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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY OF UTAH,
—vs.— *Plaintiff,*

BOARD OF EXAMINERS OF THE
STATE OF UTAH, et al.,

Defendants and Appellants,

STATE BOARD OF EDUCATION,
Intervenor and Respondent.

Clerk, Supreme Court, U. of U.

Case No. 8457

BRIEF OF RESPONDENT

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UNIVERSITY OF UTAH,
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—vs.—

BOARD OF EXAMINERS OF THE
STATE OF UTAH, et al.,

Defendants and Appellants,

STATE BOARD OF EDUCATION,

Intervenor and Respondent.

Case No. 8457

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The declaratory judgment in the lower court was based upon documents received in evidence over the objection of appellants. It was not based upon an academic issue. Appellants' "Statement of Facts" is a statement of propositions of law. The facts are set forth in Exhibit 2. Restated they are in part as follows:

1. The appropriated funds for the operation of Weber College allocated to the eighth quarter of the

biennium were reduced by the governor on the day it was expendable in the month of April, 1953, by \$5,000.00 (Exhibit 2, Page 5)

2. The appropriated funds to Weber College for the first fiscal year of the 1953-1955 biennium were reduced by the governor by \$79,027.91.

3. The appropriated funds to Carbon Junior College were likewise reduced by the governor on April 1, 1953, the day they were expendable, by \$2,000.00. (Exhibit 2, Page 10)

4. The appropriated funds to Dixie Junior College were also reduced by the governor on April 1, 1953, the day they were expendable, by \$4,000.00 for one month. (Exhibit 2, Page 14)

5. The governor and State Finance Commission refused to make available to the Board of Education, for research, appropriated funds in the amount of \$20,000.00. (Exhibit 2, Page 24)

6. The Finance Commission in 1948 refused to pay salaries fixed by the Board of Education for administrative and supervisory personnel. (Exhibit 2, Page 43)

7. The Finance Commission again refused in 1949 to pay increased salaries for staff members approved by the Board of Education. (Exhibit 2, Page 47)

8. The Finance Commission again refused in 1950 to pay salaries fixed by the Board of Education to staff members. (Exhibit 2, Page 56)

9. The Board of Examiners refused in 1951 to pay the salary of the Superintendent of the School for the Deaf and the Blind fixed by the Board of Education at \$500.00 per month and cut the salary to \$425.00 per month. (Exhibit 2, Page 65)

10. The Board of Examiners denied in 1952 the request of the Board of Education for authority to employ a custodian of a building on an overtime basis. (Exhibit 2, Page 85)

11. The Board of Examiners in 1953 directed the Finance Commission to reduce the salary of the State Superintendent of Public Instruction, as fixed by the Board of Education from \$10,000.00 per annum to \$6,000.00 per annum. (Exhibit 2, Page 91)

12. The Board of Examiners then instructed the Finance Commission to delete the name of the State Superintendent of Public Instruction from the payroll. (Exhibit 2, Page 94)

13. The State Board of Examiners in 1953 denied a request of the Board of Education for approval of a salary of \$5,200.00 a year to be paid a director of elementary education. (Exhibit 2, Page 98)

14. A demand made in 1952 for payment of legal services incurred and costs for printing of legal briefs for the Board of Education was denied by the Finance Commission and treated by the Commission and the Board of Examiners as a claim against the State requiring an act of the Legislature to authorize payment. (Exhibit 2, Page 104)

15. Request dated March 20, 1953, by the Board of Education of the Attorney General for special legal counsel selected by the Board to represent it in its claim against the Board of Examiners, of which the Attorney General is a member, asserting that the salary of the Superintendent of Public Instruction may be fixed by the Board of Education was denied. (Exhibit 2, Page 107)

The foregoing Statement of Facts is indicative of the course of conduct found by the lower court to be illegal and beyond the powers of the Appellants. This is a justiciable controversy ripe for judicial determination. (See *State of Wisconsin ex rel. Philip F. LaFollette, Governor, v. Theodore Dammann, Secretary of State*, 264 MW 627, 103 ALR 1089)

The appellants have chosen to argue the points involved in this case in seven parts. Respondents believe the subject matter more logically lends itself to a division into five parts as set forth in the five points hereinafter stated.

STATEMENT OF POINTS

POINT I

THE BOARD OF EXAMINERS DOES NOT HAVE AUTHORITY TO DISAPPROVE DISBURSEMENT OF FUNDS BY THE STATE BOARD OF EDUCATION FOR PUBLIC SCHOOL PURPOSES.

POINT II

THE GOVERNOR AND THE COMMISSION OF FINANCE DO NOT HAVE AUTHORITY TO REDUCE APPROPRIATIONS MADE BY THE LEGISLATURE FOR PUBLIC SCHOOL PURPOSES.

POINT III

IF THE BOARD OF EXAMINERS OR FINANCE COMMISSION HAVE ANY AUTHORITY OVER THE APPROPRIATED FUNDS OF THE BOARD OF EDUCATION, IT IS MINISTERIAL.

POINT IV

IN THE EMPLOYMENT OF PERSONNEL THE DEPARTMENT OF FINANCE HAS NO AUTHORITY OVER THE STATE BOARD OF EDUCATION.

POINT V

THE BOARD OF EDUCATION MAY EMPLOY INDEPENDENT LEGAL COUNSEL WHEN THE ATTORNEY GENERAL IS REPRESENTING OTHER STATE AGENCIES ASSERTING RIGHTS IN CONFLICT WITH THE AUTHORITY OF THE BOARD OF EDUCATION.

ARGUMENT

POINT I

THE BOARD OF EXAMINERS DOES NOT HAVE AUTHORITY TO DISAPPROVE DISBURSEMENT OF FUNDS BY THE STATE BOARD OF EDUCATION FOR PUBLIC SCHOOL PURPOSES.

A. The construction of similar constitutional and statutory authority prior to statehood in Utah limited the powers of the Board of Education.

In the decision involving the Plaintiff and Defendant in these proceedings, this court carefully traced the history of the constitutional provisions of the statutes surrounding the establishments of institutions of higher learning in the respective states of the country. The historical background in the western states of the constitutional and statutory provisions involved in this case are likewise important and will first be considered.

It is unfortunate that the Appellant in a statement of facts should express an opinion misconstruing the scholarly decision of the District Court. In a careful analysis and comparison of the State Constitution and the Federal Constitution, the District Court made clear the distinction between the State Executive Branch of Government under the State Constitution, which vested powers in the Board of Education and not the Chief Executive, and the Federal Executive Branch of Government which vests full executive power in the President. (Page 4, District Court Memorandum Decision)

The issues herein involve the interpretation of two constitutional provisions: The first is Article 10, Section 8 of the Utah Constitution which reads:

“The general control and supervision of the Public School System shall be vested in the State Board of Education, consisting of the Superintendent of Public Instruction and such other persons as the legislature may provide.”

Respondent will undertake to enlarge upon the clear and concise treatment and analysis of this constitutional provision made by the District Court in the first six pages of its decision. This constitutional provision has bearing upon the five points treated in this brief and will be discuss as it applies to each point.

The other constitutional provision is Article 7, Section 13 of the Utah Constitution, which reads:

“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 compensation of officers fixed by law, shall be passed upon by the legislature without having been considered and acted upon by the State Board of Examiners.”

We here cite the last four pages of the District Court's decision, concur in its reasoning, and propose hereinafter to enlarge upon the legal citation of authority and conclusions therein expressed.

A recognized rule of construction in determining the intent of the framers of constitutional provisions of legislative acts is to look to other states which have

similar provisions and which have been construed at the time of adoption of the provision in question.

Prior to the constitutional convention of the state of Utah the states of Nevada and Idaho had provided in their constitutions for a Board of Examiners. California had similar provisions in statutory law. Cases from these three states, prior to the Utah Constitution, limited the authority of the Board of Examiners.

1. The Nevada Cases

The Nevada constitutional provision creating a Board of Examiners is *identical* with the Utah provision except "until otherwise provided by law" is omitted. (Article 4, Section 21) The Nevada cases held that a "claim against the State" did not include payments originating with state agencies or liquidated claims. The Board of Examiners was also said to have only advisory authority as to claims requiring its examination.

In *Ash v. Parkinson* 5 Nev. 15 (1869) an action was brought by the Sergeant at Arms of the Assembly of the State of Nevada for a writ of mandamus compelling the Comptroller of the state to pay a sum due the Sergeant at Arms for services rendered and a \$5,000 contingent fund for use by the Assembly. The claim had not been submitted to the Board of Examiners and the Comptroller refused to issue a warrant. In considering this question the court said:

"A claim is a demand by someone other than the state against it for money or property; but when the claim originates with the state, or in its

behalf, and contemporaneously with its origin, and means and manner of payment are provided, as in the case of a bond, it does not then constitute a claim proper against the state, but a liquidated and legalized demand against the treasurer. * * * ”

A second Nevada case decided a year later concerning the authority of the Board of Examiners was *Lewis vs. Doron* 5 Nev. 399 (1870). Plaintiff brought a suit for a printing bill against the Comptroller alleging that he had performed his services as agreed and that his bill had been approved by the Board of Examiners and the Comptroller was refusing a warrant for payment. Plaintiff contended that upon examination by the Board of Examiners no further action was necessary and the claim should have been allowed. The court stated that the provisions of the constitution that no claims shall be passed upon by the Legislature without having been considered and acted upon by Board of Examiners was merely a statement that examination by the Board of Examiners was only advisory to the Legislature. This would give effect to the two provisions of the Constitution.

The court held that the board was only advisory to the Comptroller and that the Comptroller had authority over the allowance of claims irrespective of the action of the Board of Examiners. The examination by the Board of Examiners was intended as a double check on the disbursement of funds to accomplish its purpose by

“giving a fuller airing and ventilation of claims, that might or probably would follow from one examination.”

A third Nevada case decided prior to the adoption was *State v. Hallock*, 22 Pac. 123, 20 Nev. 326 (1889). The court stated the issue in this case as follows:

“The question is whether the Legislature can require the Comptroller to draw his warrant for the amount ascertained to be due by the Board of County Commissioners, or whether the State Board of Examiners, under the provisions of the Constitution, should have audited the claim.”

The court then cites the constitutional provision creating the Board of Examiners and the statutes thereunder which provide that, for a claim for which an appropriation has been made but the amount of the claim has not been liquidated, such claim must be presented to the Board of Examiners. Another statute provides that for claims for which no appropriation has been made it must be approved by the Board of Examiners before submitted to the legislature. After examining these provisions of the statutes and reasoning that they are logical in their application, the court states as follows:

“These provisions of the statutes present a practical and reasonable exposition of the provisions of the Constitution, and place the authority to audit *unliquidated claims* with the board created for that purpose by the Constitution.”

2. The California cases

The California decisions prior to the adoption of our Constitution held that disbursements authorized by the state agencies need not be examined by the Board of Examiners.

The Constitution of the State of California did not establish a Board of Examiners. The Legislature, in enacting its Political Code in 1872, provided by Section 364 that the Governor, Secretary of State, and Attorney General would constitute the Board of Examiners. The power and duty of the Board of Examiners was set out in Article 18 of the Political Code and the provisions there, with reference to the presentation of claims *for which appropriations have been made* or the presentation of claims *for which no appropriation has been made*, are practically identical with the early statutory provisions and the present law in Utah.

California, like Nevada, held that claims originating with state agencies were not to be reviewed by the Board of Examiners. In the early case of *The Board of Trustees of the State Library vs. Kenfield*, 55 Cal. 488 (1880), an action was brought to determine whether a voucher drawn by the Board of Trustees of the Library must first present their claim to the Board of Examiners for its approval before money could be drawn by the Treasurer. The court's entire decision on this matter is as follows:

“This is an application for a writ of mandate, requiring the respondent, State Comptroller, to draw his warrant upon the State Treasurer, in favor of petitioner, for money in the State Treasury belonging to the State Library fund. The objection is urged by respondent that the books, etc., required by the library should first be purchased, and the claims therefore be presented to the Board of Examiners for their inspection and

approval. We do not think that the transactions of the Board of Trustees are the basis of claims within the meaning of Section 616 Political Code. The chapter of the Political Code referring to the State Library, places the library under the control of the Board of Trustees, and authorized the board to draw from the State Treasury, at any time, all the moneys therein belonging to the library fund; and the librarian is to purchase books, maps, engravings, paintings, and furniture for the library, 'according to such rules and regulations which the Board of Trustees may prescribe.' Their judgment then, as to what books, etc., may be proper, to be added to the library is not subject to review by the Board of Examiners."

The holding of this decision in 1880, so far as respondents can discover, has not been challenged by any subsequent case.

3. The Idaho cases.

The only Idaho case prior to the adoption of our Constitution followed the Nevada case of *State v. Hall-ock* supra and limited the provision to unliquidated claims. Section 18, Article 4 of the Idaho Constitution creating the Board of Examiners used *identically* the same language as contained in the Utah Constitution with the exception that the section is not prefaced with the statement "until otherwise provided by law."

In *Winters v. Ramsey*, 39 Pac. 193, decided in January, 1895 an action was brought to require the State Auditor to issue a warrant for the payment of an amount claimed by the plaintiff owing on a contract for the con-

struction of a wagon road. The court reviewed the constitutional and statutory authority of the Board of Examiners and then stated as follows :

“These sections of the Constitution and the statute require all claims against the State of an *unliquidated character* shall be submitted to this board for approval or rejection before the auditor shall draw his warrant therefor. *This claim is of the class that must be submitted to this board, and approved by it, before the auditor can draw a warrant in payment thereof.* The disposition of the court is upheld in the case of State vs. Hallock (Nev.) 22 Pac. 123, in which this precise clause in the Constitution of Nevada is passed upon by the court, and wherein the same position is taken by the court. These conditions precedent not having been complied with, the motion to grant the alternative writ is allowed, and the petition dismissed.”

From the decisions in California, Nevada and Idaho prior to the adoption in Utah of our Constitution we may conclude :

1. That a claim as referred to in the Constitution is not a demand by the state or a claim which originates with the state in its behalf and arises contemporaneously with the origin of the demand. (Ash vs. Parkinson *supra*)

2. The examination by the Board of Examiners is only advisory, and an additional check upon the payment of funds, the auditor having the ultimate power and authority to approve claims rather than the Board of Examiners. (Lewis v. Doron *supra*)

3. Only unliquidated claims were intended to be presented to the Board of Examiners, for review and determination of the amount involved. (*State v. Hallock supra*)

4. "Claims" did not include payment and disbursement of money authorized by other political agencies whose purchases and disbursements were not subject to review by the Board of Examiners. (*The Board of Trustees of the State Library v. Kenfield, supra.*)

B. The Constitutional Convention debates clearly indicate that Section 13 could be subsequently modified by the Legislature.

At the time of the constitutional convention there was considerable discussion concerning the adoption of Section 12, Board of Pardons, Section 13, State Prison Commissioners and Board of Examiners, Section 14, Insane Asylum Commissioners, and Section 15, Reform School Commissioners in Article VII of the Utah Constitution. It will be noted that Section 12 is the forerunner of the four sections mentioned above, all of which deal with the establishment of some type of board or commission for the administration of specific agencies.

At the constitutional convention it was moved that all of these sections be stricken for the reason that they were legislative in nature. The argument advanced when Section 12 was considered and action taken in connection therewith was applied in a routine fashion to the

other three sections. At the time of the second reading of these sections it was stated :

“You will find in the report that after the third line in that section that which follows is legislation, pure and simple, and of such a nature that the Legislature should have control of it, and they should have the power to change it when the necessities of our government may demand it. * * * It will relieve us of a great amount of legislation, a tendency which is added in most constitutions of states recently formed, because we have tended in that direction too much. I prefer that we leave some little to the Legislature.” Vol. 1, Proceedings Constitutional Convention 933.

The proceedings of the constitutional convention indicate that the framers of the Utah Constitution considered the section creating the Board of Examiners as involving a legislative function and, therefore, provided that the agency created by the Constitution should be maintained only until the functions were otherwise assigned by the Legislature.

When the matters were debated later the following statements were made :

“Mr. Thurman. ‘Mr. Chairman, I would like to offer a substitute for both of these.’ (Reads)

‘Until otherwise provided by law the Governor shall have power to remit fines and forfeitures, commute punishments, and grant pardons for all offenses against the State.’

I do not see why this matter cannot be left to the Legislature. Of course, this leaves the matter where it is now ,but it gives to the Legislature the

right to create a board such as is here named, or any other kind of a board of pardons. * * *

“Mr. Varian. ‘Mr. Chairman, taking the propositions in their order, I would suggest, in speaking to the substitute offered by my friend from Utah County, that there is no reason why we should not leave it to the Legislature.’ * * * ”

When these sections came up for final reading the proceedings were as follows:

“Mr. Hyde. ‘Mr. President, I have an amendment to offer to Section 12, insert at the beginning of the section, ‘until otherwise provided by law.’

The amendment was agreed to * * * .

Mr. Emery. ‘Mr. President, I have no objection particularly to this section, but I think it deals with legislative matters too much.’ * * *

Section 13 was read.

Mr. Hyde. ‘Mr. President, I offer an amendment on that section, to add at the beginning of the section ‘until otherwise provided by law’.

The amendment was agreed to.

Mr. Creer. ‘Mr. President, I move an amendment to precede this section, similar to the one made to the other, ‘until otherwise provided by law’ And I may also offer the same amendment to Section.’

The amendment was agreed to.”

(Vol. II Proceedings Constitutional Convention
1895)

The Defendants argue that this amendment related only to the composition of the Board, and not to its pow-

ers. This argument may find some support in the technical wording of this section, but such an argument is not inconsistent with the constitutional debates.

At the time of our constitutional convention it must be remembered that the states of Idaho and Nevada had incorporated into their constitutions provisions creating Boards of Examiners. On the other hand, the State of California had by statute created a Board of Examiners. In view of these two different ways of handling the matter in other states, it was to be expected that in our constitutional convention there would be some dispute as to whether such provisions should be in the constitution or should be handled by the legislature. It will be remembered that Sections 12, 13, 14 and 15 of the Executive Article of the Constitution established administrative boards and agencies. It was first moved that Section 12 be stricken from the proposed Article. This motion was rejected. Thereafter there was some discussion with reference to Sections 13, 14 and 15. One of the delegates stated as follows:

“Mr. Chairman, I hope the motion will prevail to strike out Sections 13, 14 and 15. They are legislation pure and simple. If they work well, all right. If they do not work right we cannot get rid of them until the constitution is amended or until we have a new constitution.” Vol II Proceedings Constitutional Convention, 1015-16.

Delegate Varian, Chairman of the Committee on the executive branch of the government, argued at the time of the second reading of the section that

“The Convention should not refuse to put it into the Constitution because, as claimed, it is a matter of legislation. Of course, it is legislation—fundamental legislation. *If they desire to leave the matter open for change, it is easy enough to amend all these sections by saying, ‘until otherwise provided by law.’* That would obviate that objection, if it is an objection to the members of the Convention. It is not a reason for striking out the entire section.” II Proceedings Constitutional Convention, 1017. (Emphasis added)

It will be recalled that upon final reading all of these sections were so amended by adding at the beginning of each section the words “until otherwise provided by law.”

In spite of the convention debate Defendants argue that the words “until otherwise provided by law” only affect the composition of the Board of Examiners and do not and cannot affect the constitutional power and authority of the Board. This contention is based on the fact that part of the section stated “with power to examine all claims against the state * * * and perform such other duties as may be prescribed by law.” It is the Defendants’ contention that it would be unnecessary to add the words “as may be prescribed by law” if it was intended that the words “until otherwise provided by law” permitted the legislature to amend the entire section as it might deem appropriate.

If the section had been originally drafted as it was finally enacted, there would be merit to such an argument. Without the amendment the section defined some of the duties of the Board of Examiners and authorized

the legislature to prescribe additional duties. Later, when the amendment "until otherwise provided by law" was enacted, the provision authorizing the legislature to provide additional duties became in part redundant but through inadvertence was not deleted.

The attention of the convention was directed to the issue of whether the section should be frozen in the constitution, or whether, if included in the constitution, some provision should not be made permitting unlimited change in the future by the legislature. The fact that the constitutional section defines some of the duties of the Board of Examiners and specifies that they shall perform such other duties as may be prescribed by law, cannot, in view of the history of the enactment of this section, be interpreted to restrict the meaning of the words "until otherwise provided by law." A reading of the proceedings at the constitutional convention can leave no doubt that the framers of the constitution intended that all of these sections creating administrative agencies could be completely modified by future legislative enactment.

Other constitutional provisions prefaced by "until otherwise provided by law" in Sections 12, 13, 14 and 15 of the same Article VII have all been modified by the Legislature and superseded by statutory enactments.

Section 12 creating the Board of Pardons has been altered as shown by the present section 77-62-2 and 77-62-3 U.C.A. 1953. Part of Section 13 pertaining to the State Prison Commissioners has been modified as shown

in Section 64-9-1, U.C.A. 1955. Section 14 has been modified as shown in Section 64-7-2, U.C.A. 1953, and also Section 15 has been modified as contained in Section 64-6-1 and 64-6-2, U.C.A. 1953.

It is respectfully submitted that the Legislature has intended to modify the remainder of Section 13 to permit the Department of Finance to review miscellaneous personal claims. In addition to being a board of reviewing claims, the Board of Examiners was given the duty of being a board of supplies and purchases. (Stipulation Count 2, Paragraph 13) Thereafter when the Department of Finance was created, the functions of the Board of Examiners were transferred to the Commission of Finance which was to pre-audit all claims and the auditor was to post-audit the claims. Had the Legislature intended to require in addition to the approval of the Commission of Finance the approval of the Board of Examiners, they would have so provided since by specific amendment they were taking from the Board of Examiners this authority and transferring it to a new department.

In light of the history of the incorporation into the Constitution, "until otherwise provided by law," the Legislature has now provided by statute elaborate methods for handling claims against the state. The Board of Education must comply with proper accounting procedures to safeguard and protect public funds. But such accounting procedures cannot nullify the authority of the Board of Education as specified in the Constitution.

The Defendants argue that after the above discussed provision was inserted by amendment into these sections, a substitute to Section 12 was offered and rejected. A reading of the manner in which the substitute was offered clearly shows that the delegate wanted to substitute a short, concise paragraph for Section 12 in lieu of the rather lengthly and detailed section that was adopted. This being the purpose for the substitute, it cannot be validly argued that the reason the substitute was submitted was because it was felt that the provision "until otherwise provided by law" did not permit future modification by the legislature. The Defendants cite the case of *Bishop vs. State Board of Corrections*, 16 Utah 478, 52 Pac. 1090, which held that an act empowering the Board of Corrections, rather than the Board of Pardons, to parole convicts under certain restrictions and limitations was unconstitutional. That case merely holds that until authority of the Board of Pardons as created by the constitution is changed by a legislative enactment another tribunal cannot exercise authority granted to the Board of Pardons. The issue herein discussed was not presented to the court. It was a case where the legislature had not modified the laws relating to the Board of Pardons but had attempted to create co-existent authority in the Board of Corrections involving some authority already granted to the Board of Pardons.

For further enlightenment as to the intention of the framers of the constitution, an examination of the implementing legislation passed in 1896 immediately after the adoption of the constitution shows that it was not the

intent of the legislature as they interpreted the constitution that the Board of Examiners should control all disbursement of funds. Sec. 18, Chapter 35, Laws of Utah, 1896, defining the duties of the Board of Examiners provided:

“The state auditor shall not draw his warrant for any claim, unless it has been approved by the Board, except for salaries or compensation of officers fixed by law, *or for monies expressly appropriated by statute.*”

This additional provision was not found in the Montana Political Code Section 680, Codes and Statutes of Montana, 1895, which was otherwise copied by the Utah legislature verbatim.

The first Utah legislature had three types of statutes in other states which could be used as guides for enacting implementing legislation.

In Nevada the legislature limited the authority of the Board of Examiners to the perfunctory duty of just *examining* claims of two types: (1) A claim not supported by an appropriation, and (2) A Claim supported by an appropriation where the claim was unliquidated. If the board failed to examine the unliquidated claim within thirty days, the Comptroller could proceed without examination by the board. (Sec. 23-60, 61, Compiled Laws of Nevada 1873)

In contrast, the Idaho statutes did not confine the authority of the Board of Examiners to examination of

just two types of claims, but gave it enlarged powers by stating:

“The board may *approve or disapprove any claim or demand* against the state or any item thereof, or may recommend a less amount in payment of the whole or any item thereof, and a decision of the majority of the members shall stand as the decision of the board.” (Session Laws 1899, Page 24, Sec. 3; Session Laws 1891, Page 46; Codified Idaho Codes 1901, Sec. 344)

This broad statute obviously, influenced the Idaho Supreme Court, which in part distinguishes and explains the Idaho cases.

The third type of statute and the one actually adopted in Utah was in the Laws of Montana. (Sec. 680, Codes and Statutes of Montana, 1895) Similar laws were enacted in California; (Sec. 654-685, Political Code 1886, Calif.) however, when Utah copied these laws they added the additional provisions authorizing the auditor to issue warrants on monies *expressly appropriated by statute*. It is clear that the first Utah Legislature intended to follow a middle ground, and make their intent clear by modifying the laws as enacted in Montana and California to specifically exclude from the scope of examination of the Board of Examiners monies *expressly appropriated by statute*. Even without this exclusion the Montana and California cases have so interpreted their laws.

C. The case law decided since statehood in other states having similar provisions has limited the authority of the Board of Examiners.

Nevada, Montana and California have limited the authority of the Board of Examiners. Idaho has refused to render the State Board of Education as the Board of Regents of the University of Idaho subservient to the Board of Examiners.

The Defendants state that the Idaho, Nevada and Utah cases constitute the weight of authority holding in support of their contentions. It is the respondent's contention, however, that the cases from California, Nevada and Montana constitute the weight of authority, and that the Idaho cases can be distinguished. A brief review of the cases in the other jurisdictions show that the weight of authority is consistent with the position now taken by the respondent. The early Nevada case of *Ash vs. Parkinson* supra and the second Nevada case of *Lewis vs. Doron*, supra and the third case of *State vs. Hallock*, supra have heretofore been discussed. (See page 12)

The Defendants attempt to distinguish the case of *Board of Trustees vs. Kenfield*, supra on the ground that it was a statutory agency rather than a constitutional agency. This supposed distinction completely ignores the fact that the court was construing the same language as defined the authority and duties of the Utah Board of Examiners. The case further specifically limits the definition of the word "claim." The definition there made is consistent with the definition and limitation established in the early Nevada case of *Ash v. Parkinson*, supra.

The Montana Constitution (Section 20, Article 7) directs the State Board of Examiners to examine all

claims against the state. It is almost identical with the Utah provision. A statutory provision (Section 262, Montana Revised Code) says:

“The board of examiners may at any time, when necessary, employ clerical help for any state officer or board, and no clerks must be employed by such officers or board without the authority of the board of examiners, and no such clerks must be employed by the board of examiners except when all the duties of the officers cannot be performed by the officer himself.”

These two provisions were construed in the case of *State v. Cunningham*, 101 Pac. 962, 33 Montana 165 (1909). In 1909 the Board of Examiners authorized the employment of a stenographer at the rate of \$150 per month by the judges of the Supreme Court. The Legislature had appropriated an amount which would have permitted the payment of \$200 per month for the stenographer who had been employed by the Supreme Court since 1896, and who, since 1901, had been receiving pay of \$150 per month.

The issue was whether the Board of Examiners had power and authority to specify the amount of payment which would be made to the employee of the Supreme Court. The suit was in mandamus to compel the auditor to issue a warrant in the amount of \$200 a month.

The court after citing the constitutional provisions establishing the Board of Examiners and Section 262 Revised Code, cited above, stated as follows:

“The result of this action, if it be held to be of binding force, is that this court in some of its important functions is subject to the control of the state board of examiners; for to say that it may grant the court permission to employ a stenographer is to say that in its discretion it may withhold permission. This means no more or less than that, though the services of a stenographer are absolutely necessary to the proper accomplishment of the work of the court — a fact about which there can be no dispute — the board may in its discretion cut off all such services, and thus virtually disable the court, or at least seriously impede and hamper it, in the discharge of its duties. *To say that it may fix the compensation to be paid for each service is also an assertion of the same power; for, if through mistake or lack of knowledge, or from any other cause, if any such exist, the board should fix the compensation at such a figure as to render it impossible to secure suitable service, this would be attended by the same consequence as if no compensation were allowed.* The constitution of this state reserves the powers of government in three distinct departments — the legislative, executive, and judicial. * * *”

The court then cites the section of the Constitution which provides for the three departments of government and then further states with reference to said section as follows:

“It is within the knowledge of every intelligent man that its purpose is to constitute each department an exclusive trustee of the power vested in it, accountable to the people alone for its faithful exercise, so that each may act as a check upon the other, *and thus may be prevented*

the tyranny and oppression which would be the inevitable result of enlargement of all power in the hands of one body. It is incumbent upon each department to assert and exercise all its power whenever public necessity requires it do so; otherwise, it is recreant to the trust reposed in it by the people. It is equally incumbent upon it to refrain from asserting a power that does not belong to it, for this is equally a violation of the people's confidence. Indeed, the distinction goes so far as to require each department to refrain from in any way impeding the exercise or the proper functions belonging to either of the other departments."

The court then analyzed the duties required of a stenographer employed by the court. Mention is made of the particular qualifications required of such an employee, more particularly that he must be able to complete citations to cases, record testimony of witnesses when any hearing is held before the court, and that the employee has confidential information concerning deliberations and results of cases which require great care to be exercised in selecting the person employed. It was further stated as follows:

"In view of these considerations, it is manifest that the power to select the proper employee could not with propriety be vested elsewhere than in the court itself; and it is equally manifest that the power to say whether it may or may not be necessary to have assistance, and what the qualifications of the assistant shall be, may not be vested elsewhere. If the power of appointment exists at all, it is a necessary power of the court, and, since the qualifications of the individual desired

is determined in a measure by the amount of compensation paid for his services, the power to fix the compensation is also a necessary power. In short, the court has the inherent power to select and appoint its own necessary assistants and make the compensation due for their services a charge against the state as a liquidated claim. Any other conclusion would be to put the court in the attitude of a petitioner to the board of examiners from time to time, and thus reduce it from its position as a coordinate branch of the government to the level of the ordinary citizen who desires or claims payment for services rendered. * * *

“But the legislature could with no more propriety lodge in that department the power to appoint the employees of this court than it could empower the court to appoint the employees of the various executive offices. The provision of the constitution, *supra*, cited as a justification for the action of the board, has no application to a claim such as the one here involved. Nor has Section 226, Revised Codes, which declares in the form of a statute the prohibition embodied in the constitution. Both apply to *unliquidated claims, and not to those the amounts of which have been fixed specifically by contract or by any department of the government having authority to fix them.*”

Although the court in the above case is referring to the judicial branch of government, its analysis of the statute and constitutional provision has application here. It does not require much imagination to visualize the end result of the control of salaries of directors and employees of the Board of Education by the Board of Examiners. It is manifest that the power to select directors to carry forward the educational supervision of the Department

of Education cannot properly be vested elsewhere than in the Board of Education. The Board is a constitutional body created by the people. If the directors and employees of the Board of Education are compensated as the Board of Examiners may determine, the constitutional body is then placed in the position of a petitioner as any ordinary citizen having an unliquidated claim against the state.

The statutes of Montana appear to give broader authority to the Board of Examiners over disbursements of appropriated funds than the Utah statutes. The Supreme Court of Montana, notwithstanding, refused the Board of Examiners control over the funds of an educational institution. One Montana statute (850 Revised Codes of 1921) provided:

“The state board of examiners * * * shall have supervision and control of all expenditures of all moneys, appropriated or received for the use of said (educational) institutions from any and all sources, other than that received under and by virtue of the acts of Congress * * * shall let all contracts * * * and shall audit all claims to be paid from any moneys, * * * but * * * shall have authority to confer upon the executive boards of such institutions such power and authority in contracting current expenses, and in auditing, paying, and reporting bills for salaries or other expenses incurred in connection with such institutions, as may be deemed by said state board of examiners to be to the best interest of said institution.”

In the case of *State vs. Erickson*, 244 Pac. 287, 75 Montana 429, referring to these sections, the court said:

“These sections show the extent of the authority of the board of examiners concerning the expenditure of public funds. When the board of examiners has exercised the powers conferred upon it by the Constitution and legislative enactments of the state, its functions are ended. *State ex rel Schneider v. Cunningham*, 101 P. 962, 39 Mont. 165; *Porter v. Hartley* 216 P. 344, 67 Mont. 244. While this board is given supervision and control over the expenditures of moneys appropriated or received for the use of the educational institutions of the state, this power does not authorize an arbitrary reduction by the board of valid appropriations and authorized expenditures from available funds applicable to such appropriations and expenditures which have been duly made and authorized by the Legislative Assembly and have received the approval of the Governor. Such attempted substitution of the judgment of executive officers for that of the legislative body constitutes a usurpation of legislative functions which cannot be permitted under our constitutional division of state government into its three co-ordinate departments; the authority to do so was denied the governor in the exercise of his veto power in *Mills vs. Porter*, 222 P. 428, 69 Mont. 325, 35 A.L.R. 592, and there is much less reason for sustaining the exercise of such power by an executive board. When the Legislative Assembly has expressed its solemn judgment as to the amount necessary for the support and maintenance of an institution for the fiscal year, and in doing so has kept within the restrictions imposed by the Constitution both as to such general appropriation and its appropriations generally for such

year, the executive and judicial departments of the state must bow to that judgment."

By statutory authority cited in the foregoing case, the Board of Examiners is given broad and sweeping authority over the funds appropriated for the use of the educational institutions of that state. This statutory authority is in addition to the constitutional provision establishing the Board of Examiners. Yet, even under these circumstances, the Supreme Court held that the Board of Examiners did not have authority to interfere with the funds appropriated or expenditures authorized by appropriation made by the Legislature.

The development of the Idaho cases and the Idaho law is substantially different from any of the other states. The Idaho Constitution provides that the Supreme Court may review claims against the state in addition to the Board of Examiners. The enabling legislation of the State of Idaho was much broader than found in any other state; a factor which obviously influenced the Idaho court in its decisions.

The Idaho case prior to the adoption of the Utah Constitution was *Winters v. Ramsey*, supra, decided in January 1895. Then followed *Pyke v. Stuenenberg*, 5 Idaho 614, 51 Pac. 614 (1897) which started upon the assumption that the claim had to be presented to the Board of Examiners, and was brought to compel action by said Board. The case followed shortly after this was *Bragaw v. Gooding*, 14 Idaho 288, 94 Pac. 438, which involved an attempt by the auditor of the State of Idaho

to employ two of his relatives in his office and to compel payment to said relatives without having those claims approved by the Board of Examiners. The court in this case felt compelled to hold that the action by the auditor should be subject to review by someone other than the auditor himself, and held that the Board of Examiners had that authority.

The Idaho Constitution is unlike ours in that it provides that in addition to the Board of Examiners reviewing claims against the state, the Supreme Court shall hear and determine claims against the state. Article V, Section 10, of the Idaho Constitution provides :

“The Supreme Court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; it shall be reported to the next session of the legislature for its action.”

Article IV, Sec. 18, of the Idaho Constitution, which provides for the Board of Examiners, has been amended twice by the people, thus incorporating the prior constitution which has not been the case in the State of Utah. The first amendment was proposed by the Session Laws, 1939, page 671, S.J.R. No. 7, and ratified at the general election in 1940. The section was again amended as proposed by the Session Laws of 1945, page 398, H.J.R. No. 3, and ratified at the general election in November, 1946.

Enabling legislature setting up and defining the powers and duties of the Board of Examiners provided

that the state auditor is ex officio secretary of the State Board of Examiners.

Enabling legislation passed in 1899 (5th Session, page 24, Sec. III; and Laws of 1891, 1st Session, page 46,) in defining the duties of the Board of Examiners stated:

"The Board may approve or disapprove any claim or demand against the state, or any item thereof, or may recommend a less amount in payment of the whole, or any item thereof, and a decision of a majority of the members shall stand as the decision of the Board."

However, even Idaho has not gone so far as to hold that a claim against a constitutional body is one which must be presented to the Board of Examiners. In the case of *State vs. State Board of Education*, 196 Pac. 201, 33 Idaho 415 (1921), the Idaho court held that a claim against the Board of Education as the Board of Regents of the University of Idaho was not a claim against the state such as would require approval of the Board of Examiners. The authority granted the Board of Regents was similar to the authority granted to the Intervenor in that it provided that the general supervision, control and direction of the University was delegated by the constitution to the Board of Education. So the Idaho cases cannot even be said, as to the facts of this case, that they are contrary to the position taken by the respondent since in the foregoing case it was held that as to a constitutional body with constitutional authority the definition of claims would be restricted so as not to require examination and approval by the Board of Examiners.

In view of the foregoing cases it is contended that the Nevada, Montana, California and even Idaho cases support the contention of the Respondent and have limited the authority of the Board of Examiners.

D. There is no specific statutory authority requiring approval of disbursements by the Board of Examiners.

The Defendants attempt to answer this assertion under their Point II. In support of their position they cite Sec. 53-3-9, Utah Code Annotated, 1953, which provides in part 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.”

In considering the foregoing section with other provisions of the law for disbursement of funds, it is obvious that the foregoing statute provides only for the review of the personal expenses of the superintendent of public instruction and the board members, as contrasted with the disbursement of funds for institutions under the control of the State Board of Education. Sec. 64-1-16, Utah Code Annotated, 1953, provides in part as follows:

“On the first day of each month, or as soon thereafter as the bills for the expenses for the previous month have been audited, the governing board of each state institution, * * * shall make a requisition upon the state auditor for a warrant in sufficient amount to pay the bills so audited, and

thereupon the state auditor shall draw his warrant against the appropriation made for such institution for the amount named in the requisition * * * .”

This section obviously applies to the disbursement of funds appropriated by the legislature for the operation of the various institutions under the control of the State Board of Education, more particularly Weber College, Dixie Junior College, Carbon College, the Vocational Schools and the Deaf and Blind Schools in the State of Utah.

This section would also apply to the expenses for materials and supplies and employees of the State Board of Education. The section states that the governing board shall audit the expenses for the previous month and *shall* file the same with the auditor who *shall* draw a warrant against the appropriation made for such institution. Nowhere does it appear that the Board of Examiners should examine the request for disbursements of the institutions against their specific appropriations.

At one time the law did specifically provide that the Board of Examiners should approve all requested disbursements against appropriations made to the various institutions. Sec. 26-0-21, Revised Statutes of Utah, 1933, (Stipulation Count 2 and 3, Par. 22) provided:

“The State Board of Examiners shall not allow any demand payable out of any appropriations made to any state institution until the same is presented to the Board of Trustees or Board of Control of such institution * * *. Copies of such

bills in itemized form shall be transmitted monthly, together with a statement thereof approved and verified by the proper officer or officers of such institution, to the Board of Examiners for its approval or disapproval."

Sec. 26-0-22, Revised Statutes of 1933, provided "the State Auditor shall not draw his warrant to cover any claim against any appropriation made until such claim or claims have been approved by the Board of Examiners." The foregoing two sections were repealed by the Laws of Utah, 1941. Second Special Session, Chapter 27, Sec. 3.

The legislature has specifically eliminated any requirement that the Board of Examiners approve warrants drawn on appropriations before issuance by the state auditor. The statute requiring approval by the Board of Examiners has been specifically repealed. The Respondent does not contest the authority of the Board of Examiners to examine *personal expenses* of the state superintendent and the board members. It is felt that such a requirement is reasonable since it provides for an independent audit of these *personal claims*. However, as to the other expenses of institutions under the control of the Respondent, the board and the state superintendent audit those claims, in addition to the directors of those institutions, thus giving the independent check required to safeguard expenditure of public funds.

The same legislative history is shown with reference to employing personnel by the State Board of Education. Sec. 75-7-2, Revised Statutes, 1933, (Stipulation Count 1,

Par. 3) provided that the State Board of Education upon the recommendation of the state superintendent may appoint a secretary of the board and "The salary of the secretary shall be fixed by the board, subject to approval of the State Board of Examiners, and it shall be paid from any money appropriated for that purpose." Sec. 75-7-2, U.C.A. 1943, was amended eliminating the specific approval of the Board of Examiners.

The present law, Sec. 53-2-8, U.C.A. 1953, provides that the Board of Education:

"May appoint such assistant superintendents, directors, supervisors, assistant, clerical workers and other workers, as in the judgment of the board may be necessary to the proper administration of the public school system. The salary of such assistant superintendents, directors, supervisors, assistants, clerical workers and other employees shall be fixed by the board and shall be paid from money appropriated for that purpose." (Stipulation Par. 3)

For the Defendants to argue that Sec. 53-3-9, U.C.A. 1953, which provides for the submission of the personal expenses of the superintendent and members of the State Board of Education is sufficiently broad to grant to the Board of Examiners statutory authority to approve or disapprove expenditures of the State Board of Education generally, completely ignores Sec. 64-1-16, U.C.A., 1953, cited above, pertaining to the drawing of vouchers for expenses by the governing board of state institutions for previous months and completely ignores the legislative history whereby prior approval of the

Board of Examiners has been specifically eliminated by the legislature.

The fact that Sec. 53-3-9 requires Board of Examiner approval and Sec. 64-1-16 does not, shows that if the legislature so intended they could have provided for approval by the Board of Examiners. It is, therefore, clear that the Board of Examiners does not have any statutory authority requiring approval or disapproval by said Board for the disbursement of funds appropriated by the legislature to the Board of Education for the maintenance of institutions under its general control and supervision.

E. Reasonable construction of the Utah Constitution requires that each section be given effect.

To interpret the section creating the Board of Examiners in the manner asserted by the Attorney General and Board of Examiners would tend to nullify the other provisions of the constitution, more particularly the section creating the three departments of government and the section empowering and authorizing the State Board of Education to supervise and control the public school system. Such an interpretation is contrary to the uniform rule of construction that an interpretation will be adopted which will give effect to all provisions of a constitution or statute.

Defendants' brief answering the University of Utah discusses and relies upon the above mentioned rule of interpretation. The Defendants stated:

“It is also well established that a constitution must be examined as a whole giving full effect, whenever possible, to every provision.”

The Defendants then cite a lengthy quotation in support of that proposition from Cooley’s Constitutional Limitations. Although the Defendants rely upon this argument in support of their answer to the Plaintiff, they have completely ignored and failed to answer the application of this argument, as asserted by the Respondent. If the Board of Education is to have general control and supervision of the public school system, it cannot be hopelessly subordinated to the Board of Examiners in the employment of personnel, expenditure of funds, and in other ways as shown by the exhibit in this action.

The Defendants state that it is only the money spending power of the Board of Education that the Board of Examiners supervises and “this does not qualify the powers of the Board of Education.” (Page 49) Even the Idaho courts which have gone furthest in sustaining broad power in the Board of Examiners has recognized that where the Constitution granted to the State Board of Education as Regents of the University of Idaho general supervision and control of the University to

“Confer upon the Board of Examiners power to pass upon claims against the Board of Regents, would make the latter board subservient to the former, and in the final analysis would operate to deprive the Board of Regents of the control and direction of the funds of an appropriation to the University.” *State v. State Board of Education*, *supra*.

The exhibits filed in this action are conclusive of the fact that the Board of Examiners have exercised complete control over the Board of Education by virtue of supervising expenditure of funds. Such control is exercised to such an extent the Board of Education cannot even employ janitors on a temporary basis on up to employment of directors of institutions, creation of research departments, etc., without first securing approval of the Board of Examiners.

The Defendant cannot consistently argue that as to the University of Utah all sections of the Constitution should be given effect, and yet as to the Board of Education the section establishing the Board of Examiners should have precedence over the section establishing and defining the duties of the Board of Education.

The Appellant under Point 4, has chosen to interpret and take issue with a selected statement made by the trial judge which is not determinative of this case. Whether the educational department of the state government is or is not classified as a fourth branch of government is not the important issues. Likewise, the issue here presented is not "Can the people by constitutional amendment modify the vesting of authority in the Board of Education?" Education has been of paramount importance in the State of Utah. It received considerable attention at the Constitutional Convention, and was separately treated in the Constitution.

The issue here is one of constitutional construction, of whether one board created by the constitution shall be

permitted to dominate another constitutional agency. The trial court, in rationalizing the intent of the framers of the constitution and the two sections involved, points out the vesting of control in the Board of Education not the chief executive or any other official. The Board of Education makes no claim that it is not subject to the laws of the Legislature, providing such laws are not in conflict with constitutional provisions.

In view of the Respondents' position that the Board of Examiners has no authority over claims originating with a state agency or that the authority of the Board of Examiners, if any, is limited to the performance of ministerial duties, it is not necessary to extend this brief by discussing the particular meaning of the exception "salaries or compensation fixed by law." Reference is made to the able discussion of this issue contained in the opinion of the trial judge.

F. The specific authority of the Board of Education should have precedence over the incidental and general authority of the Board of Examiners.

The State Board of Education is given the specific and primary duty of supervising the educational system of the state, while the Board of Examiners are given the authority to examine claims only as an incidental or secondary duty.

The Defendants completely ignore the foregoing proposition and make no attempt to answer the same in their brief. Rather, they take the position that the

Board of Examiners not only have the power, but must, examine all claims and disbursements against the state. Such a position as a practical matter is illogical. The early Nevada case of *Lewis v Doron*, supra, recognized that a practical interpretation of the authority of the Board of Examiners must be given stating:

“It must be remembered that this board is composed of state officers, having other high and responsible duties imposed and powers given by the constitution—this matter of examining claims being only an addition thereto; so if there be any force, any argument that they are rendered subordinate, still such subordination is in only one particular, outside the special powers pertaining to their general official position.”

All of the arguments advanced by the Nevada Court apply with equal force to the present case. If it were not thought feasible to burden the three top state officials with the full responsibility of approving all disbursement of funds in 1870, it cannot logically be maintained that in practice such officials should be compelled to perform such collateral duties under present-day conditions.

The provision creating the Board of Examiners is as though it were an amendment or an afterthought, being attached to the section of the Constitution creating the Board of State Prison Commissioners. If the framers intended to create an all-powerful board, having authority over all appropriated funds, the section accomplishing such a purpose would have received some specific discussion at the Constitutional Convention and would

have been stated separately and not as an appendage to a group of miscellaneous sections creating administrative agencies to function "until otherwise provided by law."

G. The nine members of the Board of Education are direct representatives of the people, having been elected by them.

The nine members of the State Board of Education are elected by the people and accountable to the people.

The Defendants ignore this fact and contend the Governor should have authority to exercise budgetary control being responsive to the people. They argue:

"Cries of destruction of constitutional government are not only an overstatement but completely false. In fact, constitutional government is strengthened for the responsibility for excessive expenditures or too drastic decreases in funds is placed directly on the governor. Public opinion and the exercise of the vote can thus operate not only on the Governor but on the legislature to modify the powers granted. This is constitutional government. Insulation of bureaucrats from the electorate and their indifference to public opinion is replaced by a system responsive to public demands and requirements."

This argument sounds in politics not law; but considered as political it also fails.

The Supreme Court in the other phase of this lawsuit involving the University of Utah recognized that

a distinction should be made where a Board of Regents was appointed as contrasted to a Board of Regents elected by the people. This distinction was relied upon to distinguish the constitutions of Michigan and Colorado as compared to the constitution of the State of Utah.

H. There are other adequate safeguards for the disbursement of public funds.

It is the Respondent's contention that disbursement of funds duly appropriated by the Legislature to the Respondent for disbursement are not subject to the review of the Board of Examiners. The Board of Examiners or such other agency as is delegated to review miscellaneous and incidental claims has no authority to interfere with the administration of the policies of specific agencies equally accountable to the people as the Board of Education. There are sufficient accounting procedures to insure that the funds are disbursed for public purposes and that the funds are adequately appropriated for the expenditures made.

The Respondent does not contend that it cannot be required to submit its claims for a pre-audit to determine if they are for public purposes and within its appropriation. The Respondent is called upon to prepare budgets in advance and to submit its accounts to both a pre-audit and a post-audit.

Section 63-6-19, U.C.A. 1953, (Par. 23, Count 2 of the Stipulation) specifically prohibits any board or commission from authorizing expenditures in excess of

their appropriations and further provides that so to do would subject the members to a criminal complaint charging a misdemeanor.

Section 67-10-1, (Par. 26, Count 2, Stipulation) specifies that all of the boards and commissions of the state shall file biannual reports setting out in detail under oath the manner in which all appropriations have been expended.

Section 5, Article 7 of the Constitution outlining the duties of the Governor specifically provides that the Governor may require from any officer or executive department any information relating to its condition, management and expenses.

Certainly all of these provisions set up an adequate safeguard for the expenditure of public funds to insure honest handling of public funds and public airing of expenditures of the Board of Education. All of these safeguards are completely ignored by the Defendants, and it is then insisted that greater protection is needed for state funds, and that the Board of Examiners must examine all expenditures before the money is paid. A claim only arises when a demand for payment of money is presented. The absurd position of Defendant's contention is that the Board of Education may receive supplies and materials, may accept services, may enter into contracts, may instigate policies, and after the services have been performed, materials received and payment is to be made, at that time a claim arises which must be examined by the Board of Examiners

before payment can be made. We then have the ridiculous situation of a Board of Education with power to contract but not power to perform, with power to agree upon terms of payment, but with no power to insure payment. Numerous instances appear in Exhibit 2.

Must it be presumed that the framers of our constitution found that the balance of integrity rests with Appellants?

I. The statutory authority of the Board of Examiners does not contemplate review of disbursements authorized by the Legislature through the Board of Education.

It is only logical that some agency be authorized to review miscellaneous personal claims against the state. If the amount is unliquidated or evidence is required, some claims tribunal must investigate into the matter and verify the claims for payment if an appropriation has been made or to make a recommendation to the Legislature for an appropriation if none has been made. It is illogical to require review by the Governor, Secretary of State, and Attorney General of all payments of money authorized for specific purposes by agencies specifically authorized by the Constitution and to whom an appropriation has been made by the Legislature. Certainly the Nevada decisions made such a practical interpretation and the Utah legislature so intended when it provided that monthly bills be approved by the governing board which incurred the obligations and then warrants would be drawn by the auditor. (Sec. 64-1-16, U.C.A. 1953)

The state needed some court of claims or agency to review miscellaneous and incidental claims which may be presented by people who felt that they were entitled to some relief at the expense of the state. Such a body could be of great service in sifting facts and investigating the demands and in those cases where no appropriation had been certifying those facts to the Legislature for its consideration. Similar claims of a miscellaneous and incidental nature for which an appropriation had been made if they were not within the usual and normal jurisdiction of other branches of the government should likewise be determined by a board having the authority generally to hear such claims and to determine that they were just and proper.

After the constitutional provisions were determined, the Legislature in 1896 enacted the following three sections which implemented the provisions of Section 13 of Article VII.

The claims for which an appropriation has been made are dealt with in Section 63-6-7 which provides:

*“Any person having a claim against the state for which an appropriation has been made may present the same to the Board in the form of an account or petition * * * and the Board must allow or reject the same in the order of its presentation.” * * **

The second type of claim against the state is dealt with in Section 63-6-10, which provides:

“If no appropriation has been made for the payment of any claim presented to the board,

the settlement of which is provided for by law, or if an appropriation made has been exhausted, the board must audit the claim, and, if it is approved, must transmit it to the Legislature with a statement of the reasons for the approval.” (Emphasis added.)

The third type of claim against the state is dealt with in Sections 63-6-11, 63-6-12, 63-6-13, and 63-6-14. Section 63-6-11 provides:

“Any person having a claim against the state, the settlement of which is not otherwise provided for by law, must present the same to the Board of Examiners, accompanied by a statement showing the facts constituting the claim, verified in the same manner as complaints in civil actions.” (Emphasis added)

The method of examination of claims is set forth in Section 63-6-13 as follows:

“The board must at the time designated proceed to examine and adjust all such claims, and may hear evidence in support of or against them, and shall report to the Legislature such facts and recommendations concerning them as it may think proper. In making its recommendations the board may state and use any official or personal knowledge which any member of the board may have touching such claims.”

By the foregoing sections the Legislature has provided for a comprehensive plan in the three situations above named. There is no specific provision nor is there language from which it may be implied that the Board of Examiners has the power to deny the expendi-

ture by the Board of Education of appropriated funds (when said funds are unexpended).

The foregoing statutory provisions were copied from the law as it existed in Montana and California pertaining to the authority of the Board of Examiners. (Sec. 680, Codes and Statutes of Montana, 1895, Sec. 663, Political Code of California, 1872.) Neither Nevada nor Idaho followed this classification and type of statute defining the authority of the Board of Examiners. The case of *State Library vs. Kenfield*, *supra*, the California court held that disbursements by the Trustees for the State Library were not subject to approval or included in the definition of claims to be submitted to the Board of Examiners. In Montana, in addition to the foregoing statutory authority, there was a statute granting to the State Board of Examiners supervision and control of all expenditures of monies appropriated or received for the use of educational institutions. (850, Revised Codes Montana, 1921.) In spite of this additional statutory authority the Montana court held that the Board of Examiners does not have authority to interfere with the funds appropriated or expenditures authorized by appropriations made by the legislature to the educational institutions.

Therefore, it appears that in the other two states having similar statutory authority, both states have construed these statutes as not being intended to cover disbursements of funds appropriated by a legislature to a specific agency of the government.

If the statutes were not intended to apply to these types of disbursements, then it is logically asked what type of claims were to be presented to the Board of Examiners. The framers of the Idaho Constitution intended the Board of Examiners to be just a Board of Claims as is shown from the following excerpt from the Debates and Proceedings, Idaho Constitutional Convention:

MR. HEYBURN. Now, I renew my amendment to section 18, which is to strike out all after the word 'law' in line 3. The reason is that in the report of the Judiciary committee, Section 11 (10), it is provided that 'the supreme court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the legislature for its action.' This Section 18 provides that '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 no claim against the state, except salaries and compensation of officers fixed by law, shall be passed upon by the legislature without first having been considered and acted upon by said board.' We should make rules to be considered by this board and the supreme court and we ought to confer jurisdiction upon one body or the other. If we are going to vest it in this board, there is no necessity to vest it in the supreme court; and if it is to be vested in the supreme court, there is no necessity to have it vested in this board. There is no necessity to hear those claims twice. It deprives the legislature of the power to pass upon them until they

have been passed upon by this board under Section 18. Section 11 (10) of the Judiciary Committee provides that the supreme court shall act in this matter.

“MR. AINSLIE. If the gentleman will examine the sections in the Judiciary article and the one in this article, he will find no conflict at all. Section 18 *only* makes them 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.’ In Section 11 (10) the party who has claims against the state can commence suit in the supreme court. ‘The supreme court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory.’ Now, these claimants originally can commence suit in the supreme court, and then the matter must be certified to the legislature, and it will allow it. The supreme court in Section 11 (10) of the Judiciary bill is exactly like the court of claims in Washington. In the treasury department they have different powers; the first, second, third and fourth auditors, the comptroller of claims, etc.; and all claims go to one of these officers. If the examiner for instance is the comptroller, and he rejects the claim, the claimant then has the right to sue in the court of claims to recover the amount. And that is the condition here. *The governor, attorney general and secretary of state constitute a Board of Claims*, and if they allow it there is no necessity to go into court, if they reject it, then they go into court.” Vol. 1, Proceedings & Debates, Idaho Constitutional Convention, page 1427.

The Defendants argue that the authority of the Board of Examiners cannot be confined to claims of a miscellaneous and incidental nature for which an appropriation has been made. The Defendants stated:

“It is difficult to conceive such a situation for the legislature is prohibited from passing on a claim, that is, appropriating money to pay an individual’s claim before the Board of Examiners has acted.”

There may be many instances when it is recognized by the state that there is a duty to compensate various individuals as a result of action on the part of the state. The amounts to be paid to any individual may not be known. The legislature then may appropriate a lump sum to be disbursed to people coming within the classification for whom the appropriation is made.

As an example, the leases to the Beehive Midways, Inc., at the State Fair Ground and the construction carried on there was held void. Many people as a result had claims against the state. The legislature in 1951 appropriated \$60,000 to the Beehive Midways, Inc., et al, to be paid in settlement of those claims.

There is an example of an appropriation being made to settle specific claims, but those claims had to be adjudicated or determined so that all of the claims could be settled for the amount involved. This is one type of claim which the Board of Examiners has jurisdiction to consider. The statute seems to have that type of situation specifically in mind when it states: “Any

person having a claim against the state for which an appropriation has been made may present the same to the Board in the form of an account or petition." Certainly there must be some agency of the state which can review miscellaneous and incidental claims of the state and if an appropriation has been made, authorize payment, and if an appropriation has not been made or has been exhausted then they can be reviewed and recommended to the legislature.

Numerous such claims are considered at each session of the legislature. A glance at any appropriations act will show a long list of miscellaneous claims referred to them by the Board of Examiners. Included are claims of a tort nature where the state has not authorized itself to be sued. Others would be contract cases where the contracts have been declared void and there is a moral duty on the part of the state to reimburse or to pay in compliance with the contract. There may be cases where the state has sold property to which they did not have a title and the only basis for a return of the money by the purchaser is a claim to the Board of Examiners. These are many and frequent such incidental miscellaneous personal claims which must be passed upon by some reviewing board before presentation to the legislature.

There were eleven members of the Constitutional Convention who were present in the 1896 legislature. At that time in the general Appropriations Act after specifying the amounts to each of the state institutions in Section 2, Chapter 128, it was provided:

“It is hereby declared unlawful for any state officer or state board of any of the institutions of the state to contract any indebtedness in excess of the appropriation herein provided, except by and with the consent of the State Board of Examiners, previous to the contraction of such indebtedness.”

Similar requirements are presently contained in Section 63-6-19, Utah Code Annotated 1953. Implicit within that section is the proposition that any state officer or state board may contract indebtedness for which appropriations have been made. If such were not the case, there would be no reason for the limitation contained in Section 2.

In 1899 Section 2070 of the Revised Statutes of Utah 1898 was amended to read as follows:

“On the first day of each month, or as soon thereafter as the bills for the expenses of the previous month have been audited, the Board of Control of each state institution, or the proper committee thereof, duly authorized by the Board for such purposes, shall make a requisition upon the State Auditor for a warrant in sufficient amount to pay the bills so audited, and thereupon the state auditor shall draw his warrant against the appropriation made for such institution for the amount named in the requisition, in favor of the treasurer of the governing board of the institution, or in case of the State Prison, in favor of the warden thereof. To obtain such warrant, the treasurer of the Board or the warden must present to the State Auditor a written authorization from the Board.”

The law as therein stated has been substantially the same since that time and is now contained in Section 64-1-16, U.C.A., 1953. The foregoing section does not state or infer that authorization by the Board of Examiners must also be secured before funds are withdrawn. Rather the section is mandatory in that the auditor *shall* draw his warrant against the appropriation. If the Legislature had intended a review by the Board of Examiners, they could have easily so provided as they did with reference to personal expenses of the superintendent of public instruction and the members of the Board of Education wherein it was specifically provided that such expenses *must* be reviewed by the Board of Examiners before payment.

Section 18, Chapter 35, Laws of Utah 1896, copied verbatim from the Montana political code, Section 680 Codes and Statutes of Montana 1895, with the exception of the clause underlined defined the duties of the Board of Examiners as follows:

“The state auditor shall not draw his warrant for any claim unless it has been approved by the Board, except for salaries or compensation of officers fixed by law, *or for monies expressly appropriated by statute.* (Emphasis added)

In view of the foregoing statutes, a usual rule of construction supports the **contention that the legislature** did not intend that the Board of Examiners should approve expenditures made by a specific Board or agency consistent within the appropriation made by the Legislature.

J. The Utah cases have not yet decided to what extent the Board of Examiners may review the disbursements and expenditures of the Board of Education.

No Utah case has been decided by the Supreme Court which involves the power of the Board of Examiners to pass upon disbursements authorized by a constitutional agency. In considering the Utah cases respondent contends that the Board of Education is a constitutional body and under the decided cases in Nevada, Idaho and Montana, is created by an act of the same dignity as that creating the Board of Examiners. That to ascribe to the Board of Examiners any power and authority which would circumscribe or interfere with the responsibility of the Board of Education to assume the general control and supervision over the public school system would be violative of the constitutional provision creating the Board of Education.

The Utah Supreme Court first considered Section 13, Article 7 of the Constitution creating the Board of Examiners in the case of *Thoreson vs. State Board of Examiners*, 21 Utah 187, 60 Pac. 982 (1900). The Legislature appropriated funds for repayment of amounts paid by lessees pursuant to leases authorized by an act of the Territorial Legislature of the State of Utah which had been declared void. On rehearing the Board of Examiners maintained that the appropriations act was unconstitutional since it provided for the payment of claims *which had not first been presented to the Board of Examiners* for their approval prior to the

Legislature passing the act in question. In considering this case the court said:

“The Board of Examiners are required to perform the duties mentioned in said section of the Constitution, and also to perform such other duties as may be prescribed by law, therefore the only duties in the premises imposed upon the Board of Examiners, are such as Section 963 of the revised statutes prescribes. In our former opinion we held that the only discretionary power which the Board of Examiners had in the matter was to ascertain whether or not respondent’s assignor had paid on a lease made in pursuance of the void act of the Territorial Legislature, the sum claimed by the respondent, and it having been admitted that said sum had been so paid, that such payment was therefore a just claim within the meaning of said section of the statute, and that said Board of Examiners had no right to reject said claim on the ground that Section 963 of the Revised Statutes was a violation of the Constitution, but that it became and was a mandatory duty of the said board to receive audit, and allow said claim, and that mandamus lies to enforce the performance of that *ministerial duty*.

In a concurring opinion, Justice Miner discusses for the first time the language contained in Section 13, Article 7, “until otherwise provided by law.”

“By Section 13, Article 7, of the Constitution, the Board of Examiners were authorized, *until otherwise provided by law*, to examine all claims against the state, except for salaries, etc., and they were authorized to perform such other duties as may be prescribed by law.”

Thereafter Justice Miner sets out particularly the provisions of the section of the revised statutes involved and then further states:

“By the Constitution the Board were to examine all claims against the State until otherwise provided by law, and were also to perform such other duties as might be provided by law.

* * *

“The power to allow a just claim is given by the act and is authorized by the Constitution. Until otherwise provided by law the Board were to act under the constitution. Until otherwise provided by law no claim against the State, except salaries, etc., could be passed upon by the legislature, without having been considered and acted upon by the Board, but the board were to perform such other duties as might be provided by law and Section 963 was enacted in pursuance of the provision in the Constitution.”

In State v. Edwards, 33 Utah 243, 93 Pac. 720, (1908) an action was brought by a *court reporter* against the *state auditor* seeking a writ of mandate directing the auditor to pay a mileage claim approved by the district judge as provided by the statute. The auditor demurred to the petition on the ground that there was no allegation that the claim had been presented to the Board of Examiners as required by Section 13 of Article 7 of the Constitution.

The court did not discuss or cite the case of *Thoreson vs. State Board of Examiners*, *supra*. It had before it the question as to whether or not the claim for mileage as fixed by contract must first be presented to the

Board of Examiners. There was not pending before the court the question as to whether or not mandamus would lie against the Board of Examiners for the performance of a ministerial duty or any other duty. The court said by way of dicta:

“No doubt the Board of Examiners, in a proper case may be subject to a proceeding in mandamus.”

The authority of the Board of Examiners as parties to the action was construed in two cases. The first case was *State vs. Cutler*, 95 Pac. 1071, 34 Utah 99. This was an action brought by a court reporter seeking to recover mileage. The claim had been presented to the Board of Examiners which refused payment on the grounds that the general appropriation bill of 1907 passed by the Legislature limited payment of mileage to that actually expended by the court reporter. The court directed the State Board of Examiners to audit and allow the claim. The court said at Page 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 claim. No doubt they would have done so had they not entertained a view of the law different from the one we feel constrained to take. In such a case it is clear that the law in effect directs what the action of the board shall be, and, this being so, there is no reason why the board of examiners should not be required to comply with what it commands. There would be something lacking in our system of government

or jurisprudence if under such circumstances a claimant could be defeated simply because the officer or board required to audit and allow his claim exercised some discretion in the matter. Where the duty to act is clear, and the law gives a right to obtain payment of a claim owing by the state, courts should not hesitate to enforce the right by mandamus. It follows, therefore, that the relator is entitled to have his claim for mileage as set forth in his petition audited and allowed by the respondents as the state board of Examiners."

In the case of *Marionaux vs. Cutler*, 91 Pac. 355, 32 Utah 475 (1907) an action was brought for a writ of mandamus against the Board of Examiners on a claim for mileage presented by a District Judge. The Board of Examiners refused to audit and allow the claim upon the sole ground that they were advised and believed that there was no law of the state authorizing the allowance thereof, and therefore rejected the claim. No particular mention was made of the authority of the Board of Examiners in this regard, it apparently being conceded that the Board of Examiners would have discretion to disallow a claim if there were no supporting law for the presentment thereof. The court examined the law with reference thereto and concluded that a 1901 law allowing mileage had been repealed by implication by a law of 1903. And therefore sustained the action of the Board of Examiners.

The most recent case of significance decided by the Utah Supreme Court involving the authority of the Board of Examiners is the case of *Uintah State Bank*

vs. Ajax, State Auditor, 297 Pac. 434, 77 Utah 455, (1931). This is a proceeding before the Supreme Court seeking by mandamus to compel the State Auditor to issue warrants on the State Treasurer in favor of the Uintah State Bank on account of certain bounty certificates issued by the county clerk of Uintah County to various persons and assigned by them to the Bank. The Bank alleged all of the necessary requirements of the bounty law having been complied with by the assignor of the claims and that the bounty statute provided that the Auditor is required to draw a warrant in favor of the person entitled to the same upon the State Treasurer in the amount shown by the certificate to be due. It is admitted that all of the requirements were met and that the nineteen claims are all identical. The only question is whether or not the claim must first be approved by the Board of Examiners before being presented to the Auditor. The bounty act nowhere required that the claim be presented to the Board of Examiners.

The court quoted Section 13, Article 7 of the Constitution providing for a Board of Examiners and said:

“Pursuant to this constitutional provision the legislature has more particularly specified the duties of the Board of Examiners in Title 29, Compiled Laws of Utah, 1917.”

In Section 2471 of Title 29 it is provided:

“*Any person* having a claim against the state for which an appropriation has been made may present the same to the Board in the form of an account or petition.”

Based upon this statute the court found that the Bank's claim came within the statute and denied the argument that it was not subject to the approval of the Board of Examiners. This statutory enactment of the Utah Legislature fulfills the constitutional requirement "until otherwise provided by law," upon which statute the Ajax case depends.

Justice Straup wrote an extensive dissenting opinion concurred in by Justice Ephraim Hanson. He pointed out that the claim for bounty was under a statute which was complete and which in effect produced a liquidated claim which should be paid by the State Auditor. In support of this position that the statute refers only to unliquidated claims, he cited the Idaho and Nevada cases interpreting the constitutional provisions to so apply and said that the court in the majority virtually found the claim in this case to be unliquidated. It was the opinion of Judge Straup that:

"What the court decided with respect to such a claim constitutes an adjudication and a precedent of binding effect as to unliquidated claims. *What was said beyond that, was mere dicta without binding effect.* Callahan v. Salt Lake City, 41 Utah 300, 125 P. 863. While all members of the court concurred in the opinion, yet such does not constitute a concurrence in everything stated or discussed in the opinion or even as to all of the reasoning therein. The discussion of the questions and conclusions reached essential to a proper disposition of the case were that of the court; but in concurring therein, it is not to be understood that everything stated in the opinion

was necessarily adopted as the opinion of the court.”

The State Board of Education takes the same view of the case. There is no direct holding in any Utah case where the Board of Examiners have been sustained in their refusal to allow a claim against the State authorized by a constitutional body where funds have been appropriated to pay such claims.

The Defendants in their brief would cause this court to believe that the issues here raised have been previously decided in these three cases.

In the Edwards case, the court concluded its opinion as follows:

“In view that the writ must be denied for the reasons stated, we cannot now pass upon the other questions raised by the respondent. The Board of Examiners whose duty it is under the constitution to pass upon the claim is not before us; and thence would not be concluded by a decision upon these questions.”

The Ajax case merely reaffirms the holding in the Edwards case.

The holding in these two earlier cases is not and should not be binding in this case for the following reasons:

1. The decisions in the cases were based in part upon the construction of statutory law substantially different from the laws applicable to this case. In the Edwards case the court cited specifically Sec. 946, Revised Statutes of 1898, pertaining to authority of the

auditor to draw his warrant only after approval of the Board of Examiners. That the decision in the Edwards case was in fact based in part upon statutory construction is shown by the following excerpts from the Ajax case:

“This court had occasion to construe these provisions of *the statute* and of the constitution in the case of State vs. Edwards.”

And another place the court said:

“It follows, therefore, from the constitution and statutes as thus construed, that the bounty claims or certificates in question must be presented to and approved by the Board of Examiners * * *.”

As previously discussed, the Board of Examiners does not have any specific statutory authority to review disbursements of the Board of Education except for the personal expenses of the State superintendent and members of the board. In addition, Sec. 946, Revised Statutes of 1898 had an additional exclusion which was not considered to be applicable in the Edwards or Ajax case, and was, therefore, not considered by the court in its opinion. This exclusion, as previously mentioned, excludes monies expressly appropriated by law from being first approved by the Board of Examiners before the state auditor may draw a warrant for disbursement thereof.

2. Neither of the cases involved a constitutional agency exercising its specific authority.

The primary duty of the county clerk is not to audit and adjudicate factual issues relative to the killing of predatory animals. Nor is the primary duty of the district judge to make and adjudicate contracts for mileage payments. However, it is the specific duty of the Board of Education to supervise and control the public school system of the state. More particularly, specific institutions are directly controlled by the Board of Education. For these institutions specific appropriations are made to the Board of Education for disbursement as directed by said board.

3. Neither the Edwards case nor the Ajax case involved the disbursement of funds after approval had been given by a multi-member board or agency. In both the Ajax and the Edwards case the claim was presented to just one person, who certified the same to the auditor, demanding payment without any other examination. The public policy reasons for holding in such a case that the Board of Education should review the claim do not apply in this case.

4. There is no inconsistency in holding that a bounty claim must be presented to the Board of Examiners, but that a disbursement authorized by the Board of Education need not be examined by the Board of Examiners.

Such was the holding in two California cases. In the case of *Ingram vs Colgan*, 106 California 113, 38 Pac. 315, the California court held that a claim for a bounty payment had to be examined by the Board of Examiners. However, the California court held in the case of *State*

vs. Kenfield, supra, that a disbursement by the Board of Trustees of the State Library drawn upon funds appropriated by the legislature was not such a claim as required review by the Board of Examiners. The Utah Court in the Ajax case cited as a supporting authority *Ingram vs. Colgan, supra*. The very quotation from the California case cited by the Utah Supreme Court indicates that the word "claim" can have a technical definition. Part of the quote is as follows:

"Whatever the rule may be in cases which do not come within the technical definition of the word 'claim,' we are of the opinion that, if any force is to be given to this section in any case, it applies to the present one."

Two of the five Utah judges felt that even bounty claims need not be presented to the Board of Examiners.

5. Neither the Edwards case nor the Ajax case discussed:

- (a) the case law as it existed prior to the adoption of our constitution.
- (b) the proceedings at the *Constitutional Convention* and the effect of the amendment "until otherwise provided by law."
- (c) the issue of the control by the Board of Examiners of the Board of Education comprised of elective officials with specific constitutional duties.
- (d) the nullifications of one section of the con-

stitution by overemphasizing the power granted by another section thereof.

- (e) a legislative history establishing prior *statutory authority* requiring approval by the Board of Examiners with such authority subsequently being specifically withdrawn.

6. Neither of the cases involved the Board of Examiners as a party to the action. Consequently there was no issue raised requiring a holding defining the power and authority of the Board of Examiners.

The facts and issues presented in this case are so dissimilar to the facts and issues raised in the Edwards and Ajax cases that even assuming that the dicta in the cases had persuasive effect the discussion therein could not be held applicable to this case. As Justice Straup in the Ajax case said, after pointing out that discussions unnecessary to an adjudication of the case constituted mere dicta without binding effect:

“Every opinion or decision must be read and considered in the light of the facts upon which it is based and in view of the particular question or questions presented for decision. They constitute the foundation of the entire structure which cannot safely be used without reference to them. Attempts to pick out parts of an opinion without reference to the facts upon which it was based and apply them indiscriminately in other cases is bound to result in confusion and wrong results.”

The Defendants are indiscriminately picking and

choosing from an opinion when they rely upon a recital contained in the statement of the case in *State Board of Education v. Commission of Finance, Utah* (1952) 247 P. 2d 435, in support of their position. The Defendants admit on page 10 of their brief that the principal question in that case was the legality of the composition of the Board of Education. True, the attorney general did make the statement in his brief that the Board of Examiners had authority as contended herein. The very fact that the attorney general's office has taken the position as herein asserted by the Defendants was the reason the Board of Education felt required to employ separate counsel to present this issue and challenge the supposed authority of the Board of Examiners.

The facts in this case, unlike any other presented to this court, clearly show that the State Board of Education cannot supervise and control the public school system as required by the Constitution and be subject to the present conduct of the Board of Examiners. It now is completely subordinate to and dominated by the will of the Board of Examiners. Salaries for the professional staff of the State Department of Education cannot be adopted without approval of the Board of Examiners. Written contracts made in good faith between the State Board of Education and Directors of state schools are capriciously nullified by the Board of Examiners without investigation or explanation. The Board of Education obtain approval for the salaries of the directors of the institutions under its control and

supervision. The situation has become so bad that the Board of Education cannot now find competent personnel to fill vacancies as state directors of various departments of the public school system since it is known that such an appointment might be disapproved by the Board of Examiners. Under such circumstances the Board of Education has submitted a request for an authorized salary to be paid a state director of elementary education. Such salary being less than was paid to the former director, and even this request is flippantly refused by saying, "To many employees now." The Board of Education could not even appoint the State Superintendent of Public Instruction at a salary determined by such board.

POINT II

THE GOVERNOR AND THE COMMISSION OF FINANCE DO NOT HAVE AUTHORITY TO REDUCE APPROPRIATIONS MADE BY THE LEGISLATURE FOR PUBLIC SCHOOL PURPOSES.

The argument of the Appellants to the above finding of the trial court appears to be Point V of the Appellant's brief. The trial court did not make a finding that the budgetary control law was unconstitutional. The issue stated by the Appellants and the argument made ignores the real issue as stated above. The argument is based upon broad generalities of constitutionality, and innuendoes and inferences that the Board of Education is a spendthrift board operating under the conception that it must spend all money appropriated to it.

The issue here discussed is not academic. The defendants have in fact on different occasions openly ordered reductions in amounts appropriated by the Legislature and have claimed nothing short of a continuing veto power.

The statutory law pertaining to the relative authority of the parties hereto is as follows:

Section 53-3-2, U.C.A. 1953, provides:

“The State Board of Education shall be charged with the administration of the system of public instruction, and with general superintendence of the district schools of the State and of the school revenue set apart and appropriated for their support.”

By Section 53-3-7, U.C.A., 1953, the State Superintendent with the approval of the State Board of Education shall prepare and submit a proposed budget for submission by the Governor to the Legislature.

Section 53-3-8, U.C.A., 1953, provides:

“The State Auditor shall transfer to the state general fund from the uniform school fund to the credit of the State Board of Education the amount designated by the Legislature for the operation of the office of the State Superintendent and the State Board of Education * * *.”

Section 64-1-16, U.C.A., 1953, provides that on the first day of each month or as soon thereafter as the bills for the expenses for the previous month have been audited, the governing board of each state institution shall

make a requisition upon the State Auditor for a warrant in sufficient amount to pay the bills so audited and thereupon:

“the state auditor shall draw his warrant against the appropriation made for such institution for the amount named in the requisition in favor of the treasurer of the governing board of the institution* * *.”

Section 53-7-3, U.C.A., 1953, provides that it shall be the duty of the state auditor to notify the Superintendent of Public Instruction of the actual amount of money available in the uniform school fund. The State Board of Education shall apportion and distribute said fund among the several school districts, the Junior Colleges . . . Upon certification by the Superintendent of Public Instruction as to the amount of apportionment the State Auditor:

“shall forthwith draw his warrant on the State Treasurer in favor of each of the respective school districts and the institutions herein mentioned for the amount to which each is entitled. . . .”

Section 63-2-20, U.C.A., 1953, provides:

“The Commission of Finance shall exercise budgetary control over all state departments and agencies. The Commission shall require the head of each department to submit to it and to the Governor not later than May 15 of each year, a work program for the ensuing fiscal year and may at any time require any department to submit a work program for any other period * * *.”

The law then provides that the work program shall state all appropriations and other funds available to the particular department. It states that the aggregate of the allotments shall not exceed the total appropriations or other funds available to the department for the fiscal year requested. This section provides that the budget officer under the direction of the governor shall revise, alter, decrease, or change such allotments before approving the same.

It is the contention of the Defendants that they have unlimited authority and power to revise, decrease or alter proposed expenditures of funds by the State Board of Education.

It is the contention of the State Board of Education that the budgetary control specified in the foregoing section only authorizes the Commission of Finance, the budget officer, and the Governor to review the proposed expenditures of funds to determine that expenditures do not exceed *appropriations and other available funds and that the proposed expenditures are for public purposes within the scope of the authority of the agency involved.*

Article 7, Section 8 of the Constitution of the State of Utah specifies the procedure for the enactment of a law requiring that bills passed by the Legislature must be presented to the Governor for his approval. The section specifies the veto power of the Governor and further provides that once a bill has been approved by the Governor or passed over the Governor's objection, the same becomes law. In spite of this section of the

Constitution the Governor claims to have a continuing veto power over funds appropriated by the Legislature.

The State Board of Education, as provided in Title 53-33, U.C.A., 1953, has the direct responsibility of the management, supervision and control of Weber College, Dixie Junior College and Carbon College. (Stipulation, Counts 2 and 3, paragraph 7)

The thirtieth session of the Legislature of the State of Utah passed an appropriation bill by the terms of which \$1,163,280 were allocated to the Weber Junior College. (Session Laws 1953, Chapter 136, Item 88) The amount of this appropriation was for a biennium and, therefore, the amount available for a fiscal year was the sum of \$581,640. The amount appropriated became law and was not vetoed by the Governor. However, on June 26, 1953, a letter to the Treasurer of Weber College written by the budget officer at the direction of the Governor provided as follows:

“Dear Dr. Foulger:

“Governor Lee has reviewed your ‘Work Program’ for the first fiscal year of the 1953-55 biennium for the period beginning July 1, 1953 and ending June 30, 1954.

“Under the provisions of Title 63-2-20, Utah Code Annotated, 1953, the Governor deemed it advisable to *reduce the amount of the appropriation available from \$581,640.00 to \$502,612.09, a net decrease of \$79,027.91.*” (Exhibit 2, Page 9-a)

This was a clear attempt by the Governor to reduce the amount appropriated by the Legislature for Weber

Junior College. To permit the reduction would be to hold that the Governor has a continuing veto power. The Legislature after having studied and investigated the needs of the various institutions and having made appropriations therefor would be helpless to insure that those appropriations would ultimately be made available to the institution. Even if the Governor vetoed items in the appropriations bill and subsequent thereto the Legislature passed the act over the Governor's veto the Governor, as claimed by the Defendants, would still have the power and authority to subsequently reduce the amount appropriated as attempted in the case of Weber Junior College.

On June 8, 1952, Weber Junior College was advised that a work program for the fiscal year beginning July 1, 1952, had been reviewed under the direction of Governor Lee and that there was available for Weber Junior College during that fiscal year the sum of \$695,950. (Exhibit 2, Page 1) On February 25, 1953, Weber Junior College was advised that out of the work program approved for the fiscal year there was available for use during the month of April, 1953, the sum of \$57,000. Pursuant to this notification, Weber Junior College specified the "Object Classification" for which the sum of \$57,000 should be issued. (Exhibit 2, Page 2) However, on April 1, 1953, the Treasurer of Weber Junior College received a communication from the budget officer in part as follows:

“Dear Dr. Foulger:

Pursuant to Title 63-2-20, Utah Code Annotated, 1953, Governor J. Bracken Lee deemed advisable to decrease your requested allotments for operation and maintenance of your Administration Division for April, the first month of the ensuing quarter, from \$57,000.00 to \$52,000.00, a net decrease of \$5,000.00” (Exhibit 2, Page 4)

If he could reduce the amount available by the sum of \$5,000.00, there is nothing to stop him from completely eliminating the amount involved.

Weber Junior College protested the forced reduction of \$5,000.00. It was pointed out that the purchasing department had made purchases in reliance upon the funds to be made available and that in order to secure discount privileges bulk purchasing had been made for which payments were due and owing. The Governor was further advised as follows:

“The reduced allotment release of \$52,000 for the month of April would not even meet our salaries.” (Exhibit 2, Page 6)

Although it is intimated that the action of the Governor was to prevent the wasteful spending of unused surpluses at the end of a fiscal period, this assertion is refuted by the fact that the program was approved on a yearly basis and the table of actual expenditures shows that the average expense during the months of December through March for the years 1951-1952 and 1952-1953 were \$62,710 and \$63,602, respectively. (Exhibit 2, Page 7)

Similar reductions in the amount appropriated to Carbon Junior College and Dixie Junior College were required by the Governor on April 1, 1953, notwithstanding prior approval of the fiscal year work program. (Exhibit 2, Pages 10, 14) Carbon Junior College had a considerable amount of accounts payable for purchases which required payment.

Dixie Junior College protested the order by a letter to the budget examiner in part as follows:

“Actual monthly expenditures for contracted salaries alone are more than the total amount you propose for operation. In fact, the \$9200.00 indicated in our request is \$800.00 to \$1000.00 less than is *required* to meet current salary obligations. * * *” (Exhibit 2, Page 15)

By the laws of Utah, 1953, Chapter 136, Item 85, Carbon Junior College was appropriated by the Legislature the sum of \$240,000 for the biennium. On June 26, 1953, the president of that college received notification that the Governor was ordering a reduction for the fiscal year from \$120,000 to \$107,635.84, a net decrease of \$12,364.16. (Exhibit 2, Page 13-A) A similar reduction was ordered by the Governor with reference to the funds appropriated by the Legislature and permitted to become law by the Governor for use by Dixie Junior College. (Exhibit 2, Page 14)

In 1949 Governor Lee attempted to veto an item in the appropriation bill appropriating \$20,000 to the State Board of Education and referred to as a research fund. Subsequent thereto a district court case was filed on the

part of the Utah State Agricultural College challenging the validity of a similar veto with reference to extension service funds. The court held that such a veto was void. The case was not appealed to the Supreme Court.

Based upon the holding in that case a request was made to the budget director of the State Finance Commission for the allocation for a fiscal year of \$10,000 of the \$20,000 fund. (Exhibit 2, Page 21) The Governor still refused to make available any of these funds unless the State Department of Education would agree to certain terms demanded by the Governor. (Exhibit 2, Pages 22-38)

Can the educational institutions properly function and meet their responsibilities and liabilities if one man has the absolute authority to veto at any time the funds allocated to those institutions?

Article 5, Section 1, of the Constitution of the State of Utah provides:

“The powers of the government of the State of Utah shall be divided into three distinct departments, the legislative, the executive, and the judicial, and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any function appertaining to either of the others, except in the cases herein expressly directed or permitted.”

It is fundamental that it is within the jurisdiction of the Legislature to enact laws and appropriate funds for the various state functions. The Governor is given

some control over legislative enactments by virtue of the power to veto proposed legislative enactments. However, if the Governor fails to veto a bill or if a bill is passed over the Governor's veto, the same becomes law and thereafter the Governor is bound by the terms of the law and cannot thereafter alter the same.

It is fundamental that the Legislature may delegate to administrative agencies the duty of determining when a law shall take effect and that administrative agencies may prescribe rules and regulations within the scope of a general standard prescribed by the Legislature.

It is equally fundamental that the Legislature may not delegate to the executive branch of government the power and authority to enact laws or to prescribe how and when laws shall take effect solely within the discretion of the executive agency. The arrogate who stops payment of vouchers against appropriated funds because of the power to appoint and hire and fire disbursing officers destroys constitutional government. By dilatory tactics, lulling into security, refusal to be bound by judicial opinion or decision, money appropriated is not forthcoming, promises are broken, confidence is lost, integrity destroyed, and the purposes and divisions of government are frustrated.

The Utah cases have recognized the division of government in connection with the delegation of authority by the Legislature.

In *Young v. Salt Lake City* (1902), 24 Utah 321, 67 Pac. 1066, the Supreme Court was required to construe

Article 5, Section 1, of the Constitution. The court cited the well recognized rule as follows:

“It will be conceded that, while the Legislature cannot delegate power to make laws, it may still make laws to take effect upon the ascertainment of certain facts and conditions, and may delegate the duty to determine the existence of such facts to some other branch of the government.”

In the case of *State v. Gross*, 79 Utah 559, 11 Pac. 2d 340, the court recognized the rule cited by the earlier case and quoted with approval the following language from a United States Supreme Court case:

“In creating such an administration agency, the legislature to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function.”

The court further stated:

“The Legislature may not delegate the power to enact a law, or to declare what the law shall be or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.”

A more recent discussion of the issue of the delegation of legislative authority is contained in *Revre v. Trade Commission*, 113 Utah 155, 192 Pac. 2d 563. The

Supreme Court affirms the fundamental propositions concerning the delegation of legislative authority heretofore discussed.

The Department of Finance has no authority to establish budgets for other state agencies or to dominate the financial policies of any of the departments of government.

The State of Louisiana in 1942 established a Department of Finance which was directed to exercise budgetary control over the financial affairs of the various state agencies. The law as cited in the case shows the close similarity of the law of Louisiana with that of the State of Utah.

In *Wall v Close*, 14 So. 2d 19, an act establishing a financial code for the State of Louisiana to be administered by the Department of Finance was construed. The law provided for a Director of Finance and a Budget Officer who would aid the executive departments and the Governor in preparing an executive budget to be presented to the Legislature for an appropriation. The constitutionality of the act was challenged and in affirming the constitutionality of the act and reversing a lower court's decision that the act was unconstitutional, two judges dissenting, the Supreme Court stated as follows:

“Section 10 of Title 3 provides that after the passage of the appropriation and revenue acts, ‘the Budget Officer under the direction of the Director of Finance shall cause to be prepared a complete state budget for each year of the en-

suing biennium.' *This does not mean that the Budget Officer, under the direction of the Director of Finance, is granted power and authority to make up a financial budget for the state.*" (Emphasis added)

The court then goes on to state that it is just the duty of the Budget Officer to compile a statement setting forth in detail the financial plan for the executive budget as modified and adopted by the Legislature. It is further stated:

"Clearly, therefore, the functions of the Director of Finance and the officers serving in or under that department are to assist the governor and the legislature in gathering the data which are to form the basis of the appropriations for the different departments and agencies of the state. *In no way may these officers dictate or dominate the financial policies of either the executive or the legislative department of the state.* The Department of Finance is in no sense, therefore, a department of the executive branch of the government. It is no more so than would be an expert accountant or auditor employed by the executive department of the state to gather data necessary to guide the department in formulating its financial plans." (Emphasis added)

The act further provided that no warrants could be issued upon the State Treasury without first receiving approval of the Director of Finance. Settling of claims was also apparently granted to the Commission of Finance, but the holding of the Court is to the effect that such activities were procedural only or ministerial and were established for the purposes of accounting and were

not intended to grant supervisory power to the Department of Finance.

The Governor does not have the authority in vetoing a bill to reduce the amount of the appropriation, but rather he can either approve or disapprove the entire amount. It is therefore held that the Legislature cannot authorize the Governor to do indirectly what he is prohibited by the Constitution from doing directly, namely, reduce the amount of an appropriation. And generally it is held that an attempted substitution of the judgment of executive officers for that of the legislative body constitutes a usurpation of legislative functions which cannot be permitted under constitutional provisions establishing state representative government with three coordinate departments.

Where the Legislature has attempted to specify the terms under which a Governor would have authority to reduce appropriations the court has held such delegation to be unconstitutional.

In *State ex rel Crable vs. Carter*, 103 Pac. 2d 518, (Oklahoma), an action was brought by members of the State Department of Education and the State Superintendent of Public Instruction against the State Auditor seeking a Writ of Mandamus to require the auditor to draw warrants against the State Treasurer for payment of claims of members of the State Department of Public Instruction. It was alleged that the general departmental appropriation bill allocated to the State Superintendent of Public Instruction funds for traveling expenses and

that there was an unexpended balance in said fund with which to pay the claims. The state auditor refused to approve the claims and so notified the Superintendent of Public Instruction. The reasons assigned for rejecting the claims were as follows:

“Claims listed here are rejected for the reason that they are in excess of the amount allocated by the governor for the first three quarters of the present fiscal year under the authorization of House Bill No. 627-17th Legislature and in excess of the amount allocated to April 6, 1940.”

Another claim was also included in the suit by officers and employees of the State Board of Agriculture and the auditor had refused these claims on the basis that the governor had instructed the defendant not to approve any such claims made against said appropriation. The statute giving the governor authority to approve quarterly budgets for state departments or institutions is set out in full in the report and is very similar to the statutes of the State of Utah pertaining to budgetary control, however, this statute limits the governor's authority to disapprove quarterly work programs only if he believes that there will not be sufficient revenue to meet the appropriations.

The Oklahoma court stated:

“Having determined that the appropriations made in the departmental appropriation bill are valid and binding and having the force and effect of law, the question arises whether or not the Legislature may delegate to the Governor, under certain conditions, the power to annul or veto,

in whole or in part, any item contained in such appropriation bill. Petitioners urge that such question was settled by this court in the case of *State ex rel Hudson v. Carter*, 167 Okl. 32, 27 P. 2d 617, 624 91 A.L.R. 1497. In that case the court was concerned with an appropriation to the Corporation Commission and a provision inserted in the departmental appropriation bill providing that said funds were 'to be expended by and with the approval of the Governor.' Therein it was said: ' * * * A provision requiring the approval of the Governor of the expenditure of such an appropriation is void for three reasons: First, there is no authority of law for the Governor to approve an expenditure of money appropriated for the purpose of enabling the Corporation Commission to perform the constitutional duty required to be performed by it under the provisions of Section 29, Article 9, *supra*; second, the attempt to authorize the Governor to exercise such power is void under the provisions of Section 56, Article 5, *supra*; and, third, because the Legislature is without authority to confer the power upon the Governor to do indirectly a thing which the Governor could not be directly empowered to do, that is, to reduce an item in an appropriation bill. We held to that effect in *Peebly vs. Childres*, State Auditor, 95 Okl. 40, 217 P. 1049. See, also *Regents of State University vs. Trapp*, Auditor, 28 Okl. 83, 113 P. 910, and *Carter*, State Auditor vs. Rathburn, 85 Okl. 251, 209 P. 944. * * * '

"(1-3) Since the power of the Governor to veto items in an appropriation bill is limited by the Constitution any attempt on the part of the Legislature to enlarge the exercise of that power and to change the specified mode or manner of its exercise would contravene the constitutional pro-

vision fixing the limit of such power. It therefore appears that the statement made in the case of *State ex rel v. Carter, supra*, that the Legislature is without authority to empower the Governor to reduce an item in the appropriation bill is fundamentally correct and is controlling of the question here presented.

“This conclusion, as we view it, is in harmony with our fundamental concept of government relating to the division of powers. The responsibility of preventing the excessive expenditure of such funds rests primarily upon the Legislature who can refuse to appropriate such excess funds; but if appropriated, the responsibility thereupon shifts to the Governor who by the exercise of his constitutionally granted veto power, at the time and in the manner prescribed and limited by the Constitution, can prevent such excessive expenditure. However desirable it may be to prevent the expenditure of funds in excess of available revenues, the courts must scrupulously maintain the powers delegated to the legislative and executive branches of government, but at the same time must as carefully maintain the constitutional restrictions imposed upon the exercise of those powers, for herein lies the safeguard of representative government. *We find nothing in our Constitution which indicates that the framers thereof contemplated that the Governor might be granted a continuing veto power which, under any circumstances or conditions, might be exercised long after the Legislature has adjourned.* (Emphasis added)

The court therefore held that a Writ of Mandamus would properly lie against the auditor since the reasons for denying the claims were that the Governor had not

given his approval, the court having held that the Governor could not approve or disapprove claims upon appropriations made to the various departments.

The case of *State v. Erickson*, supra, construed a section of the Montana law which gave to the State Board of Examiners broad power and authority over the expenditures made by the educational institutions of the state. Part of that law is as follows:

Section 850, Revised Codes of 1921:

"The state board of examiners * * * shall have supervision and control of all *expenditures of all moneys, appropriated* or received for the use of said (educational) institutions from any and all sources, other than that received under and by virtue of the acts of Congress * * * shall let all contracts * * * and shall audit all claims to be paid from any moneys, * * * but * * * shall have authority to confer upon the executive boards of such institutions such power and authority in contracting current expenses, and in auditing, paying and reporting bills for salaries or other expenses incurred in connection with such institutions, as may be deemed by said state board of examiners to be to the best interest of said institution." (Emphasis added)

The court after citing the foregoing law and other sections in connection therewith recognized that the Board of Examiners had been granted by the Legislature certain authority and discretion over expenditures of funds appropriated by the Legislature. However, the court stated in this connection as follows:

“While this board is given supervision and control over the expenditures of moneys appropriated or received for the use of the educational institution of the state, *this power does not authorize an arbitrary reduction by the board of valid appropriations and authorized expenditures from available funds applicable to such appropriations and expenditures which have been duly made and authorized by the Legislative Assembly and have received the approval of the Governor.* Such attempted substitution of the judgment of executive officers for that of the legislative body constitutes a usurpation of legislative functions which cannot be permitted under our constitutional division of state government into its three co-ordinate departments; the authority to do so was denied the governor in the exercise of his veto power in *Mills v. Porter*, 222 P. 428, 69 Mont. 325, 35 A.L.R. 592, and there is much less reason for sustaining the exercise of such power by an executive board . When the Legislative Assembly has expressed its solemn judgment as to the amount necessary for the support and maintenance of an institution for the fiscal year, and in doing so has kept within the restrictions imposed by the Constitution both as to such general appropriation and its appropriations generally for such year, the executive and judicial departments of the state must bow to that judgment.” (Emphasis added)

These cases point out why the Legislature could not if it so intended delegate to the executive branch of the government the power and authority to reduce appropriations contained in a bill which has become law.

It is submitted that it was not the intention of the

Legislature to so provide when they enacted the law establishing budgetary control. Consider for instance the emergency legislation during the depression. Section 90-0-2, Revised Statutes of Utah 1933, as amended by Chapter 78, Laws of Utah 1933, provided for budgetary control in substantially the same manner as the present law. More particularly the law stated that if the Governor deems necessary he may "revise, alter, decrease or change such allotments." In spite of this law the Legislature in 1933 enacted Chapter 72 of the Laws of Utah 1933, entitled "Emergency Power of Governor Over State Revenue." (Stipulation, Counts 2 and 3, paragraph 15) By the terms of this law the Governor was authorized to require periodic reports of proposed expenditures of each department and to compel reductions in expenditures. The law likewise gave broad authority over employment and suspension of personnel and suspension or temporary elimination of certain agencies and functions of the government. However, this authority was only granted with certain restrictions and any reductions of expenditures or suspension of services were only permitted for a temporary period. Had the Legislature felt that under the budgetary control law the Governor had the necessary authority to reduce appropriations, etc., it would have been unnecessary to enact these emergency powers. The law giving the Governor this authority has been repealed by the Legislature. (Session Laws of Utah 1947, Chapter 136.)

Closer examination of the budgetary control law likewise shows that the Legislature did not intend that

the Governor, the Department of Finance or the budget officer should have unlimited authority to revise, alter, decrease or change the allotments. The act, after providing that the various departments submit to the Department of Finance their respective work programs and specifying that the budget officer under the direction of the Governor could revise, alter or decrease the allotments, then states:

“ * * * The aggregate of such allotments shall not exceed that total appropriations or other funds from any source whatsoever made available to said department for the fiscal year in question.”
... (63-2-20 UCA 1953)

The foregoing definitely establishes a rule or guide to be followed by the Governor and the budget officer in reviewing the work programs. The law then provides that the approved work program shall be transmitted to the department in question and to the state auditor and then states:

“ * * * The Commission of Finance shall thereupon permit all expenditures to be made from the appropriations or other funds from any source whatsoever on the basis of such allotments and not otherwise * * * ” (63-2-20 UCA, 1953)

The Defendants' main argument in answer to the proposition advanced by the Intervenor is based on insinuation and inferences that the Board of Education constitutes a bureaucratic agency insulated from the electorate and indifferent to public opinion concerned primarily with wasteful and extravagant spending.

Starting with this assumption, the Defendants then argue the policy reasons for the establishment of a financial code. The Intervenor has no quarrel with the proposition that it is a good business practice for a department to estimate its financial needs and to allocate the expenditure of its funds based upon a fiscal work program which takes into consideration all of the funds which are available to the department. However, such an argument evades the issue here presented as to the authority of the Governor and budget officer to reduce appropriations made by the Legislature to another department of government.

Only two cases are cited by the Defendants in answer to the respondents on this issue. The first case is *Chez vs. Utah State Building Commission*, 93 Utah 538, 74 Pac. 687. This case involved a supposed ambiguity in the statute appropriating money for state building. The appropriation, contingent upon many happenings, was made to the Governor. Whether there were to be any funds and the allocation of those funds depended on many contingencies. As was stated at Page 553 of the Utah Report, the money was to come from emergency relief funds commencing at a future date. Secondly, from the money received \$3,200,000 had to be first allocated for welfare purposes. Thirdly, any expenditures for Carbon College were dependent upon the taxing units providing a suitable campus, and fourthly, a site was to be procured by the state for a tuberculosis sanitarium. The decision as to how the money might be spent would be further influenced by the availability of federal funds

to be used in addition to the state funds. In view of this factual situation, the legislature felt that it was required to leave to the discretion of the Governor the actual allocation of the funds once they became available. The Governor, in fact, had allocated the funds.

The issue therefore is substantially different from the one here presented. In the present case the appropriation is not to the Governor, but rather to a constitutional agency. In the present case the Governor has not approved the appropriations, but rather has attempted to decrease specific appropriations made by the Legislature. Third, the issue as stated by the court above gives no support for a consideration of when and under what conditions authority may be delegated to the Governor over financial matters. The Defendants quote a part of a short statement by the court which would tend to lead one to believe that the court was deciding that the Legislature had unlimited authority with reference to the subject of appropriations. However, the entire quotation concerning this subject is as follows :

“No attack has been made on the particular method of appropriations ; that is where the whole sum is appropriated to the Governor and he is vested with discretion to reduce, transfer, or eliminate items or parts thereof. It is sufficient to say that in the absence of constitutional provision to the contrary the power of the Legislature on the subject of appropriations is plenary.”

The court by its very statement indicates that there was no real issue raised by the pleadings and arguments

in this case on the issue of granting authority to the Governor and contented itself to make a general observation in this regard. The observation so made stated that "in the absence of a constitutional provision to the contrary." It is submitted that in this case there are constitutional provisions to the contrary. The section of the constitution dividing the state government into three specific branches and the section of the constitution defining the veto power of the Governor are contrary to the supposed authority granted in the Finance Commission law.

The only other case cited by the Defendants on this point is *State ex rel Boyle vs. Ernst*, 195 Wash. 214, 78 Pac. 2d 526. This was a suit in mandamus to compel payment of welfare funds. The law appropriating the funds stated that the expenditure could not be made except upon allotments approved by the Governor. In this case the petitioner alleged that the Governor had not approved the allotments. This case does not raise the issue presented before the court. It does not involve an attempt by a Governor to reduce amount of appropriations made by a Legislature. Rather, it involves the disbursement of funds appropriated to a statutory administrative agency and involves the methods of expenditures. The precise issue in the Washington case was whether a writ of mandamus would be issued to compel expenditure of welfare funds without the Governor's approval. That issue, as has been stated, is substantially different from a situation where the Governor is attempting to reduce a specific appropriation made to a

separate department, not involving statutory administrative agencies.

Defendants have argued that the terms “revise, alter, decrease or change” can have no meaning if they are qualified by the further statement that the allotments cannot exceed “the total appropriation or other funds from any source whatever made available to the department for the fiscal year in question.” Such is not the case. A department may desire to revise, alter, decrease or change specific allocations contained in the work program by transferring funds from one proposed expenditure to another type of expenditure, or for expending a larger part of its appropriations during one fiscal year than during another period of the biennium.

If the budgetary control law of the State of Utah is to be held constitutional, it must be limited to conferring only ministerial duties upon the Department of Finance and not as conferring the right to reduce appropriations made by the Legislature. The law as contained in the Utah, Oklahoma and Montana cases as reviewed above will not support a statutory construction amounting to a holding that an unlimited, continuing veto power has been delegated to the Defendants. The Utah Legislature obviously did not intend such a delegation. The budgetary control law still serves a useful and needed purpose and gives full faith to the legislative intent by holding that the authority therein conferred is limited to the ministerial function of aiding in budget planning and the pre-auditing of expenditures to deter-

mine that they are within appropriations and are for public purposes.

POINT III

IF THE BOARD OF EXAMINERS OR FINANCE COMMISSION HAVE ANY AUTHORITY OVER THE APPROPRIATED FUNDS OF THE BOARD OF EDUCATION, IT IS MINISTERIAL.

We have heretofore presented the argument that the Board of Examiners does not have authority to disapprove disbursement of funds by the State Board of Education for public school purposes. For the purposes of this point, if there be some control over disbursements of the Board of Education, the power or authority given the Board of Examiners or the Finance Commission is limited to the performance of ministerial acts. Such authority must not violate the power of the Board of Education under the constitutional provision creating it.

The Board of Education admits that it must follow proper accounting and auditing procedures to safeguard the expenditure and disbursement of public funds entrusted to it. However, to have the power to supervise and control the public school system it must have authority and discretion to determine how the money shall be spent for public school purposes.

It should be noted that the constitutional section established the Board of Examiners and defining its

powers is divided into two sections. The first states that they shall have power "*to examine* all claims against the state * * * and perform such other duties as may be prescribed by law; and no claim against the state, * * * shall be passed upon by the legislature without having been *considered and acted upon* by the said Board of Examiners." It will be noted as to the first type of claims which do not require presentation to the legislature, it states the Board of Examiners shall have power to examine only, but as to the second type of claim, which must be presented to the legislature, it states they shall be considered and acted upon by the said Board of Examiners. It would, therefore, appear that as to disbursements by the Board of Education — assuming such claims must be presented to the Board of Examiners — the Board of Examiners would only have power to examine, which construction is consistent with the Nevada cases heretofore discussed.

The Commission of Finance, created in 1941, has authority to pre-audit disbursement of funds. Prior to this time the Board of Examiners by statute had been performing auditing and accounting functions. The Intervenor's admit that the transfer of these duties could be properly made to the Department of Finance. But whether or not the Department of Finance is acting in the capacity of an agent of the Board of Examiners as contended by defendants, its authority is limited to a determination of whether or not expenditures are for public purposes and are within an appropriation made

by the Legislature. This is true whether the auditing agency is created either by constitution or by statute.

In the Massachusetts case of *Willar v. Commonwealth*, 9 NE 2nd 405, 297 Mass. 527, the Court held that the Governor and the fiscal agency given control over financial matters of the state had the duty to insure that payments out of the public treasury were not made except for public purposes and in accordance with the law. This was an action involving a dispute as to the authority of the Department of Public Works in relation to the authority of the Governor and the council which was given authority over financial matters of the state. Concerning this dispute the court stated:

“* * * It was not the purpose to give the Governor and Council power to veto contracts or purchases lawfully made by authorized officers or to refuse to honor debts and obligations lawfully incurred.”

In the Ohio case of *State v. Defenbacher*, 91 NE 2nd 512, 153 Ohio St. 268, the Court stated:

“In the event there is money in a state fund, available for the purpose for which it is sought, it is the ministerial duty of the Director of Finance, upon proper submission of an incumbrance estimate or certificate for the purpose of incumbering such money for such purpose, to make the certification required by Section 2288-2 General Code. The discharge of this duty may be compelled by mandamus.”

(See also *State v. Ferguson*, 50 NE 2nd 992, 142 Ohio St. 179)

In the Indiana case of *State v. Clamme*, 134 NE 676, 80 Ind. App. 147, the court held the Legislature could not create a department with power to supervise and control public officers in the performance of their duties. In this case the court stated as follows:

“(8) The department of inspection and supervision of public offices was created for the purpose of examining the accounts of such public officers as handle public funds. From the Legislation relating to that department, it clearly appears that its powers and duties are limited to the subject of accounting and reporting. * * *

“There is absolutely nothing in any of the legislation relating to this subject which tends in the slightest degree to authorize the department to control the discretion of any public officer, administrative board, or other governmental agency whatsoever. Indeed, the Legislature could not create a department and endow it with power to supervise and control public officers in the performance of their duties generally, without amending all the laws relating to the powers and duties of the officers of the state and of every administrative subdivision of the state. It is to be presumed that if the Legislature were to attempt such a comprehensive and serious project, it would not be unmindful of constitutional provision, State Constitution, Art. 4, Sec. 19.21.”

In the Florida case of *State ex rel W. R. Clark Printing & Binding Co., Inc., et al v. Lee, State Comptroller*, 163 So. 702, 121 Fla. 320, the court in construing a constitutional provision said:

“Section 25 of Article 4 of the State Constitution, vesting the comptroller with power to ex-

amine, audit, adjust and settle accounts of State Officers, confers upon the comptroller the right, and imposes upon him the duty to see to it that all disbursements of public moneys are authorized by a legal appropriation, that the payment of a particular item violates no positive prohibition against payment, expressly or impliedly forbidden by law. That section and articles vest the comptroller with no supervisory authority to veto or disallow items of expenditure for which a lawful appropriation had been made by the Legislature and the payment of which, as approved by the responsible officer or agency incurring the obligation under statutory power so to do, violates no provision of law."

(See also *State v. Gay*, 46 So. 2nd 711, Florida 1950.)

In the Illinois case of *People ex rel State Board of Agriculture v. Brady*, 115 NE 204, 277 Ill. 124, the court construed another constitutional provision by saying:

"The Constitution created the office of the Auditor of Public Accounts, on whose warrant alone money was to be drawn from the Treasury. *He was made the official examiner of accounts and claims against the state*, which must be verified by him. The duty to determine whether a particular claim constitutes an obligation against the state is implied by the title of his office, and it is only when he draws his warrant for what he finds to be a proper charge against the state that it can be paid by the Treasurer. It is not within the power of the General Assembly to deprive the Auditor of Public Accounts of the power conferred upon him by the Constitution to audit claims and charges against the state created in pursuance of an appropriation made by law. *If a*

sum of money, or so much thereof as may be necessary for a specific purpose, is appropriated by law and paid over to any officer, board, or other authority authorized to make the expenditures, then the board, officer or authority becomes the one to determine the proper obligations of the state instead of the Auditor of Public Accounts, while the Constitution contemplates that, the expenditure having been made or the obligation incurred, an account shall be submitted to the auditor for his examination and verification before any money is drawn from the state treasury." (Emphasis added)

In the Arizona case of *Proctor v. Hunt*, 29 Pac. 2nd 1058 (Arizona 1934) the court stated that an auditor had no discretion in the issuance of warrants if the voucher showed that the funds were for public purposes and were drawn against duly made appropriations. The law in Arizona as to the duties of auditor states as follows:

"The auditor shall: (1) Audit, adjust and settle the amount of claims against the state payable out of funds of the state. * * *"

The court in following the prior decisions of the court stated:

"In the present case, the various claims were approved by the Governor of Arizona, the head of the department for which the appropriations, which it is contended justified the expenditure of the money in question, were made. We think under these circumstances that unless it appeared upon their face, that the claims, as approved by the Governor, were not in proper form or not for a public purpose, connected with the activities

of the Governor's office, for which an appropriation had been made, it was the duty of the auditor, enforceable by mandamus, to issue a warrant therefor."

The same result was reached in *Ward v. Frohmiller*, 100 Pac. 2nd 167, 55 Ariz. 202, on a claim for out of state travel. See also *Fairfield v. W. J. Corbett Hardware Co.*, 215 Pac. 510, 25 Ariz. 199.

In the Missouri case of *State v. Hackmann*, (Mo. 1919) 217 SW 271, a State Auditor had refused to issue a warrant for the payment of the salary of an employee of the State Board of Equalization for which an appropriation had been made. Concerning the auditor's refusal, the court stated:

"It is plain, therefore, that under the law and the facts in this case, it is the duty of respondent to audit and allow relator's claim and to issue to him a warrant upon the State Treasury for the full amount thereof. Respondent has no discretion in the matter. It is a plain ministerial duty."

The cases reviewed by the Defendants are not factually in point and do not determine the issue here presented.

The case of *Reeves v. Talbot*, 289 Ky. 581, 159 SW 2d 51, involving a request for out-of-state travel, discusses the relative authority of the Department of Finance and the Commissioner of Revenue. Cases involving travel pay should be distinguished from disbursement of other appropriations. The situation here is similar to disbursement of funds to the state board members di-

rectly for their own expenses. The statutes specifically require that for travel expenses for members of the Board of Education, the Board of Examiners must approve the same. However, for other disbursements there is no such requirement. The directors of the junior colleges and the other colleges under the jurisdiction and control of the Board of Education enter into contracts authorizing disbursement of funds, etc., which action is independently checked and reviewed by the State Board of Education. However, for personal expenses or travel pay of the board members, there is no independent check unless, as the Legislature has provided, the Board of Examiners or some other agency is required to review those disbursements.

The holding in *Reeves v. Talbot*, supra, is similar to the holding in *Marionaux v. Cutler*, supra, and *State v. Edwards*, supra, in that the court held in the Talbot case that the Department of Finance's refusal was—

“* * * based upon a misconstruction of the applicable law. The effect was to deprive the Commissioner of Revenue of a right which on a correct construction of the law would have been recognized.”

Therefore, the court's discussion as to the discretionary authority of the Department of Finance is only dicta. However, such discussion merely states that the Department of Finance should 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.”

At another place the court stated that the commissioner could refuse the request if in his opinion—

“* * * 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 it will exceed the balance of funds allotted to the department, he should disapprove the requisition in the manner prescribed by the statute.”

It is submitted that the court establishes the rule that the Department of Finance has the duty to examine the request to determine if there are sufficient funds appropriated to the department involved, that the request is for a public purpose within the scope of the authority of the particular department, and that the request does not violate any provision of the law. Such a holding is consistent with the contention of the Intervenor.

The Kentucky court further stated that the request should be considered as “*prima facie* valid and proper.” However, in the present case, the Defendants take the position that they have unlimited authority to approve or disapprove any request by the Respondent, which action can only be challenged by showing an abuse of discretion on the part of the Defendants. The Kentucky case did not require the plaintiffs to show an abuse of discretion on the part of the Defendants. Rather, the

Department of Finance would have to show an abuse of discretion before it could deny the request.

On May 18, 1953, the State Board of Education requested approval from the State Board of Examiners for the State Superintendent to attend the annual meetings of the National Council of Chief State School Officers and the National Education Association. The Board of Examiners were advised as follows:

“Superintendent Bateman is Vice-President of the National Council of Chief State School Officers. He is chairman this year of the nominating committee, has been assigned to preside at one of the general meetings, and is to be a speaker at another general meeting.”

The Board of Examiners were further advised that the expenses would be paid from the Public School Administration Fund. On May 29, 1953, the Board of Examiners, by a letter, stated:

“The board denied your request to incur out-of-state travel expense for yourself to Miami Beach, Florida, June 24 to July 1.”

The case of *Reeves v. Talbot* cited by the Defendants would require the Board of Examiners to approve such a request for out-of-state travel.

The case of *State ex rel Yapp v. Chase*, *infra*, cited by the Defendants deals with authority over employment of personnel and will be discussed under Point IV dealing specifically with that problem. However, the case is of interest since it held that the Commission of Adminis-

tration and Finance did not, in that case, have any discretionary power. The court stated :

“The conclusion follows that the existing law gave these employees a legal right to receive as compensation for their services the amount specified in the estimate, and there was no valid reason for refusing to approve such estimate. *Its approval under such circumstances did not involve the exercise of any discretionary power.*” (Emphasis added)

The Defendants rely on the case of *State v. Manning*, 220 Iowa 525, 259 NW 213. It is asserted that the Court in that case sustained the discretionary power of a budget officer. The case was brought to remove a mayor and two city commissioners for transferring municipal funds from one account to another in violation of the specific provisions of the state law. The Defendants as a defense challenge the constitutionality of the law. There is no showing that the budget officer was requested to approve the transfer or that any action of any type was taken by the budget officer.

The decision of the Iowa court is of no value in determining whether the Board of Examiners or Commission of Finance in this case has either discretionary or ministerial authority.

The defendants cite *Sellers v. Frohmiller*, 42 Ariz. 239, 24 Pac. 2d 666 as a case similar to *Reeves v. Talbot*, supra, pertaining to a “provision of an appropriations act requiring the Governor’s approval as to legality and necessity for proposed travel expenses.” This case, like

those heretofore reviewed and cited by the Defendants, is of no help in deciding the issue now presented to this court. In the first instance the claim was not proposed travel expenses, but rather was a claim for one day's salary. Secondly, the issue raised before the court was the constitutionality of an appropriations act. The court held that the act was unconstitutional since it involved not only appropriations, but also legislation regarding the disbursement of funds.

If the case stood for the proposition as asserted by the Defendants, the holding would be inconsistent with the subsequent Arizona case of *Ward v. Frohmiller*, supra. This was an action by employees against the state auditor to approve travel expenses for attending conferences concerning governmental problems. The case is a clear holding that authority of a state officer to adjust and settle the amount of claims against the state payable out of the funds of the state is limited to the ministerial function of determining if the funds are being disbursed for a public purpose and within an appropriation made by the Legislature. The court in so holding stated as follows:

“After this is done, it must be presented to the auditor, and if it is, on its face, for a public purpose and is properly itemized and accompanied by vouchers, and an appropriation has been made by law for that purpose, it is the mandatory duty of the auditor to approve said claim and to issue a warrant therefor; no discretion being given, if the matters recited beforehand appear in the claim as presented.”

The court summarized its holding as follows:

“We hold, therefore, that if it appears from the face of the claims in the present case that they were in proper form and that the money claimed thereunder was expended for a public purpose, and they were properly approved by the head of the state department, it was the duty of the auditor to approve the claims and issue the warrants.”

Another Arizona case, *Industrial Commission v. Price*, 37 Ariz. 245, 292 Pac. 1099, is cited by the Defendants. The case does not involve disbursement of funds or budgetary control, but rather deals with the authority of a statutory administrative agency to enter into employment contracts. This case will be reviewed under the next point specifically considering that issue.

The Defendants cite the case of *Wycoff v. W. H. Wheeler & Co.*, 38 Okla. 771, 135 Pac. 399, in answer to the Intervenor's assertion that the Board of Examiners and Commission of Finance have only ministerial duties with reference to disbursement of funds appropriated by the Legislature. This case once again is not factually in point. The case involved a suit by a publishing company to enjoin the defendants from entering into a new contract for the supplying of text books to the schools in the State of Oklahoma. The court stated that the issue was whether the Plaintiff had a **valid contract** to supply the text books. The law specifically provided that the Board of Education as the text-book commission could investigate and advertise for bids with reference to the books to be used, and that in entering into a contract the

publishing company had to present a written contract and bond for performance. The law provided that the bond should be approved by the Governor. The Governor refused to approve the bond. The court stated :

“From all of which it appears that the state entrusted the business of making this contract to two of its agents, who were required to work together to that end—the Board and the Governor, and prescribed the duties of each; * * * The functions each had to perform were intended to be of equal importance and indispensable to the other.”

Since the Governor had not approved the bond, the court held that the Plaintiff did not have a valid contract.

It is not sufficient to answer the cases cited by the Intervenor by merely stating that they involved auditors and comptrollers. In those cases often the constitutional authority was much broader than the mere authority of “examining” claims as granted to the Board of Examiners.

In *State ex rel W. R. Clark Printing & Binding Company, Inc., et al v. Lee, State Comptroller*, supra, the court was construing the authority contained in Sec. 25, Article IV, Florida Constitution, which stated that the comptroller had power to examine, audit, adjust and settle accounts of state officers.” In fact, the most that can be said about the Board of Examiners is that as to the Board of Education it is a board of auditors.

As was stated in *Lewis v. Doron*, supra :

“The relator, forever, contends that the word ‘examiner’ means auditors; and that the powers instant to the name, being specifically conferred, are taken from the comptroller. Admit the proposition as to the meaning of the word, yet the conclusion does not follow for the Board of Examiners might be auditors, and still the comptroller be, as the name implies, chief auditor.”

As to the Board of Examiners, the Defendants rely, of course, primarily on the Idaho cases. As previously discussed, the Idaho cases are to be distinguished since the implementing legislation in Idaho considerably broadened the authority of the Board of Examiners. Also, the Supreme Court sits as an appellate court of claims to review the action of the Board of Examiners for recommendation to the Legislature. Also, there have been two amendments to the constitutional provision involved in the State of Idaho. In view of the constitutional, legislative and case history, the Idaho cases must be distinguished.

The Utah cases cited by Defendants concerning the authority of the Board of Examiners stand only for the proposition that if refusal to approve a claim is based on an issue of law the Board will be ordered to act or refrain from acting, depending on the determination of the legal question. The cases do not adjudicate the nature of the Board’s authority.

Only three Utah cases have involved the Board of Examiners as a party to the litigation. These cases considered the duty of the Board of Examiners in examining

claims which, as recognized by the Defendants, involved only questions of law. In *Thoreson v. State Board of Examiners*, supra, our Utah court stated:

“It became and was a mandatory duty of the said board to receive, audit, and allow said claim, and that mandamus lies to enforce the performance of that ministerial duty.”

In *State v. Cutler*, supra, the court stated:

“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 claim.”

The third case of *Marionaux v. Cutler*, supra, did not discuss discretionary power, but rather considered the legality of the payment as raised by the decision of the Board of Examiners. None of these cases stands for a holding that the Board of Examiners does have discretionary authority in a case such as is presented to the court.

It is, of course, conceded that when the Board of Examiners is sitting as a court of claims for miscellaneous demands made upon the state and for the sifting of information and referring the same to the Legislature, that in such a case they would have discretionary authority. But it is here maintained that a disbursement by the Board of Education is not a claim within the jurisdiction of the Board of Examiners, but if it is concluded to be such a claim the authority of the Board of Examiners would be to determine if the disbursement is

authorized by an appropriation and is otherwise not illegal.

In Utah the Department of Finance was created to pre-audit disbursements and the auditor, a constitutional officer, is required to post-audit disbursements. It cannot be maintained that a statutory agency with pre-auditing functions should have greater authority than the auditor.

In *State Board of Land Commissioners v. Ririe*, 56 Utah 213, 190 Pac. 59, the court stated:

“However, it is no concern of the auditor, neither is it a part of his duty to ascertain whether the investment is desirable or whether the security is sufficient. Whenever the Land Board, or any committee or official whose duty it is to determine those matters, has acted, such acts or conclusions are final and binding upon the auditor, so long as the investment is authorized by law.

* * *

“In the very nature of things in carrying on the affairs of the state, it could not be otherwise. If the auditor were charged with the duty and responsibility of examining and determining the legality and desirability of the investment of the funds of the state, then, indeed, would conflicts, disputes, and general chaos follow. The law has vested no such duty or authority in the auditor.”

If the authority of the Board of Examiners as a board of auditors over specific appropriations and the Department of Finance as a pre-auditing agency are not limited to the same ministerial function as the auditor, as

was stated in the Ririe case, “conflicts, disputes and general chaos” will follow, as is shown by the facts of this case.

In the recent case of *State Board of Education, et al v. Commission of Finance*, supra, the Commission of Finance did not assert that it had discretionary authority. In refusing to approve the payment of salaries established by the State Board of Education, the Commission of Finance contended that the State Board of Education was not legally constituted. They contended it did not have authority to appoint the state superintendent and fix his salary. The pleadings and the briefs set forth the statutes establishing the Department of Finance and its authority to approve disbursement of funds. No argument was made by the Department of Finance claiming a discretion to allow or disallow a claim. We must therefore conclude:

1. The great weight of authority in other jurisdictions where agencies are set up by the Constitution or by statute for the protecting of the funds of the State regard the action of such agencies as ministerial and without discretion.

2. The Utah law as decided particularly by the case of *State v. Cutler*, supra, is a direct holding that the Board of Examiners have no discretionary powers where a claim is specifically payable out of a defined appropriation. The most that Defendants can argue is that so far as the Board of Education is concerned the Board of

Examiners have a ministerial responsibility to examine the claims.

3. The Utah law as decided in the case of *State Board of Land Commissioners v. Ririe*, supra, holds that the Auditor, a constitutional officer, has only a ministerial duty over the expenditures of other agencies. The Department of Finance, a statutory auditing agency, can have no greater authority.

4. The cases cited by the Defendants do not consider the issues as here presented, and are not factually in point. Certainly the Commission of Finance has only a ministerial duty with reference to disbursements by the State Board of Education.

5. If disbursements by the Respondents are considered to be claims which must be presented to the Board of Examiners, the authority of the Board should be limited to "Examination" of those disbursements within the limitations herein discussed.

POINT IV

IN THE EMPLOYMENT OF PERSONNEL THE DEPARTMENT OF FINANCE HAS NO AUTHORITY OVER THE STATE BOARD OF EDUCATION.

We have heretofore discussed the factual situation concerning the employment of personnel by the State Board of Education and control and supervision exercised by the Department of Finance and the Board of

Examiners. (Point I) The discussion of the law under that point was limited to the determination of whether the Board of Examiners had any authority over such matters. The issue here presented relates to the apparent conflict in statutory authority of the Board of Education and the Department of Finance.

The trial court found: "The Board of Examiners and the Finance Commission do not have authority over the employment of experts or specially qualified personnel by the Board of Education." (R. 73) The Appellant in challenging the determination by the trial court merely cites the statute and states that it speaks for itself. Reference is then made to cases considered under a preceding point. Such an approach to the problem ignores specific statutory authority granted to the Board of Education. It also ignores the legislative history and the nature of the enactments. The authority of the Board of Education is subsequent to the authority of the Commission of Finance. The authority of the Board of Education is specific, while the authority of the Commission of Finance is general. The two cases dealing with the specific problem of the employment of personnel discussed in the preceding point referred to by the Defendants do not stand for the proposition for which they are cited and can be readily distinguished.

The Board of Education, in addition to having the constitutional and statutory authority of general supervision and control of the public school system, is authorized by Section 53-2-8, U.C.A., 1953, as follows:

“The Board may appoint such assistant superintendents, directors, supervisors, assistants, clerical workers, and other employees, as in the judgment of the Board may be necessary to the proper administration and supervision of the public school system. The salaries of such assistant superintendents, directors, supervisors, assistants, clerical workers, and other employees shall be fixed by the Board and shall be paid from money appropriated for that purpose.”

The law as it above reads was enacted by Chapter 16, Section 3, Laws of Utah 1951, First Special Session. Section 5 of the foregoing Chapter 16, Laws of Utah 1951, First Special Session, provided:

“All existing statutes of the State of Utah which are inconsistent or in conflict with this act, are to the extent of such inconsistency or conflict, declared null and void insofar as they relate to the provisions of this act.”

Section 53-2-8 was amended by Chapter 80, Section 1, Laws of Utah 1953; however, the above provisions were not changed.

The foregoing statutory provisions clearly specify that the Board of Education shall have authority to employ its personnel and to determine the salary which shall be paid to them. However, the Department of Finance maintains that it has authority over such matters by virtue of Sections 63-2-13 and 63-2-14, Utah Code Annotated 1953, formerly Sections 82C-2-13 and 82C-2-14, which provide as follows:

63-2-13. "The commission of finance shall prescribe and fix a schedule of salaries for the officers, clerks, stenographers and employees of state offices, departments, boards and commissions, except where such salaries are fixed by statute or by appropriation; and such schedule of salaries shall have the force of law in all state offices, departments, boards and commissions, and shall in no case be exceeded without the express approval of the commission of finance.

63-2-14. "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."

The foregoing sections were enacted in 1941 and have not been amended since that time. The specific authority of the Board of Education is granted subsequent to the general authority of the Commission of Finance.

The following brief quotations accurately state a fundamental rule of construction which has been ignored by the Defendants:

March v. Aljoe, 41 Wyo. 119, 282 Pac. 1055:

"It is a familiar and elementary rule of statutory construction that if it is not possible to reconcile inconsistent statutes, the dates of their enactment will be consulted in determining the legislative meaning and effect given to the later one. See *United States v. Tynen*, 78 U.S. (11 Wall.) 92, 20 L. Ed. 153; *Sedgwick on Statutory Construction*, 125; *State ex rel. Attorney General v. Heidorn*, 74 Mo. 410; *Bramham v. City of Durham*, 171 N.C. 196, 88 SE 347; *in re Ogilvie's Estate*, 291 Pa. 326, 139 A. 826; *State v. Anderson*, 191 Wis. 538, 211 NW 938."

State v. Langer, 177 NW 408, 46 N.D. 462:

"It is a well-settled rule of law, where two legislative acts are repugnant to or in conflict with each other, that the latest expression of the legislative will must control, even though it contains no repealing clause. 36 Cyc. 1073."

The Legislature could not, even if it so intended, constitutionally grant to the Department of Finance power and authority by virtue of controlling the employment of personnel the right to interfere with the functions of the State Board of Education. However, in this case the Legislature has not so intended, rather it has by statute granted to the Board of Education complete control and supervision over the employment of its personnel. By the terms of the law amending and re-enacting these provisions, all prior laws inconsistent or in conflict therewith were declared null and void insofar as they related to the authority of the Board of Education. The statutory authority of the Commission of Finance as construed by the Defendants would there-

fore be null and void. In addition, the *specific* authority of the Board of Education would control over the *general authority* of the Department of Finance.

The courts construing similar authority have uniformly held that it was the intention of the Legislature to grant complete control over employment to the agency involved.

In *State v. Miser*, 72 Pac. 2nd 408, 30 Ariz. 244, the court held that such a statute, conferring authority over employment of personnel upon the Board of Regents of the University of Arizona, gave to that Board complete control in the management of its affairs placing wholly within its hands the power to say who shall enter the service of the University, from president to janitor, and to decide what salary shall be paid. The Arizona law stated:

“Sec. 1135. Powers of board; appointment of professors; salaries; tuition. The board shall enact ordinances for the government of the university; appoint and *employ a president of the university, and professors, instructors, lecturers, and other officers and employees, and fix and determine the salaries of the persons so appointed and employed*; remove any officer or employee when in its judgment the interests of the university require; fix all fees to be charged by the university and graduate the same as between residents, non-residents and students from foreign countries.”

The court on construing this law stated:

“It is clear from these and other sections pertaining to the university that the Board of Regents is given complete control in the management of its affairs, including the expenditure of its funds, and that the only restriction placed upon it in paying these out is that they must be used for the purpose for which they were appropriated. Section 1135, it will be noted, makes it the duty of the Board of Regents to ‘appoint and employ a president of the university, and professors, instructors, lecturers, and other officers and employees, and fix and determine the salaries of persons so appointed and employed,’ *thus placing wholly within its hands the power to say who shall enter the service of the university, from president to janitor, and to decide how much salary he shall receive.*” (emphasis added)

Although the Utah legislature intended to grant authority to the State Board of Education to employ state directors down to janitors, it will be remembered that the Utah State Board of Education has not been permitted to employ and determine the salary of state directors or to even employ janitors on a temporary basis.

Assuming that the statutory authority of both departments was of equal dignity as to time, the statutes would have to be construed so as to make the Board of Education dominant in its field.

As was held in *State v. Herrick*, 140 NE 314, 107 Oh. St. 611, although the Department of Finance is important, its importance is not such as to overshadow all the other departments and completely reduce them to a state of impotence. A reasonable construction of the relative

authority of the two departments must be made if the finance commission law is to be held constitutional.

In the case of *State v. Herrick*, supra, the contracting authority of the Director of Highways in relationship to the authority of the Department of Finance was discussed. The contemplated contract, however, was not for the employment of personnel. The Ohio statutory authority of the Department of Highways was as follows :

“Sec. 154-40. The department of highways and public works shall have all powers and perform all duties vested by law in the superintendent of public works, the state highway commissioner, the chief highway engineer, and the state building commission. * * *”

The statutory authority of the Department of Finance was as follows :

“(Sec. 154-28) The department of finance shall have power to exercise control over the financial transactions of all departments, offices and institutions, excepting the judicial and legislative departments, as follows: * * *

“(3) By requiring itemized statements of expenditures proposed for any specified future period to be submitted to the department, and by approving or disapproving all or any part of such proposed expenditures.

“(4) By requiring orders, invoices, claims, vouchers or payrolls to be submitted to the department, where such submission is prescribed by law or where the Governor shall deem such submission necessary, and by approving or dis-

approving such orders, invoices, claims, vouchers, payrolls. * * *

In this action the Director of Finance refused to approve a contract recommended by the Director of Highways for the reason that the said Director of Finance did *“not regard it as an appropriate or desirable contract for the state to enter into.”* The issue before the court was stated as follows:

“This question is purely one of statutory construction. The inquiry is as to the power and authority of each of the aforesaid departments of the administrative branch of the government, as to what extent each is dependent upon the other, and to what extent, if at all, the finance department is authorized to control the policy of the highway department in the matter of state aid in the construction of highways throughout the state.
* * *

“Each of the branches has certain duties to discharge, and the head of each department is burdened with certain responsibilities. The duties of each relate to separate and distinct functions, each requiring certain technical skill, knowledge, experience, and training not common to all the others.”

The court further made the distinction that the Department of Highways and Public Works was not a constitutional office, but nevertheless concluded that the Commissioner of Finance did not have authority to supervise the policies of a highway department.

“It is true that the department of finance is first named, and it may be conceded that none of

the other departments ranks greater in importance, yet it does not follow that its importance is such as to overshadow all the others and to completely reduce them to a state of impotence. If any illustration is necessary to show that such power and authority in the director of finance as claimed in this case, if applied to all the other administrative branches of the state government, would completely submerge the other branches and put it within the power of the director of finance to completely defeat and destroy the usefulness of the other branches, that illustration is found in the facts of the present controversy.

“We shall not attempt in this proceeding to define the duties and limitations of the director of finance in his relations to the directors of the other departments, but we do find it necessary and do not hesitate to say that his duties do not reach even in the remotest degree to a control of the policies of the department of highways and public works.

“While the Administrative Code has not attempted to define the technical qualifications of the director of finance, it will be readily conceded that the duties devolved upon him by that Code require the training of a banker and an accountant. The Legislature has, however, clearly recognized the fact that the technical qualifications of the state highway engineer, one of the offices created in the department of highways and public works, shall be those of a competent civil engineer, with at least five years' experience in the construction and maintenance of highways. It would be a little short of absurdity to require this skilled knowledge, training and experience in the highway department, if the policy of the highway

department were entirely subject to the control of the finance department."

Proper administration of the affairs of the State Department of Education require skill, training, experience and study expected of those delegated the authority of conducting those affairs. The members of the Department of Finance cannot be expected to have those qualifications, but rather, as stated in the preceding case, they are selected having in mind quite different qualifications for the performance of quite different functions. Both departments by a proper construction of their statutory authority can be supreme in their own sphere of activity and as such serve a valuable function and perform a valuable service without interfering with the performance of the duties of other agencies.

As was stated in *State v. Cunningham*, 101 Pac. 962, 39 Mont. 163, the power to control the employment of personnel gives the power to control the agency involved. By Section 262, Revised Codes of Montana, the Board of Examiners was given authority over employment of personnel similar to the authority granted to the Department of Finance. The Montana law stated:

"The board of examiners may at any time, when necessary, employ clerical help for any state officer or board, and no clerks must be employed by such officers or board without the authority of the board of examiners, and no such clerks must be employed by the board of examiners except when all duties of the office cannot be performed by the officer himself."

Pursuant to this statutory authority the Board of Examiners of Montana attempted to determine the compensation to be paid to an employee of the Supreme Court. Concerning the exercise of this authority the court stated:

“The result of this action, if it be held to be a binding force, is that this court in some of its important functions is subject to the control of the state board of examiners; *for to say that it may grant the court permission to employ a stenographer is to say that in its discretion it may withhold permission.* This means no more or less than that, though the services of a stenographer are absolutely necessary to the proper accomplishment of the work of the court—a fact about which there can be no dispute—the board may in its discretion cut off all such services, and thus virtually disable the court, or at least seriously impede and hamper it, in the discharge of its duties. To say that it may fix the compensation to be paid for such services is also an assertion of the same power; for, if through mistake or lack of knowledge, or from any other cause, if any such exist, the board should fix the compensation at such a figure as to render it impossible to secure suitable service, this would be attended by the same consequence as if no compensation were allowed. * * *

“In view of these considerations, it is manifest that the power to select the proper employee could not with propriety be vested elsewhere than in the court itself; and it is equally manifest that the power to say whether it may or may not be necessary to have assistance, and what the qualifications of the assistant shall be, may not be vested elsewhere. If the power of appointment exists at all, it is a necessary power of the court, and,

since the qualifications of the individual desired is determined in a measure by the amount of compensation paid for his services, the power to fix the compensation is also a necessary power. *In short, the court has the inherent power to select and appoint its own necessary assistants and make the compensation due for their services a charge against the state as a liquidated claim. Any other conclusion would be to put the court in the attitude of a petitioner to the board of examiners from time to time, and thus reduce it from the position as a coordinate branch of the government to the level of the ordinary citizen who desires or claims payment for services rendered.* * ** (Emphasis added)

The Board of Education being a constitutional body directed by the Constitution to perform functions likewise has the inherent power to select and appoint its own necessary assistants and the power to fix the compensation paid to such assistants. Any construction of any statutory law repugnant to this authority would render such statute unconstitutional.

Although the statutory law was the same at the time the recent Utah case of *State Board of Education, et al. v. Commission of Finance*, supra, was decided, the Department of Finance did not feel that the argument here presented had sufficient merit to urge the same upon the Supreme Court, although the issue was raised by the Board of Education.

The two cases dealing with the employment of personnel cited by the Defendants *do not support the holdings for which they are cited.*

State ex rel Yapp v. Chase, 165 Minn. 268, 206 NW 396, cited by Defendants, involved a suit brought by the Railroad and Industrial Commission and five of its employees against the Commission of Administration and Finance and the state auditor for payment of salaries determined by the Railroad and Industrial Commission. The lower court granted a preemptory writ ordering the Defendants to pay the salary claims. On appeal the decision of the lower court was affirmed, and in so doing the Supreme Court stated as follows:

“If the approval of the estimate for the salaries in controversy involved the exercise of discretionary powers on the part of the Commission of Administration and Finance, its action cannot be reviewed or controlled by the courts. But if these salaries had been lawfully fixed and the existing law gave the employees named the legal right to the amount specified in the estimate, the approval of the estimate did not involve the exercise of any discretionary power on the part of that Commission, and the refusal to approve it was an arbitrary act against which the courts may properly grant relief.”

The holding of the court in the above-mentioned Minnesota case supports the contention of the Intervenor rather than the position of the Defendants on the issue here discussed. The court stated:

“The conclusion follows that the existing law gave these employees a legal right to receive as compensation for their services the amount specified in the estimate, and there was no valid reason for refusing to approve such estimate. *Its approval under such circumstances did not involve*

the exercise of any discretionary power.” (Emphasis added)

As previously stated, the preemptory writ granted by the trial court was sustained ordering the Commission of Administration and Finance and auditor to pay the salaries of the employees involved.

The Defendants cited the case of *Industrial Commission v. Price*, supra, under the preceding point. The Industrial Commission of Arizona was established to administer the workmen's compensation law. The specific statute establishing and defining the authority of the Industrial Commission stated:

“Such employment and fair compensation shall be first approved by the governor.”

It must be recognized that there is a fundamental distinction between statutory agencies and constitutional agencies. The legislature in establishing a law for workmen's compensation benefits could if it so desired require the Governor to administer the provisions of that statute, or could appoint an agency subject to the approval of the Governor to administer the law, or might even establish an agency without the Governor's approval to administer the provisions of the act. The Legislature having the authority to create the agency in the first instance may define and limit the authority of such agency as it may desire. A different situation is involved when a constitution creates a state board of education, defining its duties consistent with other constitutional provisions requiring the state to provide for the education of its

inhabitants. In this latter situation the legislature cannot specify limitations which will frustrate and circumvent the provisions of the constitution.

The facts before the Arizona court in the foregoing case were substantially different than those here presented. In the first instance the specific statute referring to the Industrial Commission required the governor's approval. In this case the specific statute pertaining to the Board of Education states that the Board may appoint its various employees and has eliminated therefrom the previous requirement that such employment be approved by the Board of Examiners or any other officer. The specific statutory authority of the Board of Education is subsequent to the general enactment giving to the statutory Department of Finance authority over employment of personnel.

The later case of *State v. Miser*, supra, is more in point.

The cases cited by the Defendants are not in point, to show that in the employment of personnel the Department of Finance has authority over the State Board of Education, and therefore we must conclude:

1. Statutes appearing to be in conflict should be construed in favor of granting to each department authority to operate without interference in its own sphere of activity.

2. Specific statutory authority of the Board of Education refers to the employment of personnel by the

Board of Education in particular, while the authority of the Department of Finance is only general.

3. The recent statutory authority of the Board of Education pertaining to employment of personnel superseded the statutory authority of the Department of Finance.

4. If the Department of Finance has authority to control employment of the Board of Education personnel and their salaries, it has in effect the power to control the Board of Education, rendering such law unconstitutional.

5. In the employment of personnel the Department of Finance has no authority over the State Board of Education.

POINT V

THE BOARD OF EDUCATION MAY EMPLOY INDEPENDENT LEGAL COUNSEL WHEN THE ATTORNEY GENERAL IS REPRESENTING OTHER STATE AGENCIES ASSERTING RIGHTS IN CONFLICT WITH THE AUTHORITY OF THE BOARD OF EDUCATION.

The Board of Education admits that it is a board or commission of the State of Utah as referred to in Section 67-5-1 (1), U.C.A. 1953, and that in ordinary matters it looks and should look to the Attorney General for the prosecution or defense of the causes in which it is interested. But where the Attorney General (1) refuses to represent the Board of Education, or (2)

recommends that the Board of Education employ other counsel, or (3) represents other departments asserting authority in conflict with that of the Board of Education, or (4) where the Attorney General is actually an adverse party, then the Board is acting reasonably and of necessity in employing private counsel. It would be unreasonable under such circumstances to hold that the Board of Education could not employ independent legal counsel and that the Board could not do so without first securing permission from the Attorney General. As was stated in *State v. Cunningham*, supra, to say that one may grant permission is to say that one in his discretion may withhold permission.

Page 99 of the Exhibit shows that in the lawsuit commenced by a taxpayer against the Board of Education in which the Board of Education thought it important to challenge the availability of an appropriation for a research fund and also to challenge the authority of the Finance Commission to fix salaries of professional personnel the Attorney General recommended that the Board select its own counsel. Thereafter A. M. Ferro, attorney at law, was employed by the Board of Education and performed services in the matter of the research fund during the months of October, November and December, 1950, and January, 1951, and rendered a statement for such services. (Exhibit 2, Page 101)

The submission of this bill by the Board of Education and its efforts to get the Attorney General to rule on the legality of the claim are shown at pages 100, 102

and 103 of Exhibit 2. Such an opinion was never given and the claim was not approved by the Finance Commission. It was therefore presented to the Board of Examiners who failed to approve it and transmitted it to the Legislature without recommendation. (Exhibit 2, Page 104). After appropriation of the funds by the Legislature, the Governor vetoed the bill which would have paid the claim. (Exhibit 2, Page 105)

The facts with reference to employment of counsel in this case are similar. In answer to allegations in Intervenor's Complaint that the Board of Education should be allowed to employ its own counsel, the Attorney General stated:

"Whenever a dispute arises between Defendant, the Attorney General, and any other officer of the state, including the Intervenor, the Attorney General, upon request offers to and does appoint attorneys chosen or approved by the other state officer or agency, including the Intervenor, as Special Assistant Attorneys General to represent said other state officer or agency whose claims are adverse to the counsel, legal advice or claims of the Attorney General." (Ans. to Count V, Par. 4)

The former Attorney General, in an opinion which was published in his biennial report June 30, 1952, commencing at Page 213, stated: "Obviously, it would be improper for this office to attempt to represent both sides of the controversy."

The cases clearly hold that where there is a conflict of interest or where the Attorney General is in fact an

adverse party, independent counsel may be employed and the law decided in those cases does not impose any restrictions on the exercise of that right.

In *State v. Langer*, supra, the court held that the law did not require the futile action of securing the permission of the Attorney General by another state officer when the action was against the Attorney General as a party. The respondents objected to the jurisdiction of the court upon the ground that no application was made to the Attorney General to institute the proceedings. In answer to this contention the court stated as follows:

“This technical objection is also without merit. It is true that ordinarily the consent or refusal of the Attorney General should be secured in initiating the exercise of the original jurisdiction of this court for the reason that ordinarily the Attorney General is the legal representative of the interests of the state, its sovereignty, franchises, and liberties of the people. However, the contention is absurd that an application should be made to that officer in an action in which he is in fact one of the parties defendant, and which concerns his alleged wrongful acts and seeks to restrain them. The law does not require futile acts. The original jurisdiction of this court is not to be denied merely because the Attorney General happens to be one of the respondents.”

The law, concerning situations where the Attorney General is presented with a conflict of interest is reported in 7 C.J.S. 1229, Attorney General, Section 8b, as follows:

“Conflicting interests

“Between conflicting duties and interests the attorney general should choose that duty or interest most closely identified with the public good.

* * *

“Where an application to prohibit wrongful acts would ordinarily be made by the attorney general, but he is alleged to be the wrongdoer, the court may entertain the petition of parties interested without the consent of such attorney general.”

The cases support the foregoing statement of the law.

In *Marsh v. Aljoe*, *supra*, the court had to construe the effect of two inconsistent statutes. By one statute the Attorney General was directed to represent claimants under the workmen’s compensation statute. Under another provision it provided:

“The Attorney General, or his deputy or assistant shall act as the attorney of the state treasurer in all cases.”

The lawsuit involved an assertion by a claimant for workmen’s compensation which position was contested by the state treasurer. The court in holding that the Attorney General owed a paramount duty to the state treasurer and could not represent both sides of the controversy stated:

“It is plain, we think, that when, under the statutes as they now stand, the duty owed by the Attorney General and his assistants to the claimant, under section 4328, *supra*, to conduct the proceedings in this court in the latter’s behalf,

conflicts with that owed the treasurer of the state of Wyoming in such proceedings, the duty first mentioned must yield and the right of the treasurer to the services of the Attorney General is paramount. In the instant case the claimant is represented by counsel, unconnected with the Attorney General's Office, and his interests are therefore fully protected. Other reasons exist which lead to the same result on this point, but we do not deem it necessary to extend this opinion further."

In *State v. Executive Council of State*, 223 NW 737, 207 Iowa 923, the court stated as follows:

"The legislative call upon the Attorney General to test the constitutionality of the act, by action brought by himself, overlooked the limitations upon the power of the judiciary, and quite ignored the legitimate scope of the powers of the Attorney General. By the very nature of his office, and by statute, he is the legal advisor, both of the executive council and of the General Assembly. To require him to maintain this action is to put him in a position which is repugnant to his other official duties."

State ex rel Dysart v. Gage, 107 Wash. 282, 181 Pac. 855, was cited in a quotation from the Dunbar case in the Attorney General's 1951 opinion. Here the directors of a school district attempted to consolidate school districts upon advice of the prosecuting attorney for the county, a statutory officer who:

"Shall have authority and it shall be his duty * * * to appear for and represent the state and the county and all school districts in the county in which he is a prosecuting attorney * * *."

Entanglements arose between the districts whereupon the prosecuting attorney advised the directors to employ the relators who were private attorneys. The services were satisfactory and this action was brought by the attorneys against the auditor to compel payment. The court examined the statute creating the school districts, which had broad powers including the power to sue and be sued, and held that these powers:

“Must include the right to employ special counsel when, as here, the prosecuting attorney cannot act and the necessity for legal aid is urgent. The statute heretofore referred to regarding the prosecuting attorney is merely a definition of their powers, and does not attempt to restrain, modify, or define the powers of boards of school directors.”

The court then noted that the attorney had advised hiring relators (as in Ferro's case):

“And it is apparent that the proper attention to the affairs of the district demanded that counsel be procured to represent it, and the prosecuting attorney, being the adviser of all the school districts, could not, in the nature of things, properly represent the interests of this district, when they had become antagonistic to interests of the other districts with which a consolidation had been attempted. An urgent necessity existed for procuring special assistance, and it was only in meeting this necessity and upon the advice of the prosecuting attorney that the relators were employed.”

And the auditor was ordered to pay the claim.

The Attorney General's 1951 opinion, after considering the Dunbar and Reiter cases in Washington said:

"Under the authority of these cases the Finance Commission should be permitted to employ counsel to defend it in the action which will be brought on behalf of the Board of Education and the superintendent to compel payment of the salary in question."

It surely cannot be argued that the Finance Commission would have authority to employ counsel whereas the Board of Education would not, the Attorney General representing the opposite party in each case.

In *State v. Hendrix*, 124 Pac. 2nd 769, Arizona (1942) the court stated that "the Attorney General cannot properly represent" two public officers involving conflicting claims.

The statutory law pertaining to the authority of the Attorney General in Arizona is practically identical with the law of Utah with the exception that the Utah law does not provide that no commission or agency, etc., shall employ any other attorney.

The court stated:

"(13-15) It not infrequently happens that one public officer may take a certain view of the law, while another may construe it in a contrary manner, and litigation may properly be commenced to determine the true construction. *The attorney general obviously cannot properly represent both officers. He must choose which side he will take. If the other officer is not permitted to secure competent counsel to represent his point*

of view, it may be that the court will be misled into rendering a wrong judgment. Further, since the attorney general has no discretion to determine whether suits like the present one be commenced or maintained by the auditor, it would be unreasonable to hold that section 4-503 supra, was intended by the legislature to deny the officer, whose discretion it was to determine whether the suit should be instituted and maintained, the right to be represented by counsel whom she thought could and would present her view of the law, in a manner satisfactory to her, to the court.

***"

In the present case we know of no Utah law specifically prohibiting the Board of Education from employing independent counsel. And, unlike the Arizona action, this case presents a conflict of interest with reference to representation by the Attorney General.

It was stated in the Attorney General's opinion as well as in the cases that it was "obvious that the Attorney General could not represent both sides of the dispute." It cannot be disputed that it is unethical for attorneys to represent both sides of a controversy or clients having conflicting interests. Since different members of a law firm cannot represent both sides of a controversy it should likewise follow that different members of the Attorney General's staff should not be permitted to litigate both sides of a dispute As was stated in *Gillam v. Sanders*, 204 N.C. 206, 209, 167 SE 799, 800:

"The unamendable mandate of both law and morals forbids an attorney, in the homely phrase of the field, 'to run with the rabbits and bark with the hounds.'"

The Utah court in the case of *Chez, Attorney General, ex rel Weber College v. State Building Board*, 93 Utah 538, 74 Pac. 2d 687, recognized the impropriety of the attorney general's staff representing both sides of a lawsuit. In a concurring opinion the court stated:

"The matter comes before us distinctly as a 'case made,' a 'friendly suit,' to obtain a certain judicial determination, without a basic or real dispute between the parties, as is evidenced by the fact that the attorney general brings the action, and some members of his office staff appear for plaintiffs, while others appear for defendants. This method of presenting questions for judicial determination is not to be commended or encouraged. It is hardly fair to the court, nor to the parties involved."

The Defendants do not seriously contend that independent legal counsel may not be employed when there is a conflict between two state agencies. The point of difference appears to be in the procedure to be followed before legal counsel is selected. It is the contention of the Defendants that permission from the attorney general should first be secured.

The procedure suggested by the Defendants is that if the department is not satisfied with the opinion of the attorney general a request should be made for reconsideration of that opinion. If this is unavailing the attorney general should be requested to take legal action. At this point the attorney general then will decide upon which side of the controversy he will align himself, and if there is substantial merit to the other side to warrant

approval of opposing counsel. Applying this procedure to the factual situation presented by the Board of Education, it shows that the requirement merely calls for futile action.

When the Board of Examiners refuses requests for disbursements of funds the Board of Education should request the attorney general to again reconsider opinions as to the authority of the Board of Examiners. It is not seriously believed that the attorney general would reverse these prior opinions. Then, according to the Defendants, requests should be made upon the attorney general to bring action on behalf of the Board of Education against the Board of Examiners. Again this action would seem to be futile and unnecessary since it is conceded by the Defendants that the attorney general cannot represent both sides and to assume that the Attorney General would choose to represent the Board of Education involving a suit challenging prior opinions of the attorney general and the authority of a board upon which the attorney general is a member is completely unreasonable and illogical. Even at this point, however, according to the Defendants, the Board of Education would not be permitted to employ legal counsel, but rather they must now request the attorney general to determine if the proposed case challenging the opinions of the attorney general and the action of the board of which he is a member has any merit. Of course the attorney general would be reluctant to see such a suit commenced, and further, to have the expense of employing special coun-

sel charged against his department. The entire suggested procedure is completely futile and illogical.

In the pleadings of this case and by official opinion the Attorney General recognizes the impropriety of his office representing both sides of a dispute. Yet the Attorney General insists that his permission must be secured before the agency not represented by his office can employ independent counsel. In an attempt to comply with this requirement request was made to the Attorney General for permission to employ counsel to instigate an original action in the Supreme Court challenging the authority of the Board of Examiners to reduce the salary of the State Superintendent of Public Instruction. (Exhibit 2, Page 107) Even though the Attorney General does not feel qualified to represent the Board of Education in such matters, he apparently feels that he is qualified in spite of his conflict in interest to decide whether or not suit should be commenced which would involve him as a party challenging the authority of the action of a board of which he is a member.

There is an additional reason why the Board of Education should be permitted to employ independent legal counsel without securing the permission of the Attorney General or having such counsel appointed as an assistant attorney general. The Attorney General is appropriated funds with which to carry on the normal operations of his office. To require him to appoint special counsel to litigate issues in which the Board of Education is primarily interested is to require him to pay out of his

budget the expenses so involved. Naturally, under such circumstances he would be reluctant to incur this additional expense. It is more logical to require the Board of Education to incur this expense since they are most directly affected.

By the pleadings the Attorney General claims to be the exclusive counsel for all state agencies and departments. Yet in the Ferro case the Attorney General declined to represent the intervenors and suggested that independent counsel be employed. Thereafter the Attorney General failed to give an opinion authorizing payment, the Board of Examiners failed to approve payment, and after the Legislature appropriated funds for payment the Governor vetoed the same. This is just one more example of the subjugation of the Board of Education by the Attorney General, Board of Examiners, and the Governor.

By refusing to represent the Board of Education, by failing to approve payment for independent legal counsel, by failing to appoint independent legal counsel, by vetoing appropriations made for payment, the Attorney General, the Board of Examiners and the Governor continue to completely control and subordinate the Board of Education even to the extent of attempting to prohibit and thwart the Board's right and duty to secure judicial interpretation of its constitutional authority.

When the Attorney General (1) refuses to represent the Board of Education or (2) recommends that the Board of Education employ other counsel, or (3) repre-

sents other departments asserting authority in conflict with that of the Board of Education, or (4) where the Attorney General is actually an adverse party, the Board of Education must be permitted to employ independent legal counsel.

CONCLUSION

Appellants respectfully submit that the declaratory judgment of the District Court should be affirmed. To affirm the District Court his court must conclude as a matter of law the following:

1. The State Board of Education was created by the constitution. It is a constitutional body. Its executive officer was named in the executive department of Government.

2. Article 10 of the Constitution of Utah vests in the State Board of Education the general control and supervision of the public school system. Such powers, rights, duties or functions as are within the terms, control and supervision used in Section 6 of Article 10 are not subject to control or the approval of either the Board of Examiners or the State Commission of Finance.

3. The State Board of Education in order to have control and supervision of the public school system must have the power and right to manage, handle, expend, employ and supervise all funds and personnel within its jurisdiction.

It must have the exclusive right to determine the use, need, wisdom of and discretion in the expenditure of appropriated funds for the management, direction, administration, operation and regulation of the public school system. In this respect it must have the right to select personnel and fix their salaries.

4. Section 13 of Article VII of the Constitution of Utah specifically excludes from the jurisdiction of the Board of Examiners

(a) Compensation of all officers which has been fixed by law and

(b) Salaries of persons working for the state, its institutions and departments.

5. As to claims originating with or incurred by the Board of Education or their proper agents, the Board of Examiners has the authority to examine said claims only as to their legality, more particularly in the following respects: Is the claim correct in amount; was it incurred for a lawful purpose; and is money in the treasury from which that claim can be lawfully paid? With reference to said claims the function of the Board of Examiners is essentially ministerial. The Board of Examiners cannot exercise discretion or review the wisdom of the expenditures except as to the personal expenses of the Superintendent of Public Instruction and the members of the Board.

6. The authority of the Board of Examiners as contained in Article VII, Section 13 of the Constitution of

Utah is only granted until otherwise provided by law and may therefore be modified by the Legislature.

7. The Governor and the Commission of Finance do not have authority to reduce appropriations made by the Legislature for public school purposes.

8. The Finance Commission in exercising budgetary control in conjunction with the Governor or in pre-auditing the expenditures of the State Board of Education has ministerial authority only to determine that said expenditures are within appropriated funds and are for public school purposes.

9. The Board of Examiners and the Finance Commission do not have authority over the employment of experts or specially qualified personnel by the Board of Education.

10. The Board of Education may employ independent legal counsel when the Attorney General is representing other state agencies asserting rights in conflict with the authority of the State Board of Education.

This includes the situation where the Attorney General is actually an adverse party or refuses to represent the Board of Education or recommends that the Board of Education employ other counsel.

Respectfully submitted,

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