

1981

The State of Utah, Department of Social Services v. Roger C. Higgs, Kurt Mathia, and George C. Melis : Brief of Defendants-Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, DEPART- :
MENT OF SOCIAL SERVICES, :

Plaintiff-Appellant, :

-v- :

ROGER C. HIGGS, KURT MATHIA :
and GEORGE C. MELIS, :

Case No. 17607

Defendants-Respondents. :

BRIEF OF DEFENDANTS-RESPONDENTS

APPEAL FROM THE THIRD JUDICIAL DISTRICT
COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH

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TABLE OF CONTENTS

	Page
 ARGUMENT	
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PLAINTIFF- APPELLANT'S ACTION FOR LACK OF JURIS- DICTION	1
A. UTAH CODE ANN. §76-19-25 (1953, AS AMENDED 1979) HAS NOT BEEN APPLIED "RETROACTIVELY" TO THE PARTIES IN THIS CASE NOR DID THE PARTIES AGREE THAT ITS PROVISIONS WOULD NOT APPLY TO RESPONDENTS' GRIEVANCE EXCEPT AS THEY WERE INCONSISTENT WITH THE EXISTING PROCEDURE PROVISIONS OF FORMER LAW.	1
CONCLUSION.	8

STATE STATUTES CITED

Utah Code Ann. §67-17-6 (1953 as amended)	3,6
Utah Code Ann. §67-17-25 (1953 as amended).	6
Utah Code Ann. §67-19-25 (1953, as amended 1979).	1,3,4,7
Utah Code Ann. §67-19-25(6) (1953, as amended 1979).	4,5,7

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:

BRIEF OF DEFENDANTS-RESPONDENTS

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PLAINTIFF-APPELLANT'S ACTION FOR LACK OF JURISDICTION.

- A. UTAH CODE ANN. § -19-25 (1953, AS AMENDED 1979) HAS NOT BEEN APPLIED "RETROACTIVELY" TO THE PARTIES IN THIS CASE NOR DID THE PARTIES AGREE THAT ITS PROVISIONS WOULD NOT APPLY TO RESPONDENTS' GRIEVANCE EXCEPT AS THEY WERE INCONSISTENT WITH THE EXISTING PROCEDURE PROVISIONS OF FORMER LAW.

Although respondents disagree with appellant's "Statement of Facts" (Appellant's Br., pp. 2-7) in numerous particulars, the facts critical to the Court's decision

on this appeal may be readily established.

Respondents Higgs, Mathia and Melis initiated grievance proceedings against Anthony W. Mitchell, Director of the Department of Social Services, and other officers and employees of the Department in August and September of 1978, complaining that appellant engaged in illegal and unethical conduct in investigating and disciplining respondents for their offers to provide consulting services to child support enforcement agencies in other states. (R. 40-64).

At the time respondents initiated their grievances, Utah law provided a five step grievance procedure which consisted in: (1) an oral discussion with the grievant's immediate supervisor; (2) a written appeal to the grievant's immediate supervisor; (3) a written appeal to the grievant's second level supervisor; (4) a written appeal to and hearing before the grievant's department head; and (5) a written appeal to and hearing before the state hearing officer. (Utah Code Ann. §67-17-6).

Respondents completed the first four steps in the grievance procedure and filed for a Step Five hearing. Appellant correctly notes that at the prehearing conference held on April 24, 1979, before the newly-appointed State

hearing officer, Dr. Wann, that:

it was further agreed by all concerned that these cases should be heard through to their final resolution in accordance with the provisions of the then governing statute, Chapter 17 of Title 67, Utah Code Annotated, even though the parties were aware that the Legislature was considering a new management act, Senate Bill 179, which would, if enacted, become effective during the pendency of the proceedings.

(R. 44)

(Appellant's Br., p. 7, para. 3). However, appellant fails to direct the Court's attention to the next sentence in the record which clarifies the meaning of the parties' agreement regarding the application of Senate Bill 179 which ultimately became Utah Code Ann. §67-19-25:

It was agreed that the grievances should be carried through under the "old" law, even if S. B. 179, if enacted, might make some procedural changes in the existing grievance procedure provisions.

(R. 44, para. 2)

(Emphasis Supplied) This clarifying language makes it obvious that the parties agreed to go through the steps of the grievance procedure "existing" under the law at that time, even if those "existing" procedures (the five levels of grievance resolution) were changed or abolished by the passage of S. B. 179. There is nothing in the record to indicate that respondents and appellant agreed

that the provisions of S. B. 179, insofar as they did not conflict with "existing" law, would not apply in the resolution of respondents grievances against appellant.

As it happened, S. B. 179, as passed, and implemented in Utah Code Ann. §67-19-25 retained the five steps of the grievance procedure contained in the former law and added a sixth level hearing. Utah Code Ann. §67-19-25(6).

Although the hearing examiner made findings favorable to respondents on a number of their grievances against appellant as a result of the step five hearing (R. 46-64), the hearing examiner ruled against respondents on several of their grievances. (R. 62). In accordance with the provisions of Utah Code Ann. §67-19-25(6), respondents filed a request for a step six hearing on February 12, 1980. (R. 38).

From February 12, 1980, to the present, appellant failed to respond to respondents' request for a level six hearing. Then, on May 29, 1980, without any previous notice to respondents, appellant filed an action in the Third Judicial District Court of Salt Lake County, State of Utah, seeking to appeal the decision of the hearing examiner at step five of the grievance procedure (R. 2-4).

In response to this initiative, respondents filed an Answer to appellant's Complaint, alleging as a defense to the action that the district court lacked jurisdiction over the subject matter of the action because Utah Code Ann. §67-19-25(6) does not permit appellant (plaintiff below) to appeal the decision of the hearing examiner at the fifth level of the grievance procedure and provides that the right of appeal from the fifth to the sixth level of the grievance procedure shall only lie in the "aggrieved employee." (R. 22-23). Subsequently, respondents filed a Motion to Dismiss Appellant's action in the district court on the same ground, noting that their interpretation of the statute as not providing a right of appeal for appellant from the fifth to the sixth level of the grievance procedure was supported by an opinion previously rendered by the Attorney General of the State of Utah. (R. 12-21).

During the oral argument on respondents' Motion to Dismiss in the district court, respondents' counsel advised the Court that they had timely filed an appeal from the fifth to the sixth level of grievance procedure pursuant to the provisions of Utah Code Ann. §67-19-25, and that appellant's appeal should be dismissed not only

because appellant had not right to appeal from the fifth level of the grievance procedure but also because respondents were still in the presence of trying to obtain review of the hearing examiner's decision at the fifth level hearing by having filed a request for a sixth level hearing. The Court requested respondents to produce the notice of appeal of the fifth level decision to level six which respondents provided to the district court. (R. 37-38).

It was against this backdrop, that the district court, the Honorable Kenneth Rigtrup presiding, issued its decision dismissing appellant's action in the district court, concluding that:

Although Step 5 of the Procedural steps contained in Section 67-17-6, Utah Code Annotated (repealed 7/1/79) provided for appeal to the appropriate court of law, the Court concludes that the substantive rights of the parties are not abridged by utilization of the procedural steps contained in Section 67-17-25, Utah Code Annotated ('79 Supp.), since (6) providing for an appeal to the personnel review board preserves to the parties the right of appeal to the district court.

Plaintiff's apparent preference for a judicial review of the non-law trained hearing officer's decision as opposed to further proceedings before a lay board is not sufficient basis to avoid the necessity of exhausting all available

administrative remedies before resort
is had to the courts.

(R. 35-36).

Respondents submit that the district court did not abuse its discretion in so holding. The record of this case clearly shows that the application of Utah Code Ann. §67-19-25 to the parties dispute was not "retro-active" nor did it deprive the appellant of any substantive right of appeal. The statute simply provided one more level of administrative remedy for respondents to exhaust if they chose to do so. Appellants should not be able to short-circuit the administrative review process by seeking to have the district court review the decision of the hearing examiner at step five while respondents are in the process of seeking review of that decision at the sixth level of the administrative grievance procedure. Indeed, if respondents had appealed the decision of the hearing examiner at the fifth level to the district court, appellant would have probably been in the district court arguing that respondents had "failed to exhaust their administrative remedies" by failing to prosecute an appeal of the fifth level decision to the sixth level as provided in Utah Code Ann. §67-19-25(6). The district

court's decision simply recognizes that the administrative grievance procedure provided under former law and supplemented by S. B. 179 must be exhausted before resort may be had to the district court by either party.

CONCLUSION

BASED upon the foregoing, respondents respectfully submit that this Court should affirm the decision of the district court and deny appellant's request for reinstatement of its action in the district court.

DATED this 13 day of August, 1981.

Respectfully submitted,

A handwritten signature in cursive script that reads "Kathryn Collard". The signature is written in dark ink and is positioned above the printed name.

KATHRYN COLLARD

Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that I mailed two (2) true and correct copies of the foregoing Brief of Defendants-Respondents to Don R. Petersen, HOWARD, LEWIS & PETERSEN, 120 East 300 North, P.O. Box 778, Provo, Utah 84601, this 13 day of August, 1981, by depositing the same in the U.S. Mail, postage prepaid.

T Stewart