otherwise provided by law." For every board but the Board of Examiners, the Legislature has exercised its prerogative by providing a different membership. But as to the powers of the various boards, the framers were careful to designate whether and to what extent the Legislature could change their powers. For example, in Section 12, the Board of Pardons is given power to pardon "subject to such regulations as may be provided by law, relative to the manner of applying for pardons." The Legislature then can only regulate the manner of applying for pardons. On the other hand, the Board of State Prison Commissioners "shall have such supervision * * * as may be provided by law," a clear statement authorizing complete legislative regulation. The same statement is repeated in Sections 14 and 15. Compare this with the grant of power to the Board of Examiners to examine all claims against the State and "perform such *other* duties as may be prescribed by law." Here the Legislature can only prescribe duties *other* than the duty to examine claims against the State.

Finally, the position of the trial court is directly contrary to the Utah, Idaho and Nevada cases discussed above, particularly the Utah cases of *State v. Edwards*, *supra*, and *Uintah State Bank v. Ajax*, *supra*. All of these cases expressly recognize the constitutional authority of the Board of Examiners and state that the Legislature has no power to interfere with this constitutional authority.

POINT II

BY STATUTE, THE BOARD OF EXAMINERS HAS DISCRETIONARY AUTHORITY TO APPROVE OR DISAPPROVE EXPENDITURES OF THE STATE BOARD OF EDUCATION.

Section 53-3-9, Utah Code Annotated 1953, provides as follows:

“At the end of each month the state superintendent shall file with the state board of examiners an itemized account of his expenses, including those of the state board of education, verified by his oath. The said board shall examine the same, and if the account is found to be correct and the expenditures necessary, shall certify the same to the state auditor. The state auditor shall issue a warrant on the state treasurer for the amount due on such account, and at the end of each month he shall issue his warrant for one-twelfth of the superintendent’s annual salary.”

This provision has been a part of our law since 1896 (Sec. 18, Ch. CXX, Laws of 1896). It provides explicitly not only for review of expenditures of the Board of Education by the Board of Examiners, but also for disapproval by the Board of Examiners if they deem the expenditures unnecessary. Such a statute is, of course, only declaratory of the Board of Examiner’s constitutional responsibilities and we do not wish to minimize our argument in Point I to that effect. But this statute makes clear that the Legislature, as well as the framers of our Constitution, have consistently adhered to a policy of requiring a check on expenditures of state agencies by the Board of Examiners.

Consideration should also be given to the declaratory statutes relating to the Board of Examiners (Stipulation, Par. 5, pp. 3, 4, R. 27), one of which states the Board has jurisdiction over claims for which an appropriation has been made.

With respect to salaries, every appropriations act since 1949 (Stipulation, Par. 7, 8, R. 28), including the 1955 act (Sec. 12, Ch. 164, Laws of 1955), has contained an explicit directive to the Board of Examiners to regulate salary schedules and control working conditions.

POINT III

THE COMMISSION OF FINANCE, AS AGENT OF THE BOARD OF EXAMINERS OR BY STATUTE, HAS POWER TO APPROVE OR DISAPPROVE EXPENDITURES MADE BY THE STATE BOARD OF EDUCATION.

The Commission of Finance was created in 1941 as a part of a comprehensive reorganization of state departments and agencies. The purpose and need for this reorganization is set out in Governor Maw's opening message to the Twenty-Fourth Legislature. (See *House Journal*, 1941 Regular Session, page 6; *Senate Journal*, 1941 Regular Session, page 23.) His proposals and the action taken by the Legislature followed similar plans undertaken by almost every state since 1900, reorganizations which are still being carried on. See the discussion in *House v. Creveling*, 147 Tenn. 589, 250 S. W. 357, particularly at 363. There are many treatises on this general subject which we

commend for the Court's consideration, particularly the following: Bollens, John C., *Administrative Reorganization of the States Since 1939*, University of California, Bureau of Public Administration, Berkeley, April 16, 1947; Buck A. E., *The Reorganization of State Governments in the United States*, New York City, Columbia University Press, 1938; *Reorganizing State Government*, The Council of State Governments, 1950.

The basic purpose of all reorganization plans, including Utah's plan, is to obtain increased economy and efficiency in state government by centralizing authority, usually in the Governor, or as Governor Maw stated, to give Utah a state government rather than a government of a hundred separate units (*House Journal*, Ibid, page 12; *Senate Journal*, Ibid, page 29). Vital to this plan was centralized control of expenditures of all state departments and agencies. The result was the creation of the Commission of Finance. Its workings were well described in Professor G. Homer Durham's 1947 Report to the Tax Study Committee of the 1945 Legislature, entitled *Utilization of Tax Resources by State Government in Utah*. He states, on page 43:

“Actually, the existing system of financial administration focuses responsibility on the Department of Finance. This department, created in 1941, lies at the heart of State government. On it, the legislature and the executive branch must largely rely for enforcement of the appropriation act and the maintenance of legal financial service. Section 82C, Chapter two, Utah Code Annotated 1943, affords an excellent basis for such service and control.

Under this statute the Department of Finance has the legal authority and obligation to:

- “1. Prescribe and maintain a schedule of salaries and job classifications for all State employees except where salaries are fixed by statute.
- “2. Examine all requests for personnel with power to approve or disapprove the same.
- “3. Authorize travel expense and set up rules and regulations governing the same.
- “4. Maintain a budget and accounting system and exercise accounting and budgetary control over all State departments.
- “5. Purchase supplies, materials, equipment, and services required in the administration of State departments.’

In a very real sense, this phase of the 1941 reorganization program provided, for the first time, an adequate ‘house-keeping’ agency in Utah State government.”

Although noting its relationship to the Board of Examiners should be clarified, Professor Durham strongly endorsed the work of the Commission and recommended that its powers be strengthened. He particularly approved of the Commission’s functions in reviewing expenditures, stating that this policing duty is “healthy” and has been properly exercised.

The duty of the Commission of Finance to review expenditures is declared in 63-2-21, Utah Code Annotated 1953, as follows:

“The commission of finance shall exercise accounting control over all state departments and

agencies and prescribe the manner and method of certifying that funds are available and adequate to meet all contracts and obligations. *The commission shall examine and approve, or disapprove, all requisitions and proposed expenditures of the several departments, except salaries or compensation of officers fixed by law, and no requisition of any of the departments shall be allowed nor shall any obligation be created without the approval and certification of the commission.* The commission of finance shall pre-audit all claims against the state. The commission of finance shall, with the approval of the state auditor as to the adequacy of such documents in facilitating the post-audit of public accounts, prescribe all forms of requisitions, receipts, vouchers, bills or claims to be used by the several departments and the forms, procedures, and records to be maintained by all departmental, institutional or agency store rooms and exercise inventory control over such store rooms." (Emphasis added.)

It was soon apparent that the italicized sentence, if literally applied, divested the Board of Examiners of its constitutional powers. The Attorney General was asked for advice on this problem and replied in the opinion set forth in Stipulation, Exhibit A, pp. 13-21, R. 43-51. His conclusion was that construing the constitutional powers of the Board of Examiners and the statutory powers of the Commission of Finance together, the Commission of Finance must be considered to be only an agent for the Board of Examiners in the matter of the approval or disapproval of claims against the State. This has been the consistent interpretation followed since that time.

As a matter of practice, the Commission of Finance determines the mathematical accuracy of the claims and

the availability of funds; the Board of Examiners is primarily concerned with the justness or advisability of the expenditures for which the claims are made, reserving the power to control the actions of the Commission of Finance in other matters relating to claims against the State. This has been the practice and, we contend, the correct practice in view of the express constitutional powers granted the Board of Examiners which we have discussed in Point I.

However, if the Court considers this administrative interpretation and practice to be erroneous, we contend, as an alternative, that the Commission of Finance has statutory authority pursuant to 63-2-13 and 63-2-21, Utah Code Annotated 1953, to approve or disapprove expenditures made by all departments of the State. The language of 63-2-21 is unequivocal: "The Commission shall examine and approve, or disapprove." The authority given is comprehensive, applicable to *all* expenditures of all departments with only the one exception of salaries or compensation of officers fixed by law. Based on the purpose of the reorganization plan, and the language used, it is clear the Legislature intended all departments to be subject to this control, including the Board of Education. It is also clear that the Legislature intended the Commission to prevent unnecessary or unwise expenditures as well as illegal expenditures for which no funds are available. Otherwise, the sentence requiring examination and approval or disapproval would be unnecessary and meaningless.

Salary claims are treated somewhat differently under the reorganization plan. Pursuant to 63-2-13, Utah Code Annotated 1953, the Commission of Finance, after study,

prescribes a salary schedule for the various types and classes of employment in all state departments. After such a schedule has been adopted, no salary claim can be paid in excess of the salary fixed in the schedule without express approval of the Commission of Finance. Consistent with the Attorney General's opinion above referred to, the salary schedule before adoption is referred to the Board of Examiners for its approval and claims for salaries in excess of the schedule must be separately approved by the Board. (See Stipulation, Pars. 10-11, p. 5, R. 29-30.) The obvious purpose and sound policy behind such a procedure is to prevent different pay for the same work. It would be unjust to employees if different pay were awarded for the same work merely because different departments were involved. Also, it would lead to lobbying for additional appropriations by the departments so that each could attract employees from the others by higher salaries.

Most of the cases resulting from state administrative reorganizations have involved provisions allowing a designated state official or finance department to disapprove salaries fixed by another state board or official. But, it is obvious that salary expenditures have no different status than non-salary expenditures so that cases on one aspect are in point as to the other.

In *State ex rel. Yapp v. Chase*, 165 Minn. 268, 206 N. W. 396, the Commission of Administration and Finance was authorized to fix salaries "for the various classes, grades, and titles" of all employees in all departments of the State. The Railroad and Industrial Commission, under a statute

giving it power to fix the salaries of its employees, fixed the salaries of certain employees in excess of the schedule adopted by the Commission of Administration and Finance. The court held the salary fixing power of the Industrial Commission to be restricted to the fixing of salaries not in excess of the schedule adopted by the Commission of Administration and Finance.

In *State v. Manning*, 220 Iowa 525, 259 N. W. 213, the court sustained the discretionary power of a financial officer to disapprove transfer of funds from one budget item to another. In its opinion the court made this pertinent statement (259 N. W. at 220) :

“The Legislature might have said that he should consent to the transfer when in his judgment it would be for the best interests of the taxpayers of the municipality, or when from his examination of the estimates on file as compared with the prior two years, he deemed it expedient or proper, or when in his judgment it could be safely done, or similar general expressions. All this is implied and is inherent in the very nature and purpose of the Budget Act, and the Legislature having entrusted the supervisory and directing power in his hand, it certainly can be presumed that in his quasi-judicial function, coupled with his administrative, supervisory, and directory powers, he will act in the best interests of the taxpaying public.”

In *Reeves v. Talbot*, 289 Ky. 581, 159 S. W. 2d 51, central review by the Commission of Finance of all travel requisitions was sustained. As chief financial officer of the state, the Commissioner of Finance was characterized by the court as “the watchdog of the treasury” with not

only accounting functions but discretionary authority to pass on the propriety and justification of proposed expenditures of all departments of the state. The court said:

"The legislature realized that the determination of incurring expenses for travel outside the state had to be left to the discretion of somebody, and believed it could well be left with the heads of the departments to whom it had granted so much greater and more important powers. But that is not all. Doubtless realizing that the strength of our form of government lies in its system of checks and balances which curbs the abuse of official power, the authority to approve or disapprove the action of the heads of departments in such matters, as well as in other contemplated disbursements, was lodged with the Commissioner of Finance * * *."

The court further stated:

"Considering the relative rights and powers of the heads of the departments and of the Commissioner of Finance in this matter, it seems to us that when an executive officer makes a requisition in accordance with the statutes, the exercise of his discretion as to the propriety and legitimacy of the travel outside the state is entitled to high regard and influential consideration. It is especially his responsibility. If the requisition reveals a good and sufficient reason for incurring the proposed expenditure, we think the Commissioner of Finance should regard it as prima facie valid and proper and that he may rely upon those representations and approve the requisition if the purpose is within the scope of the appropriation for the department and the amount is within the unexpended balance to the credit of the particular fund. If that is the condition he will be shielded from liability. It is not to

be overlooked that that officer has a second chance to review and control the payment of the claim for reimbursement when it shall be presented. Sections 340, 359a-1, 359a-4, Statutes. On the other hand, if in the exercise of a sound judgment the Commissioner is of opinion that the proposed travel is not legitimate or proper, considering the functions of the department and the nature of the duties of the officer or employee and, as well, the purpose and character of the business to be attended to or if he regards the proposed expenditure as prima facie excessive, or if he ascertains that it will exceed the balance of funds allotted to the department, he should disapprove the requisition in the manner prescribed by the statute."

A similar situation was presented in *Sellers v. Frohmler*, 42 Ariz. 239, 24 P. 2d 666, where a provision of an appropriations act required the Governor's approval as to legality and necessity for proposed travel expenditures. Although holding the requirement invalid because of an unique provision of the Arizona Constitution prohibiting appropriations acts containing other than appropriated amounts, the court said:

"The passage of section 6 was undoubtedly prompted by a legislative desire to take from the auditor the control and supervision of the expenditure of appropriations for operation and travel and place it under the governor, and, in addition, to require every officer, before using any part of the sum appropriated to his department for these purposes to show to the Governor the *necessity* for its use and procure from him a requisition therefor. The accomplishment of this end, it is clear, is a rightful and proper subject of legislation, but in view of sec. 20, supra, providing that the general

appropriations bill shall embrace nothing but appropriations for the different departments of the state, it is equally clear that it cannot be done as a part of that bill."

Another Arizona case, *Industrial Commission v. Price*, 37 Ariz. 245, 292 Pac. 1099, involved a statute authorizing the Industrial Commission to appoint and fix the salaries of its employees but providing, "Such employment and their compensation shall be first approved by the governor * * *." It was contended that the Governor had only a ministerial duty and the Industrial Commission was the sole judge of the help needed and the amount of their compensation. Holding that the Governor had discretion to disapprove employment or the compensation thereof, the court said:

"The Governor has nothing much to say as to who the employees shall be, but much to say as to their necessity. He has nothing to say as to the fixing of their compensation, but, if such compensation as fixed by the commission seems to him to be excessive, he may disapprove it."

It was further contended that with such a power, the Governor could dominate the administration of the Industrial Commission. To this argument the court replied that the purpose of the Legislature was merely to have a check on expenditures of the Industrial Commission, a proper subject for legislation.

In *Wycoff v. W. H. Wheeler & Co.*, 38 Okla. 771, 135 Pac. 399, a statute required the Governor's approval of publisher's bonds for all contracts made by the State Board

of Education acting as a State Textbook Commission. This was held to vest discretion in the Governor to approve or disapprove such bonds, a discretion which a court could not control.

In California, a state which has served as the model for so many of our laws, a Department of Finance is vested with the power to review expenditures. In *Ireland v. Riley*, 11 Cal. App. 2d 70, 52 P. 2d 1021, the court held that contracts for liquor stamps made by the Board of Equalization must be approved by the Department of Finance. The court characterized the purpose of the California financial reorganization as follows:

“The unmistakable purpose of the Legislature in [creating the Department of Finance] is to conserve the financial interests of the state, and to prevent, as far as possible, any improvident acts by any of the departments thereof; to give to the state such powers as would enable the department of finance to control the expenditures of state money by any of the several departments of the state. The general powers extend to the supervision of all the financial and business policies of the state, which necessarily include supervision of the expenditure of moneys belonging to the state.”

The above case and the quotation therefrom was affirmed in the more recent cases of *State v. Brotherhood of Railway Trainmen*, 37 Cal. 2d 412, 232 P. 2d 857, and *Treu v. Kirkwood*, (Cal. 1953), 255 P. 2d 409, both of which involved review of salaries by the Department of Finance.

The above cases clearly hold that a check by one department or official on the exercise of the powers of another

department or official is constitutional and proper. Indeed the courts have applauded the internal system of checks and balances thus established. The State Board of Education in effect contends that it has the right to be as extravagant as it desires, that it can pay excessive salaries, that it can make unnecessary purchases, and that no one but the Board of Education itself can prevent such abuses. Such a check on expenditures is useless, for certainly the one who asks for and uses the funds would never admit the expenditures to be unnecessary or extravagant. The Legislature itself could not by appropriation or general statute provide an effective check. A statutory specification of the number of employees, the number of typewriters, the amount of paper, etc., would be impossible to state realistically two years in advance, would not provide the needed flexibility in administration, and would take up so much of the time of the Legislature as to be impractical. Yet, a continuing review by an independent board or official is necessary to secure efficient and economical administration of the State Government. In Utah, such a function is vested in the Board of Examiners and Commission of Finance.

We submit that the plain meaning and purpose of the present statutes of Utah authorize and require the Commission of Finance to review and, in its discretion or as agent of the Board of Examiners, to approve or disapprove expenditures of the State Board of Education.

POINT IV

THE COMMISSION OF FINANCE IS AUTHORIZED AND REQUIRED BY STATUTE TO AP-

PROVE OR DISAPPROVE ALL APPOINTMENTS OF EMPLOYEES MADE BY THE STATE BOARD OF EDUCATION, INCLUDING EXPERTS AND SPECIALLY QUALIFIED PERSONNEL.

Section 63-2-14, Utah Code Annotated 1953, provides as follows:

"The commission of finance shall examine all requests for personnel and shall approve or disapprove the same and no new position shall be created and no vacancy shall be filled until the commission has certified to the department requesting the creation of a new position or the filling of the vacancy that the position is necessary to carry on the work of such department in an efficient and business-like manner and that the necessary funds therefor are available to the department. The commission shall investigate the need for every existing position in every department and shall report its findings to the board of examiners with its recommendations for the most effective means of discontinuing unnecessary positions."

This statute is another part of the state reorganization plan. Centralized personnel control is vested in the Commission of Finance in order to promote more efficient utilization of employees and to prevent the creation and continuance of unnecessary positions. The discretion vested in the Commission is apparent for it is to "approve or disapprove" all requests for personnel and to determine whether a new position is "necessary" for the performance of the work of the department making a request.

The statute speaks for itself. To avoid repetition we refer the Court to the cases and arguments in Point III. We only emphasize that the authority of the Commission of Finance is effective only as a check on the exercise of the powers of the various departments of the State. Paraphrasing *Industrial Commission v. Price*, supra, the Commission of Finance has nothing to say as to who the employees shall be but much to say as to their necessity.

POINT V

THE DUTY OF THE BUDGET OFFICER, UNDER THE DIRECTION OF THE GOVERNOR, TO APPROVE OR DISAPPROVE WORK PROGRAMS SUBMITTED BY THE STATE BOARD OF EDUCATION, IS CONSTITUTIONAL.

By Section 63-2-20, Utah Code Annotated 1953, (Supplemental Record, Par. 18, p. 5) the Budget Officer under the direction of the Governor has power to "revise, alter, decrease, or change" the allotments requested in the Board of Education's work program. The actual operation of this system is described in Supplemental Record, Par. 19, p. 6.

This is an integral part of that part of the state reorganization relative to finances. It requires each department to estimate its financial needs. It is important to realize that not only are appropriations subject to the requirement of a work program but all other funds available to the particular department are included. Thus, federal matching funds, land grant funds, tuitions, fees, or any other moneys available to the department must be stated

and accounted for. The result is that the department knows what funds it has to work with and can plan accordingly, the Governor controls and, by controlling, takes the responsibility for policies involving the expenditure of money, and the public and the Legislature have comprehensive and accurate figures by which it can be determined what funds are available and from that information how efficiently our government is being run.

As to the constitutionality of this procedure, we contend the statute to be an ordinary exercise of the police power. The Legislature has given the Governor, assisted by the Budget Director, the duty to supervise the fiscal policies of the State so that full value is received by the taxpayers from the taxes they pay to support our government. To this legislation, as well as all other legislation, the well known presumption of constitutionality applies.

A similar grant of power to the Governor was referred to in *Chez v. Utah State Building Commission*, 93 Utah 538, 74 P. 2d 687. There a statute provided:

“The Governor shall have authority to reduce or transfer items or parts thereof within any appropriation, or eliminate any appropriation made herein, or transfer any appropriation or part thereof to the general fund.”

Although no question was raised as to the discretion thus vested in the Governor, this Court held it to be proper, saying, “in the absence of a constitutional provision to the contrary, the power of the Legislature on the subject of appropriations is plenary.”

In *State ex rel. Boyle v. Ernst*, 195 Wash. 214, 78 P. 2d 526, a statute provided that no expenditure for welfare should be made "except upon allotments approved by the Governor." A taxpayer, asserting certain welfare expenditures should be made, sought mandamus against the Director of the Washington Welfare Department, whose defense was that the Governor had failed to approve allotments for welfare purposes. The taxpayer argued the Governor's power was an unconstitutional delegation of legislative power. The court replied:

"* * * of necessity the legislature must delegate to executive and administrative officers the power to expend state funds. It may and does set up such safeguards and limitations as it may deem expedient—as in this instance, where it has prohibited expenditures except upon quarterly budgets approved by the director, and from allotments made by the governor. Should the court, in face of these statutory provisions, grant the writ sought, its decree would amount to nothing short of usurpation of legislative power and the assumption of executive and administrative functions."

Not only did the Washington Supreme Court refuse to declare the Governor's budgetary control powers unconstitutional but held that to do so would be an unconstitutional invasion by the judiciary of legislative and executive powers.

The Washington court was correct in holding there was no delegation of legislative power by a statute granting budgetary control powers to the Governor. It is fundamental that an appropriation is only a maximum in excess of which a state department may not spend funds. Approp-

riations are not directions by the Legislature that the sum appropriated must be spent. They are only authorizations to spend *not more* than a certain amount—"so much thereof as may be necessary" is the term used in appropriations. Explicit in every appropriation is an authorization to the board or official in charge of the agency to which the appropriation is made to spend less than the entire appropriation if the entire sum is not needed. Except for salaries and compensation fixed by law, unlimited authority is given to "revise, alter, decrease or change" proposed expenditures. Happily, there are some boards and officials who do exercise some restraint in the spending of state money, who do feel a responsibility to the taxpayers, and who believe they have no inherent right to spend the money appropriated to them regardless of need. That this is both constitutional and commendable cannot be denied. See *Stephens v. Chambers*, 34 Cal. App. 660, 168 Pac. 595 at 600; *State Board of Health v. Frohmiller*, 42 Ariz. 231, 23 P. 2d 941 (Syl. 3).

Considering this in the light of 63-2-20, which statute is made a condition to all appropriations (Secs. 1(b) and 6(a), Ch. 164, Laws of Utah 1955), it is apparent that the budgetary control power of the Governor is nothing more than a legislative authorization to save state money if the Governor, aided by statistical information and advice from the Budget Director, deems it necessary. There can be no objection to placing in the Governor and Budget Director a power which all department heads would have even without any legislation. True, the Governor and Budget Director can supervise the department heads in this respect, but

this is only a matter of administration of the State Government which the Legislature, in its discretion, has deemed a wise public policy. If the plan does not work well, it is up to the Legislature, not the courts, to change it.

There are, of course, other purposes achieved by 63-2-20. Expenditures are kept within appropriations and other available funds; the department is advised what funds it can use; accounting is simplified and clarified; and financial information is available to the public and the Legislature. We have limited our discussion to the authority of the Budget Officer and Governor to revise work programs, for respondent has complained only of that.

POINT VI

THE STATE BOARD OF EDUCATION IS NOT A FOURTH BRANCH OF STATE GOVERNMENT.

The court below stated in its opinion (R. 61) :

“The Constitution recognizes four general fields of Government in and by the State: Legislative, Executive, Judicial and Educational.”

A similar statement was made in the Conclusions of Law and Judgment (Par. 1, R. 70, 72). It is easy to see that such a concept has far-reaching and drastic effects upon the present practice under our Constitution. The court suggested some of the changes which would flow from this concept. It was reasoned that powers are either granted or vested, granted powers being those which may be cancelled or revoked, whereas vested powers are those that “cannot

be cancelled, withdrawn, vacated or annulled by the will of the grantor" (R. 60). It was then noted that Article X, Section 8, of the Utah Constitution, relating to the Board of Education, *vests* the general control and supervision of the public school system in the State Board of Education. Implicit in this reasoning and the specific reference to the term "vested" in Article X, Section 8, is the result that these powers which are vested in the State Board of Education cannot be withdrawn nor cancelled by the will of the grantor, to wit, the people of the State of Utah.

As applied to the particular issues raised in this case, it was determined that the control and supervision which was vested by the Constitution in the State Board of Education means that the Board "must have the exclusive power and right to manage, handle, invest, expend, employ and supervise all funds and personnel within its jurisdiction." (Par. 3, R. 70, 73.) This we contend to be erroneous and contrary to both the practice and interpretation of our State Constitution.

Consider Article X, Section 8, for a moment. It provides, as amended:

"The general control and supervision of the Public School System shall be vested in a State Board of Education, the members of which shall be elected as provided by law."

This merely establishes a State Board of Education to exercise general control and supervision of the public schools. It is only a declaration of general policy requiring legislative implementation to become effective. That this is so

was the holding of *State Board of Education v. Commission of Finance*, supra. It does not operate to vest constitutional powers in the State Board of Education. It is merely descriptive. In *Salt Lake City v. Board of Education of Salt Lake City*, 52 Utah 540, 175 Pac. 654, this Court stated:

“Article X of our Constitution, entitled ‘Education’, provides that the control of the public school system, which includes all schools of whatever kind and grade, is *vested in the Legislature*.” (Emphasis added.)

Based upon this, the Court reasoned that local boards of education were subject to legislative control and their powers and duties were subject to extension or limitation only by the Legislature with the result that city regulations could not be applied to schools without authorization by the Legislature.

Such an interpretation obviously makes good sense not only because it comports with our understanding of the republican form of government but also because it complies explicitly with Article V, Section 1, of our Constitution. Solicitous as our founding fathers were to the needs and progress of education, they would not have said in one breath that the “powers of the government of the State of Utah shall be divided into three distinct departments,” and in another say that the State Board of Education is a fourth department of government, exercising broad powers over the public school system, which powers cannot be withdrawn or circumscribed by the people of the State of Utah nor by its Legislature.

A similar contention was made in Montana in *State ex rel. Public Service Commission of Montana, et al. v. Brannon, et al.*, 86 Mont. 200, 283 Pac. 200, 67 A. L. R. 1020. There a statute required a professor at the University of Montana to act as state chemist. Article 11, Section 11, Montana Constitution, provides:

“The general control and supervision of the state university and the various other state educational institutions shall be vested in a state board of education, whose powers and duties shall be prescribed * * * by law. * * *”

It was contended that this provision of the state constitution prevented the Legislature from imposing a non-educational duty on a university professor. In holding to the contrary, the court stated:

“The assertion that the Legislature is without power to prescribe or regulate the functions of the University or one of its units cannot be admitted. That the board of education is ‘within the scope of its functions, co-ordinate and equal with the legislature’ must be denied. ‘The powers of the government of this state are divided into three distinct departments: The Legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.’ Section 1, art. 4, Constitution.

“The board of education is a part of the executive department, and is but an agency of the state government. The Legislature may prescribe the extent of the powers and duties to be exercised by

the board in the general control and supervision of the University of Montana. The Legislature may broaden the functions of the University, or any of its units. It may require research and experimental work to a greater extent than is now being carried on, and for the public benefit may require the discharge of functions in new fields. In other words, the state may extend, and add power to, its developmental arm."

Thus, Article X, Section 8, does not of itself vest constitutional powers in the Board of Education. It follows that the Powers of the Board of Examiners, Commission of Finance and Governor are in no way in conflict with Article X, Section 8.

Even considering general control and supervision of the schools to be a self-executing grant of power, it must nevertheless be held that claims made by the Board of Education must be approved by the Board of Examiners and the Commission of Finance as agent of the Board of Examiners. The responsibilities of the Board of Examiners only relate to the wise use of funds by state agencies including the Board of Education. Certainly, the Board of Education would be the last to admit that it is wholly concerned with spending money and does not have additional important policy making and supervisory functions which do not involve expenditures. It is only the money spending powers of the Board of Education that the Board of Examiners supervises, and as to this, the Examiners are not only justified but required by the Constitution to continue such supervision. This does not qualify the powers of the Board of Education. Within its powers it has

the initiative to do what it will. Only when it makes an unwise or illegal expenditure does the Board of Examiners act to restrain them. The extravagant or unlawful *exercise* of the spending powers of the Board of Education are restrained, not the existence or extent of the powers granted. As was stated by the Idaho court in *State ex rel. Taylor v. Robinson*, *supra*, "the people of the State through the Constitution have placed the State Board of Examiners as the final arbiters of expenditures" and further "the Constitution sets up what were considered by its framers as essential safeguards as to the expenditure of public funds generally. These same essential safeguards on expenditures are a part of the Utah Constitution and cannot be impaired by the Judiciary, the Legislature, or even by the Board of Education. Only the people, by constitutional amendment, can alter this principle of our State Government.

POINT VII

IN DISPUTES BETWEEN STATE DEPARTMENTS, THE ATTORNEY GENERAL HAS DISCRETION TO REFUSE TO APPOINT COUNSEL.

It was conceded below that the Attorney General, as legal adviser of all state officers (Article VII, Sec. 18, Utah Constitution) and being in charge "of all civil legal matters in which the State is in anywise interested" (67-5-1(1), U. C. A. 1953), is the legal adviser of the State Board of Education, its officers and employees and that, as a general rule, the Board of Education has no authority to

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employ its own counsel. See Annotation, 137 A. L. R. 818. It was contended, however, and the court below so held that when a dispute arises between the Board of Education and other departments or agencies, counsel may be employed without the consent of the Attorney General.

The problem is not easy of solution and we wish to assure the Court that what we say here is not aimed at the able attorneys for respondent.

We realize that the Attorney General is in no different position than any other attorney in being unable to represent both sides of a controversy. Nor can the matter be solved by having different attorneys in the Attorney General's office represent each side, a fact Justice Larson noted in his concurring opinion in *Chez v. Utah State Building Commission*, supra. See also *State v. Hendrix* (Ariz. 1942), 124 P. 2d 769.

Thus, there is a dilemma. On the one hand, there is the policy of having a single legal adviser for all state departments. One of the purposes of such a policy is, we believe, to avoid duplication of effort and expense. Furthermore, as applied to disputes between departments, it has the effect of providing an arbitrator, for most of such disputes are settled by an opinion rendered by the Attorney General. On the other hand is the policy of our adversary system of jurisprudence which has shown that the best presentation of both sides of a dispute occurs when each is represented independently.

In such a dilemma, we believe the Attorney General has authority to employ special assistant attorneys general

for the side he chooses not to represent. See *Reiter v. Wallgren* (Wash.), 184 P. 2d 571. This should be done in every case where the Attorney General, on his own behalf or as attorney for another state department, is suing a state department or official for violations of the Constitution or statutes (criminal violations, of course, excepted). This is so even though he has the statutory duty to defend all state departments and officers (See 67-5-1(1)) for as noted in *State ex rel. Dunbar, Attorney General v. State Board of Equalization*, 140 Wash. 433, 249 Pac. 996:

“His [the Attorney General’s] paramount duty is made the protection of the interests of the people of the state, and, where he is cognizant of violations of the constitution or the statutes by a state officer, his duty is to obstruct, and not to assist, and, where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the attorney general to defend such state officers.”

But where one department has a grievance against another and the Attorney General, as a lawyer, feels such a claim to be unsubstantial, a different rule must be applied. In such a case, we contend, the Attorney General can refuse to appoint special counsel. This has the effect, it is true, of denying the department the right to prosecute its claim. Yet in such a case, is not the duty of the Attorney General to provide legal representation to all departments subordinate to his primary duty to protect the interests of the people of the State? One of the beneficial results of a single legal adviser is the prevention of groundless litigation and

the avoidance of unnecessary expenditures of public funds for legal expense.

This is not to say that the Attorney General should or would refuse to appoint counsel where he disagrees with the claims of the prospective plaintiff. He must exercise his discretion as a lawyer even though personally he believes the claim unsound or officially he has taken a contrary position. If a substantial question exists, counsel should be appointed; if not, counsel should be denied. Bear in mind, the decision to proceed with litigation is a decision which the departments themselves are not qualified to make.

We submit that the Attorney General, as legal adviser of all state officers and having charge as attorney "of all civil legal matters in which the State is in anywise interested," is the only official under our Constitution and statutes to make such a decision.

CONCLUSION

The fundamental issue underlying this case is whether the present structure of State Government in Utah provides for a system of checks and balances on the expenditure of public funds. We contend such a system exists and applies to the State Board of Education along with all other departments and agencies of the State. We contend that the people of the State of Utah who adopted our Constitution established such a system through the Board of Examiners and that the people, through their representatives in the Legislature, expanded and amplified this system through the 1941 reorganization plan. Our state educational agen-

cies, important as they are in carrying out so vital and fundamental a state service as education, are but one aspect of the total functions of the State. They are not so important as to be a government unto themselves, unrestricted and unsupervised by any other state department or agency and not subject to control by even the Legislature. This, we submit, is not and cannot be the law in Utah.

The judgment of the court below should be reversed.

Respectfully submitted,

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