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

Utah Supreme Court

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

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JUN 11 1956

In the
Clerk Supreme Court, Utah

Supreme Court of the State of Utah

UNIVERSITY OF UTAH,

Plaintiff,

vs.

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

Case No.
8457

STATE BOARD OF EDUCATION,
Intervenor and Respondent.

REPLY BRIEF OF APPELLANTS

E. R. CALLISTER,
Attorney General,

H. R. WALDO, JR.,
Special Assistant

Attorney General,
Attorneys for Appellants.

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STATE BOARD OF EDUCATION,

Intervenor and Respondent.

Case No.
8457

REPLY BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

Respondent contends we failed to apprise the court of the factual background of this case in our Statement of Facts. Counsel state that the only facts involved are found in Exhibit 2-I and proceed to set forth *part* of these "facts". Counsel are, of course, entitled to criticize our

presentation, but we suggest that we have presented the background of this case in the only understandable way.

The "facts" of this case are admitted. Only questions of law remain. Respondent in its voluminous pleading set forth in considerable detail the actions that had been taken by appellants with respect to expenditures, budgetary control, personnel and legal representation of the respondent, State Board of Education. It was then alleged that appellants asserted they had authority to act in these ways and would continue to so act. Finally, it was alleged the actions taken and the authority asserted were unlawful. Appellants in answer *admitted* all these allegations, except the last. This left nothing at issue save questions of law. Far from being academic issues, the questions raised are current, fundamental and real controversies with potential consequences, both direct and indirect, of major significance to the government of the State of Utah.

In considering Exhibit 2-I, it is well to keep in mind that in addition to the hearsay and irrelevant statements contained therein, it does not purport to cover all expenditures, work programs, appointments of personnel and use of the services of the Attorney General by respondent during the period in question, nor does it purport to cover all the situations during the period in question in which appellants have rejected requests made by respondent. At most it is an accumulation of the major disputes between respondent and appellants in recent years.

But we are not concerned here whether Dr. Bateman should receive \$10,000.00 per year as fixed by the State

Board of Education, \$6,000.00 as approved by the Board of Examiners, or \$8,000.00 as determined by the legislature, nor is there any issue raised as to whether the employees of the State Board of Education should have received pay increases in 1948, 1949 and 1950. It may be that these and other decisions of appellants were not wise or even that the decisions made were arbitrary or involved an abuse of discretion. It may also be that the Board of Education has been wasteful and extravagant or unreasonable in its demands. The questions before this court, however, are not what requests to the appellants by respondents should have been granted nor what actions by appellants should not have been taken, but rather the questions are whether the respondent is subject to any supervision of appellants with respect to expenditures, budgetary control, personnel and employment of counsel and if so the character and extent of this supervision. In this reply brief we will not cover the last question which we believe is adequately covered in Point VII of our original brief.

STATEMENT OF POINTS

POINT I

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

POINT II

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

POINT III

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

POINT IV

THE COMMISSION OF FINANCE IS AUTHORIZED AND REQUIRED BY STATUTE TO APPROVE OR DISAPPROVE ALL APPOINTMENTS OF EMPLOYEES MADE BY THE STATE BOARD OF EDUCATION.

POINT V

THE BUDGET OFFICER UNDER THE DIRECTION OF THE GOVERNOR HAS AUTHORITY TO APPROVE OR DISAPPROVE WORK PROGRAMS SUBMITTED BY THE STATE BOARD OF EDUCATION.

ARGUMENT

POINT I

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

In our opening brief we contended that the Board of Examiners (1) has constitutional authority which cannot be diminished by the legislature to examine all claims against the state except salaries and compensation of officers fixed by law, (2) that a claim includes expenditures of state officers and agencies including the respondent, and (3) that the power to examine such expenditures comprehends the exercise of discretion to grant or deny them. We have chosen to discuss only the first two points here and refer the court to our original brief for a discussion of the latter point.

A. *The Constitutional Authority of the Board of Examiners.*

Respondent contends that the framers of our constitution did not intend to vest constitutional authority in the Board of Examiners. They point to the constitutional debates, particularly the amendment made to Article VII, Section 13, inserting the "until otherwise provided by law" proviso at the beginning of the section. It is true, of course, that the framers of the constitution must have intended something by the addition of this proviso, but as we have

pointed out in our brief, the most reasonable construction of their intention is that they intended to affect only the composition and powers of the Board of State Prison Commissioners or at most the composition as distinguished from the powers of the Board of Examiners.

This is more than a technical interpretation. The framers of our constitution, many of whom were leaders of the bar and understood the importance of precision in language, spent a full four days of convention sessions revising and polishing the constitutional language and punctuation to make it conform precisely to the intention of the delegates. Surely, they would not have allowed such an important matter to slip by unnoticed because their "attention" was directed elsewhere (Respondent's Brief, p. 23).

No member of the constitutional convention objected to the examination of claims against the state by a board of examiners. Certain members objected that Sections 12 through 15 were "legislative" but it seems clear that this objection related only to the membership of the various boards created by these sections. When these objections were made, the delineation of the powers of these boards was expressly left to the Legislature with two exceptions: the powers of the Board of Pardons and the powers of the Board of Examiners. With these two exceptions, you will note that the powers of these boards are "as may be provided by law". This was the wording before the "until otherwise provided by law" clause was added at the beginning of each section and is the present wording of the sections. When it adopted the "until otherwise provided by

law" amendment, the convention had reference only to the membership of these various boards. It may have been felt that in the future it might not be feasible for the principal state officers enumerated to act as members of these boards and thus left it open to the legislature to provide a different membership. This in no way affects the powers of the Board of Examiners and Board of Pardons established by the constitution and not subject to change "as may be provided by law".

The framers' intention is clear when it is considered that after the proviso was adopted, the following substitute to Section 12 was offered but rejected (II Proceedings Const. Conv. 1152) :

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

Had this substitute carried, the powers of the Board of Pardons could have been restricted and controlled by the Legislature. That a substitute to the section *as it now stands* was needed to accomplish this demonstrates that the "until otherwise provided by law" amendment was intended to affect only the membership not the powers of the Board of Pardons and Board of Examiners.

It is argued further that the framers of our constitution, by enacting Article VII, Section 13, with similar or identical language to constitutional provisions of other states, adopted the judicial construction placed on such other provisions in other states. This is sometimes used

as an aid to construction, but it is far from conclusive. Its value as an aid to construction is considerably diminished where, as here, there is no evidence that the framers of our constitution knew of or intended to adopt the judicial construction of other states.

But, these cases from other states are far from definitive. The old Nevada case of *Ash v. Parkinson*, 5 Nev. 15, stands only for the proposition that expense bills of the legislature itself need not be passed upon by the Board of Examiners. After much contradictory language and argument pro and con, the court stated at 5 Nev. 32 that legislative expenses already accrued were claims against the state which must be passed on by the Board. The court concluded that the failure so to do was only an irregularity; and aided by contemporaneous administrative construction exempting legislative expense bills from the action of the Board and the presumption of constitutionality, the court refused to hold the act in question unconstitutional. Statements therein that the Board has no constitutional powers and that claims made by state agencies are not claims against the state must be considered dicta disregarded by the court in the later Hallock case, and thus no longer the law in Nevada.

Lewis vs. Doron, 5 Nev. 399, is not in point. The sole question was whether the comptroller, as well as the Board of Examiners, had discretionary authority to approve or disapprove expenditures. Expressly stating that the Board of Examiners' authority was not affected (the only question at issue in the case at bar), the court held that the

comptroller also had discretionary authority in the matter of claims against the state.

The California case of *Board of Trustees vs. Kenfield*, 55 California 488, does hold that claims by state agencies are not within the jurisdiction of a statutory Board of Examiners but the reasons for the creation of a statutory board may well be very different from the reasons for the creation of a constitutional board.

The reliance of respondent on the Idaho case of *State vs. State Board of Education*, 33 Idaho 415, 196 Pac. 201, is misplaced. As pointed out by this Court in *University of Utah vs. Board of Examiners, et al.*, 295 P. 2d 348, the Idaho Board of Education, acting as regents, have more than "general control and supervision of the Public School System"—they have "the control and direction of all the funds of, and appropriations to, the university".

Furthermore, this court in *State vs. Edwards*, 33 Utah 243, 93 P. 720, and *Uintah State Bank vs. Ajax*, 77 U. 455, 297 P. 434, has determined that the framers of our constitution intended to vest constitutional powers in the Board of Examiners. As this Court stated in the Edwards case, "The Auditor is bound by the constitutional provision. The Legislature is so bound, and so are we". In the attempted distinction of these cases, the respondent fails. We concede that neither of these cases is specifically related to the authority of the Board of Examiners over the respondent, State Board of Education. That is this case. But we do contend that the principles established by this Court in those cases applies here. To say that the Court in those cases was influenced by the statutes may be correct, yet

that in no way diminishes the holding by the court that the Board of Examiners is vested with constitutional powers nor can it make any difference whether the claim involved was subject to approval by a single official rather than a multi-member board or agency. The principle is the same in both instances. The fact that this court in the Edwards and Ajax cases did not discuss all of the contentions here made by respondent does not diminish the authority of those cases for it may have been that these same arguments were considered by the court and rejected without discussion as being without substance. Furthermore, the principles established by these cases have been applied in the operation of state government since they were decided and particularly during the last 15 years. (See Stipulation Exhibit "A", pp. 13-21, R. 43-51). To overturn them now should not be lightly considered.

Respondent advances other arguments based on constitutional interpretation. It is first stated that the constitution must be construed as a whole, a principle we heartily endorse. Next it is said that Article X, Section 8 vesting "general control and supervision of the Public School System" in the respondent would be given no effect if our construction of Article VII, Section 13 is correct. On the contrary, if respondent's construction of Article X, Section 8 is correct, the result would be to give no effect to the powers vested in the Board of Examiners by Article VII, Section 13. As this court has previously determined in the other branch of this case, *University of Utah vs. Board of Examiners, et al.*, supra, the framers of our constitution intended the educational functions of our state government

to be subject to the same financial review as all other functions of our state government. The court's opinion in that case also referred to Article X, Section 7, which declares: "All public school funds shall be guaranteed by the State against loss or diversion". This is a provision as applicable to the State Board of Education as it is to the University of Utah and is a provision which should be given the same effect as to both.

By vesting constitutional powers to examine claims of the State Board of Education in the Board of Examiners, the authority granted to the State Board of Education to supervise the schools is not diminished. The initiative at all times is in the respondent. The Board of Examiners only reviews that part of the functions of the respondent concerned with expenditures. It has only a revisory power and the initiation of all action must come from the respondent.

Again it is argued that the general authority of the Board of Examiners is limited by the specific authority vested by Article X, Section 8 in the State Board of Education. But is not the converse actually the case? The State Board of Education deals with all matters relating to the public school system. The Board of Examiners deals only with financial matters and with respect to the functions of the Board of Education deals only with the financial aspects of the public school system and only after action has been initiated by the State Board of Education. Consideration must also be given to the fact that the University of Utah, which also operates, in part, under a specific constitutional provision, has been held by

this court to be subject to the supervision of the Board of Examiners.

Respondent attempts to avoid the effect of the Idaho cases and practice by stating that the Idaho constitutional provision relating to the Board of Examiners has been amended twice and thus the former construction of the provision has been impliedly adopted and approved. If that is a valid argument, it applies in Utah for Article X, Section 8, was amended in 1950 after the Board of Examiners had made many of the decisions to which respondent now objects (See Exhibit 2-I). Have not the voters of Utah also approved the supervision by the Board of Examiners of the financial policies of the respondent?

B. *A Claim Within the Meaning of Article VII, Section 13 Includes Expenditures of State Officers and Agencies.*

The above proposition cannot be seriously contested by respondent. The court below so held and the case of *State vs. Edwards*, supra, involving a mileage claim by a state employee so held. See also *State Board of Education vs. Commission of Finance*, 247 P. 2d 435. This court in *Uintah State Bank vs. Ajax*, supra, defined a claim as a demand for money "paid into the state treasury * * * subject to appropriation by the Legislature, and [payable only] by the state treasurer on warrant of the state auditor," a definition which certainly includes expenditures of state funds by respondent.

Notwithstanding, respondent contends the 1896 legislature interpreted the constitution as not including expendi-

tures of appropriated funds as claims. Sec. 18, Ch. 35, Laws of 1896 provides 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.”

This statute did not restrict the authority of the Board of Examiners since it applied only to the duties of the state auditor. Nor did it imply that the Board of Examiners had no authority over claims for which an appropriation had been made. Sec. 63-6-7, U. C. A. 1953, originally enacted as a part of the same statute, declares this authority; the Legislature would not have denied authority in the same statute. If there is any implication from this section affecting the power of the Board of Examiners, it is the implication that claims previously passed by the Board of Examiners, approved by the Legislature and money expressly appropriated therefor need not be again approved by the Board before a warrant can be drawn. Beyond that, the statute does not go. In any event, it is a fragile basis for an argument in the light of the repeal of this statute and the contrary interpretation by the Utah and Idaho courts.

Respondent further argues (Brief pp. 48-50) that our contentions should not be accepted because there are other adequate safeguards for the expenditure of public funds. Whether the statutes and constitution referred to are adequate to safeguard state funds is a question of opinion and policy which, we submit, is not a question before this court nor can it properly be decided by this court. But the re-

spondent misinterprets our contentions by supposing a situation where payment has been made or services performed and then the claim is submitted to the Board of Examiners. No such situation can arise because the examination by the Board occurs *before* payment has been made. This error by respondent is perhaps understandable for they have referred to statutes which, for the most part, grant authority to take action or seek information only after the expenditure has been made. The discovery of extravagances or irregularities after the transaction is complete is informative but seldom effective. There is a great deal of truth and good common sense in the old admonition against locking the barn door after the horse is stolen.

POINT II

BY STATUTE THE BOARD OF EXAMINERS
HAS DISCRETIONARY AUTHORITY TO AP-
PROVE OR DISAPPROVE EXPENDITURES
OF THE STATE BOARD OF EDUCATION.

This point was covered in Point II of our opening brief and reliance was placed on Sections 53-3-9, 63-6-7, 10 and 11, UCA 1953 and Section 12 of the Biennial Appropriations Acts.

With respect to Section 53-3-9, respondent contends that it relates only to the "personal expenses" of the State Superintendent of Public Instruction and the members of the State Board of Education. No authority is cited for this proposition nor is any definition of "personal expenses"

attempted. Does it mean the salary of the Superintendent? This cannot be for his salary is specifically covered by the last sentence of the section. It certainly does not mean the living expenses of the Superintendent. The most reasonable construction of the section is that it requires review by the State Board of Examiners of the expenditures of the State Superintendent of Public Instruction and the State Board of Education with respect to their official functions and the carrying out of their duties as prescribed by law. This would include the operation of the Department of Public Instruction and the payment of the employees thereof.

It is contended that Section 64-1-6, U. C. A. 1953, first found in the Revised Statutes of 1898, relating to expenses of state institutions, conflicts with Section 53-3-9. It is our position that this statute must be read in connection with 63-6-7, discussed below, requiring the Board of Examiners to examine all claims for which an appropriation has been made.

Furthermore, Section 64-1-6 has been modified by Section 67-4-4 which provides as follows:

“67-4-4. Preparation, issuance and drawing of warrants—Return of redeemed warrants.—Wherever provision is made by any existing law that any warrant or warrants upon the state treasurer, shall be prepared, issued or drawn by the state auditor, from and after the effective date of this act, such provision shall be construed to mean that any such warrant or warrants shall be prepared, issued or drawn by the department of finance. The state treasurer shall return the redeemed warrants to the commission of finance.”

Thus, it is now provided that the Commission of Finance rather than the auditor draws all warrants. Implicit in this change, which was adopted by Chapter 14, Laws of 1943, shortly after the initial adoption of the Finance Commission Act, is the authority of the Commission of Finance, as agent of the Board of Examiners or pursuant to Title 63, to approve or disapprove expenditures of the State Board of Education.

Finally, respondent has not brought itself within the scope of 64-1-6 as a state institution. An examination of the various chapters of Title 64 shows that the only "state institution" over which respondent has any authority is the Schools for the Deaf and Blind. This has been the case since 1898. The statutes dealing with the junior colleges, vocational schools and general administration of the Department of Public Instruction have always been found in Title 53 or its equivalent and cannot therefore be considered state institutions within the meaning of 64-1-6.

With respect to Sections 63-6-7, 10 and 11, U. C. A. 1953, which you will recall were enacted in 1896, respondent has an elaborate analysis found on pages 51-57. We are not here directly concerned with Section 63-6-10 relating to claims, the settlement of which is provided for by law for which no appropriation has been made nor are we concerned with Section 63-6-11 relating to claims for which no appropriation has been made where the settlement has not been provided for by law. We are concerned with Section 63-6-7 which specifically applies to claims for which an appropriation has been made. The two former sections relate to the examination of miscellaneous tort and some-

times contract claims which often arise in the operation of state government. The latter section, however, although including these miscellaneous claims, also covers claims arising by state officers and agencies acting under appropriations made by the Legislature. The language is clear—claims for which an appropriation has been made—and, as we have previously discussed, a claim is simply any demand for money from the state treasury.

Of the statutes we have noted to support our argument, the provisions of the biennial appropriations acts is perhaps the most important in so far as expenditures for salaries is involved, yet respondent has made no answer thereto. These sections specifically vest authority in the Board of Examiners to approve or disapprove salary schedules. These provisions, together with the provision found in recent appropriations acts (Section 1 (b), Appropriations Act of 1953 and 1955; Chapter 136, Laws of 1953 and Chapter 164, Laws of 1955) condition the expenditure of appropriations by all departments of the state on review by the Board of Examiners. See also Sec. 8 of the same acts relating specifically to travel expense.

The matters discussed under this point are, of course, immaterial if our contentions under Point I of this and our opening brief are sustained for the constitutional powers of the Board of Examiners would then justify the exercise of financial review, irrespective of statutory authorization.

POINT III

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

The respondent has cited cases purporting to hold that under similar statutes to the Utah statute state financial agencies have been held to have no discretionary authority to disapprove unwise or extravagant expenditures. For the most part these cases involve constitutional or statutory auditors or auditing agencies acting under laws which do not allow the exercise of discretion. In our opening brief we discussed the distinction between the powers of auditors and the powers of a Board of Examiners or Finance Commission (see appellants' brief, pp. 21-22). It is almost universally held and is the rule in this state that a state auditor has only ministerial powers, *State Board of Land Commissioners vs. Ririe*, 64 Utah 213, 190 P. 59, but the Commission of Finance of Utah is specifically given authority to approve or disapprove proposed expenditures—a clear grant of discretion.

Some of the cases cited by respondent are unquestionably contrary to the contentions of the appellants. We respectfully suggest that these decisions are erroneous and cannot be applied in Utah under the present Utah statutes relating to the Commission of Finance. Particularly is this true in view of the history and the purposes for the 1941 reorganization of state government. Governor Maw put it quite succinctly in stating the purpose of the plan was

to give Utah a single state government rather than government of a hundred separate units.

In accordance with that purpose, a bipartisan commission was established assisted by a part time advisory council. Among other powers, it was given the duty to fix salary schedules for all state officers and employees which "shall in no case be exceeded without the express approval of the commission of finance" (Sec. 63-2-13, U. C. A. 1953). Concerning expenditures other than salaries, the commission must "approve or disapprove all requisitions and proposed expenditures of the several departments" (Sec. 63-2-21, U. C. A. 1953). Other powers over purchasing, investments, insurance and the fixing of bonds were granted. Consistent with the scope of the title of Ch. 10, Laws of 1941, 1st S. S., "An act relating to the financial activities of the state and the administration thereof * * *," the Commission of Finance is to exercise these powers with respect to "all offices, boards, commissions, institutions, arms and agencies of the state government of every name or nature now in existence or that may be hereafter created * * *." For the first time, a unified comprehensive and well thought out plan of financial service for the state was established. Income and outgo could be correlated. Detailed information concerning state revenue and state expenditures could be obtained for the use of the Legislature, the departments themselves and the public.

Such a plan was certain to create friction with the departments. No administrator is happy to have his decisions questioned by another agency. Quite naturally he

feels that he is the best one to make the final determination as to whether a new position should be established, a particular expenditure made or a salary increased. The difficulty is that this administrator has no knowledge of the total picture. He is concerned only with his department and has no information or inclination to learn of the problems of other departments or of the financial condition of state government as a whole. Here is where the Commission of Finance fills the gap. With up-to-date information of the fiscal activities of all state departments, it can control state expenditures to assure the best use of state money. As a supervisory agency, the Commission can view expenditures more objectively than the administrator who initiated them.

These are some of the purposes for the establishment of the Commission of Finance. Many arguments both pro and con exist as to the desirability of such an agency, but these must be left to the determination of the Legislature. At present, the statutes grant the Commission of Finance in unmistakable language authority to supervise the expenditures of all departments of the state including respondent and we ask this court to so declare.

POINT IV

THE COMMISSION OF FINANCE IS AUTHORIZED AND REQUIRED BY STATUTE TO APPROVE OR DISAPPROVE ALL APPOINTMENTS OF EMPLOYEES MADE BY THE STATE BOARD OF EDUCATION.

Section 63-2-14, U. C. A. 1953, quoted in our opening brief, is our authority for the above proposition. Respondent contends, (1) that this statute has been repealed by implication and (2) that the statute conflicts with the constitutional powers of the State Board of Education.

Section 53-2-8, enacted as a part of Chapter 16, Laws of 1951, 1st S. S., is relied upon in support of the first point, particularly the general provision of that enactment to the effect that all existing statutes inconsistent or in conflict with the act are repealed. This clause, however, adds nothing to the argument for it is apparent it only states the common law result that a subsequent statute repeals by implication a prior inconsistent statute. See *Batchelor vs. Palmer*, (Wash.) 224 P. 685; *State vs. Becker*, (Wash.) 234 P. 2d 897; *Ex Parte McKelvey* (Calif.) 64 P. 2d 1002; cf. *Lagoon Jockey Club vs. Davis County*, (Utah) 270 P. 543. The question then is whether 53-2-8 is inconsistent with and thus repeals 63-2-14 by implication.

It is an established rule of statutory construction that repeals by implication are not favored and every reasonable intendment is against a construction resulting in inconsistency and repeal. See 50 *Am. Jur.* 562-567, Statutes, Secs. 561-565 and the Washington and California cases cited above. *Ireland vs. Riley*, 11 Cal. App. 2d 70, 52 P. 2d 1021, cited in our opening brief at page 38, is directly in point. There a statute authorized the Department of Finance to approve or disapprove all contracts made by all state departments. A statute enacted subsequently, authorized the Board of Equalization to contract for liquor stamps. De-

partment of Finance approval of such a contract was held necessary. In discussing the question of repeal by implication, the court stated:

“* * * the courts will not adjudge a statute to have been repealed by implication unless a legislative intent to repeal or supersede the statute plainly and clearly appears * * * Also, the rules are especially applicable where a repeal would lead to absurd consequences, or where the statute is an important one relating to a governmental matter, and a repeal would be destructive or injurious to the public welfare, impair a settled prerogative of the government or leave no law whatever on a subject concerning which it is necessary that there be a positive law of some sort.”

There is no inconsistency between 53-2-8 and 63-2-14. The former prescribes the agency to initiate, the latter the agency to review. The State Board of Education must naturally be given the power to determine who shall be its employees and we do not contend otherwise nor do we contend that the Commission of Finance pursuant to 63-2-14 can choose the particular employee to be hired or can reject a particular employee for personal or political reasons. The functions of the Commission under this statute are to prevent the unnecessary proliferation of jobs by a particular agency and to more efficiently utilize the employees already employed by that agency or by other departments of the state. We can state it no better than the Arizona court in the case of *Industrial Commission vs. Price*,³⁷ Ariz. 245, 292 P. 1099, that the reviewing authority has nothing to say as to who the employees shall be but much to say “as” to their necessity.

It is also contended that 63-2-14 is a general statute whereas 53-2-8 is a specific statute and that the specific controls and supersedes the general. This argument was raised and rejected in *Ireland vs. Riley*, supra, and *State vs. Brotherhood of Rwy. Trainmen*, 37 Cal. 2d 412, 232 P. 2d 857. Concerning Article X, Section 8, and Article VII, Section 13 of the constitution, respondent also makes this argument (respondent's brief pp. 42-45). Our answer there is the same as our answer here, namely that the more general provision is 53-2-8 and the more specific is 63-2-14. Under 53-2-8 the Board of Education can examine the qualifications of applicants for employment and determine who is best fitted for the particular job they have in mind. The Commission of Finance has none of these functions, does not concern itself with the particular person involved and only determines whether the job to be filled is necessary.

We have discussed in Point VI of our opening brief the proposition that the Board of Education is not a fourth branch of state government. It has no constitutionally vested powers but operates only under powers granted by the Legislature. *Salt Lake City vs. Board of Education of Salt Lake City*, 52 Utah 540, 175 P. 654. We further pointed out that even assuming a grant of constitutional power to respondent to supervise the public school system, the contentions here made by appellants do not conflict with these supervisory powers. The initiative is always with the respondent. The Commission of Finance can only review and operate as a check on the unwise or unlawful exercise of a limited aspect of the total functions performed by the

respondent. These considerations apply with equal force to Section 63-2-14.

POINT V

THE BUDGET OFFICER UNDER THE DIRECTION OF THE GOVERNOR HAS AUTHORITY TO APPROVE OR DISAPPROVE WORK PROGRAMS SUBMITTED BY THE STATE BOARD OF EDUCATION.

That phase of financial review known as budgetary control is the question involved here. We contend, in accordance with the applicable statute, Section 63-2-20, U. C. A. 1953, the Governor assisted by the Budget Officer has power to "revise, alter, decrease, or change" the amounts requested by the Board of Education in their yearly and quarterly work programs. Respondent would limit this authority to a power to revise, etc., only when the amounts requested exceeded the appropriations made by the Legislature. It is claimed this construction is required because otherwise the authority would be unconstitutional as an extension of the veto power or as an unlawful delegation of legislative power.

The statute is clear and requires no construction. The allotments requested can be reduced or changed "if the Governor deems necessary". The purposes for such a method of financial review are several. Basic to the plan is that both the department involved and the disbursing agencies know with definiteness how much money is available during the period in question and can plan accordingly.

It tends to assure the availability of funds throughout the biennium by preventing the expenditure of too much at the beginning of the biennium with a resulting lack of funds at the end of the two year period. Furthermore, it gives a necessary flexibility to state financial operations by allowing adjustments to be made during the appropriation period. These adjustments, of course, need not be reductions for other funds may be made available over and above appropriations which were not anticipated at the time the appropriation was made. Furthermore, additional programs and expenditures, sometimes of an emergency nature, can be accommodated. The Legislature cannot, of course, anticipate all eventualities which may occur during the two-year period for which the appropriations are made. It must invest authority in some official or agency to assure that the best use of state monies is achieved.

The argument that by 63-2-20, the Governor is given a continuing veto power is a poor analogy. The veto power is a constitutional power residing only in the Governor and can be employed by him only under the constitutional limitations. The power of budgetary control is a statutory power which, we submit, could be given to any official designated by the Legislature. Certainly, if this same power to revise, alter, decrease or change requested allotments was vested by the Legislature in the Secretary of State, for example, there could be no claim that this power is an extension of the veto power. The power itself, not the person who exercises it, is the only matter to be considered here.

The analogy to the veto power is invalid for another reason. Once a veto is made of an item of appropriation or of any other act of the Legislature, the appropriation or statute is obliterated. It can have no further force or effect unless the Legislature votes to override. Budgetary control, however, is not a final irrevocable action for 63-2-20 expressly provides the allotments made may be "subsequently revised or changed by the governor". Furthermore, a work program submitted by a department can be increased as well as decreased within the limits of the appropriation and other available funds. A veto, being irrevocable, can never be "subsequently revised or changed" nor can an item of appropriation be increased by independent action of the Governor.

To the argument that this power is an unconstitutional delegation of legislative power, respondent cites the cases of *Young vs. Salt Lake City*, 24 U. 321, 67 P. 1066; *State vs. Gross*, 79 U. 559, 11 P. 2d 340; *Revne vs. Trade Commission*, 113 U. 155, 192 P. 2d 563. We have no quarrel with the principles of these cases but contend that none of these principles have been violated by the authority granted the Governor and budget officer under 63-2-20. These cases are concededly not in point factually and it may be significant that respondent has failed to cite a later case which is more factually analogous. In *Johnson vs. Bankhead*, 120 U. 71, 232 P. 2d 372, a statute authorized the County Commissioners to fix the salary for the County Attorney at not to exceed a stated maximum. This Court held such power not to be an unlawful delegation of legislative power to the County Commissioners. Similarly, the Governor,

aided by the budget officer, may "revise, alter, decrease or change" requested allotments as he deems necessary, provided that the aggregate of such allotments shall not exceed the stated maximum, namely, "the total appropriations or other funds from any source whatsoever made available to said department for the fiscal year in question".

The most obvious answer to the contention that this budgetary control power is an unlawful delegation is to consider the situation if no such power existed. The appropriation "or so much thereof as may be necessary" (Section 14, Chapter 136, Laws of 1953; Section 14, Chapter 164, Laws of 1955) would be made directly to the respondent as it is now. The respondent, however, would not submit work programs to the Governor. It would decide how much of the appropriation was needed for the two years and proceed to spend it accordingly. Perchance, it might decide to spend less than the full appropriation. This is a power unquestionably held by all executive officers and agencies. Yet, no one would suggest that the decision to spend less was an unconstitutional action. Therefore, can it be reasonably argued that the Legislature, by authorizing the Governor as well as the respondent to share in the decision to spend less, was unlawfully delegating its legislative power? Clearly the answer is "No". The respondent or the Governor merely determine the fact that the respondent at a particular time can perform its public functions without the expenditure of the full amount of appropriations or other funds available for expenditure. This is not a delegation of legislative power, but an exercise of inherent executive power.

With all deference to the Louisiana, Oklahoma and Montana cases cited by respondent, they are erroneous in their discussion of the constitutional questions. The respective courts failed to recognize the true nature of the appropriations and of the budgetary control powers granted and made the spurious analogy to the veto power discussed above.

CONCLUSION

For the failure of the court below to recognize and apply to respondent the internal system of checks and balances on the expenditure of state money and employment of personnel provided for in our constitution and statutes, the judgment should be reversed.

Respectfully submitted,

E. R. CALLISTER,
Attorney General,

H. R. WALDO, JR.,
Special Assistant
Attorney General,
Attorneys for Appellants.