1982

George W. Frame and Lory Herbison Frame v. Residency Appeals Committee of Utah State University et al : Brief of Respondents

Utah Supreme Court

Lisa J. Remal; Attorney for Appellants;
Tom C. Anderson; Attorney for Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE W. FRAME and LORY HERBISON FRAME,

Appellants,

-v-

RESIDENCY APPEALS COMMITTEE OF UTAH STATE UNIVERSITY, CLAUDE J. BURTENSHAW, Chairman, and EVAN J. SORENSON, Assistant Director of Admissions and Records,

Respondents.

Case No. 18097

BRIEF OF RESPONDENTS

Appeal from the District Court's Denial of Appellants' Motion for Summary Judgment.

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STATEMENT OF THE NATURE OF THE CASE

Respondents, members of the faculty and staff at Utah State University properly reviewed and denied appellants' application for residency in accordance with Utah State law and the rules and regulations promulgated by the Board of Regents, Utah State System of Higher Education. The constitutionality of those regulations and the validity of those decisions was upheld by the lower court which granted respondents' motion for summary judgment. The decision to deny residency to appellants was based on constitutionally sound regulations, and the facts as they existed at the time appellants applied for residency status.

DISPOSITION OF THE LOWER COURT

Respondents and appellants made cross Motions for Summary Judgment in the District Court in Cache County. The court granted respondents' motion and denied appellants' motion.

RELIEF SOUGHT ON APPEAL

A. A finding that the Board of Regents' guidelines as set forth in Rules and Regulations for Determining Residency Status in the Utah System of Higher Education are constitutional.

B. A finding that the decision made by respondents' classifying appellants as non-resident students was made within the proper discretion granted to respondents.

C. Uphold the ruling made by the First Judicial District Court of Cache County granting respondents' Motion for Summary Judgment and denying appellants' Motion for Summary Judgment.

STATEMENT OF FACTS

Appellant, George Frame moved to Utah in May of 1971 and immediately applied for admission at Utah State University. After a year at the University appellant and his wife appellant, Lori Herbison Frame left for Africa. Prior to their departure George Frame had not sought to change his residency status with the University and thus retained his status as a non-resident student. The appellants were gone from the State of Utah continuously during the period from

1972 through 1978 with the exception of sporadic visits to the United States.

When appellants returned from Africa to Utah in September, 1978, they applied to receive residency at Utah State University. Since they had not been classified as residents earlier and had been out of the state for six years their application was denied by both respondent Evan J. Sorenson and the Residency Appeals Committee. Appellants then reapplied for residency status only seven months later in April, 1979 and again their application was denied by Mr. Sorenson and the Residency Appeals Committee. Following this denial appellants initiated the present suit.

ARGUMENT

POINT I

THE STATE BOARD OF REGENTS' REGULATIONS ADOPTED PURSUANT TO THEIR AUTHORITY ARE LAWFUL IN ALL RESPECTS.

In 1967, the Legislature re-enacted its definition of the term "resident student." Utah Code Annotated, Section 53-34-2.2 (1953).

In 1980, the definition of a "resident student" was modified by virtue of legislative action. Utah Code Annotated, Section 53-34-2.2(1) (1980). Pursuant to these statutes the State Board of Regents has the authority to promulgate rules and regulations concerning the definition of "resident" and "non-resident" students. This authority has

been recently approved by this court. Petty v. Utah State Board of Regents, 595 P.2d 1299 (1979).

Appellants have not claimed that the statutory definition of a "resident student" has violated their rights to "resident student" status or any other rights under the statutes or constitutions of the State of Utah or the United States.

Appellants contend that Section I.(D) of the Rules and Regulations for Determining Residence Status in the Utah System of Higher Education, adopted by the State Board of Regents somehow violates their constitutional rights by the creation of a conclusive and irrebuttable presumption that if they have left the state for more than thirty days, they cannot obtain residency status. The specific language relied on by appellants is as follows:

> D. Year's Continuous Residency
>
> A person who lives in the state for one year will not qualify as a resident unless the other requirements of paragrph A are statisfied. Short absences from the state, i.e., less than 30 days, will not break the running of the required one-year residence. Extended absences, i.e., longer than 30 days, especially if during such an absence the student works out of state or returns to the prior home of record for an extended duration, will break the running of the continuous year.

Courts have recognized that states may place a burden on students to show that they are truly residents of the state and not present for academic purposes only.

Appellants have cited the United States Supreme Court in Vlandis v. Kline, 412 U.S. 441 (1973), in support of their contention that the above-stated regulation creates an unconstitutional irrebuttable presumption of non-residency. The Utah regulation is easily distinguishable from the statute reviewed in Vlandis. There the court ruled that a Connecticut statute which classifed any student with a "legal address for any part of the one year period immediately prior to his application for admission at a constituent unit of the state system of higher education which was outside Connecticut" coupled with a further provision providing that the student's initial classfication upon application would remain the same for the entire period of his attendance at a Connecticut unit of higher education, did rightly create an unconstitutional irrebuttable presumption. Id. at 443. As can be seen from the Utah regulation no such permanent classification is made. The regulation provides only that a student may not qualify as a resident if he is out of the state for longer than thirty days during the year he seeks to apply for residency. The Vlandis court did recognize that, "the state can establish reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the state, but who have come there solely for educational purposes cannot take advantage of the in-state rates." Id. at 453. Consistent with Vlandis the Utah regulation is designed to reasonably distinguish between bona

fide residents from those who come solely to avail themselves of educational opportunties.

Since the Vlandis decision, several courts have upheld the validity of a one-year residency requirement to attain resident status. In Hasse v. Board of Regents of the University of Hawaii, 363 F.Supp. 677 (D. Haw. 1973), the court recognized that while the twelve month rule created an irrebuttable presumption foreclosing students and prospective students from making a satisfactory showing of residency, the regulation was a rational administrative convenience. In an earlier decision affirmed by the United States Supreme Court, a three-judge court in Minnesota held that a state university regulation barring any student from attaining residency status for tuition purposes unless the student had been a domiciliary of the state for one year was neither arbitrary nor unreasonable, served a legitimate state interest, and was not violative of the Equal Protection Clause of the Fourteenth Amendment. Starns v. Malkerson, 326 F.Supp. 234, aff'd 401 U.S. 985 (1971).

The cases of Robertson v. Regents of the University of New Mexico, 350 F.Supp. 100 (D.C. N.M. 1972) and Covell v. Douglas, 179 Colo. 443, 501 P.2d 1047 (1972), cert. denied 412 U.S. 952 cited by appellants are both easily distinguishable from the case at bar. In Covell, the Colorado Supreme Court struck down a statute prohibiting all full-time students from ever contesting their non-residency status if they were not

residents of Colorado prior to attending school. Id. at 1050. The Utah regulations do not require such harsh treatment. Robertson is similar to Covell in that a court struck down a requirement that a student terminate or substantially reduce enrollment at a state institution of higher education as a prerequisite to obtaining residency. Robertson v. Regents of the University of New Mexico, 350 F.Supp. 100, 101 (D.C. N.M. 1972).

There is absolutely nothing analagous in the Utah statutory scheme or in the regulations promulgated by the Board of Regents to the cases cited for support by appellants. Every person has the opportunity of obtaining residency while enrolled as a full-time student at a Utah state college or university. There is no challenge, nor could there reasonably be a challenge, to the state's requirement for a year's continuous residency as a minimum requirement for obtaining resident tuition status. There is no unlawful presumption created when the State of Utah requires in its definition of continuous residency that the running of the year is broken if a person voluntarily leaves the state and either pursues gainful out-of-state employment or returns to the former residence which is out-of-state. Indeed, this is what appellants did. During the summer months of 1978 they left the State of Utah to return to New Jersey. The stated purpose for the trip was to gather information to write a story for a children's magazine. This work appellants would be paid for.

Additionally, appellant George Frame's parents also reside in New Jersey, appellant's previous permanent residence.

The regulations promulgated by the Board of Regents were designed to prevent the very situation which appellants seek. Appellant George Frame received an early discharge from the Army so he could enroll at Utah State University. He had never previously been a resident of the state. Before he applied for residency after spending over a year in the state he and his wife left for Africa where they remained several years. It was not until appellants returned some six years later in 1978 that they then applied for residency status. The Residency Appeals Committee therefore rightfully denied their application due to the lack of compliance with the one-year residency requirement and appellants' failure to satisfy the other minimal requirements. The second application submitted just months later was again denied on the same grounds.

While in Utah in 1978 appellants listed as their residence address the home of a professor who was out of town. This consequently led the Residency Appeals Committee to assume that this was merely a temporary residence for the appellants. Appellants gave as their permanent address the "Department of Wildlife Science, Utah State University." It is no wonder that respondent Mr. Sorenson and later the Residency Appeals Committee saw no permanent ties to the state other than the University tie, which was for academic purposes

only. The Cache County Clerk's Office had no record of appellants being registered to vote or voting in abstentia as they claimed in their residency application. At the time of their arrival again in the state in 1978, neither had a Utah driver's license nor a car registered in the state. When he was not enrolled in classes at the University, Mr. Frame was engaged in research, lecturing, and consulting in various cities throughout the United States and Africa. Additionally, respondents were unable to obtain any records of appellants having ever filed a Utah State Income Tax Return.

The decision as to whether residency has been maintained in Utah during the one year period is based on a variety of factors. The thirty days absence rule is just a minimal hurdle students must get over if they desire to obtain the benefits of residency status. The regulations also provide that "an adult must establish by objective evidence an intent to establish a permanent domicile in Utah:" (See Section I Paragraph A, Rules and Regulations for Determining Residence Status in the Utah System of Higher Education).

The regulation, even if required to be given a strict interpretation, is lawful. This court has clearly recognized when reviewing laws and administrative regulations that courts should strive to give interpretations which will uphold their constitutionality. Petty v. Board of Regents, 595 P.2d 1299 (1979). This regulation passes the constitutional requirements set forth in Vlandis and other similiar cases.

POINT II

RESPONDENTS HAVE ACTED REASONABLY IN INTERPRETING THE APPLICATIONS AND STATUS OF THE APPELLANTS AND THAT ACTION SHOULD BE SUSTAINED BY THE COURT.

This Court has long recognized that the Supreme Court of Utah will only overturn an administrative decision when it is arbitrary, capricious, or unreasonable. Wycoff Co. Inc. v. Public Service Commission, 227 P.2d 323 (1951); Uintah Freight Lines v. Public Service Commission, 229 P.2d 675 (1951). The record clearly indicates that both respondent Mr. Sorenson and the Residency Appeals Committee exercised their discretion within the proper and reasonable limits provided by law.

Appellants cite as a basis for their claim that respondents' decision violated appellants' equal protection rights the case of Kelm v. Carlson, 473 F.2d 1267 (6th Cir. 1973). Appellants point out that in that case a court ruled that the requirement of post-graduate employment as prerequisite to establishing residency was unconstitutional. However, that particular regulation provided such employment was the only way to satisfy the residency requirement. Id at 1272. There is no such requirement in the Utah regulatory system. Acceptance of "non-temporary employment" is only one of several criteria outlined in Section I Paragraph E of the Rules and Regulations for Determining Residence Status in the Utah System of Higher Education to be used as evidence in

determining residency status. The Kelm court's ruling lacks any reasonable application to this case.

There is however substantial evidence to support respondent's finding that appellants were non-residents of the State of Utah. First, appellant George Frame moved to Utah and immediately enrolled at Utah State University. After attending classes for a year appellant took his wife and left the state for six years. Appellants earned their livelihood outside the State of Utah. The only time appellants had contact with the State from 1972 to 1978 were their vague recollections of passing through the state while traveling from the west coast to the east coast of the United States. Appellant George Frame maintained a New Jersey driver's license until October, 1978.

Appellants have claimed that their work in Africa and New Jersey was in support of the appellant George Frame's thesis research in connection with his studies at Utah State University, but contrary to this assertion, but in his answers to interrogatories prior to trial the appellant George Frame stated that his work in New Jersey and on the seashore had no correlation to his thesis. In fact, this research done in New Jersey was one of the only ways appellants had of making a living. Articles were later written from this research for a children's publication known as Highlights for Children.

Appellants point to a number of factors which they feel mandate a change in their residency status. They refer

to Section I Paragraph E of the Board of Regent's regulations which discusses various criteria which may be used in determining residency status. However, assuming for argument's sake that appellants had satisfied the 365 day rule, compliance with any one or two of the additional requirements of the regulations may not be sufficient in light of the existing circumstances.

In the case of Hayes v. Board of Regents of Kentucky State University, 362 F.Supp. 1172 (E.D. Ken. 1973), the court found that the University could constitutionally classify students as non-residents for tuition purposes even though they were considered domiciled for voting purposes. The Hayes court used the same test as the Kelm court which was stated in Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 1972 (1972), as follows: "This court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." Id. at 1176. The Board of Regent's regulations easily surpasses this minimal requirement. The State of Utah is rightly concerned that only those students who truly make the effort to receive residency status are granted it.

The court in referred to the case of Michelson v. Cox, 476 F.Supp. 1315 (S.D. Iowa 1979), where plaintiffs brought a civil rights action alleging that their denial of residency status violated their constitutional rights. The actions taken by Michelson go beyond those claimed by

appellants. They included; registering to vote in the county, obtaining an Iowa driver's license and surrendering his New Jersey license, registering his automobile in the county, paying local property taxes, paying Iowa income taxes since he began work for the University in 1976, registering to take the Iowa bar, joining a legal fraternity, maintaining his sole bank accounts in Coralville, Iowa, living only at his permanent residence in Coralville, and finally being employed as a teaching assistant by the University. Id. at 1318. The court held that the Review Committee's decison denying a change in residency status was not arbitrary, capricious or irrational. It stated:

> To accept plaintiff's argument would require the University to reclassify as a resident every student who, after attending the University for a year, makes a self-serving declaration that he intends to reside in Iowa permanently and performs a series of "objective" acts, some of which are required by law and all of which are customarily done by some non-resident students who do not intend to remain in Iowa after graduation. This would, in effect create a presumption that any such student is a bona fide Iowa resident, thus seriously jeopardizing the University's non-resident tuition program and consequently its entire financial structure. It would remove the tuition decision from the hands of the University and place it in the student's.

Id. at 1320 (Emphasis added).

The similiarity between the Michelson case is quite strong, except unlike the plaintiff Michelson, appellants do not have a consistent record of ties or residence in the State

of Utah. Since 1972 they have never lived continuously in Utah for a year without absences in excess of thirty days; they have not lived in the state during vacation periods; they have maintained at least three bank accounts out-of-state; they have worked on non-University related activities out-of-state; they have resided at or near the appellant George Frame's prior residence and near or at the home of his parents; they have rarely visited the state during these long periods of absence; and they have done little else to demonstrate to the Residency Appeals Committee or any other body, their intent to become domiciled in the State of Utah. Appellants have failed to meet the burden of showing that denial of their residency was arbitrary and capricious. This court should maintain its previous stance by requiring them to do so. See Utah Power and Light Co. v. Utah State Tax Commission, 590 P.2d 332 (1979); and Petty v. Utah State Board of Regents, 595 P.2d 1299 (1979).

CONCLUSION

This Court should uphold the District Court's granting of summary judgment for respondents. The burden rests with appellants to show that the lower court's decision was improper as a matter of law and they have failed to sustain that burden in this appeal.

The Rules and Regulations for Determining Residence Status in the Utah System of Higher Education should also be

found to be constitutional. They do not work an undue hardship on any student to gain residency status. Nor are they arbitrary or capricious in principal or effect.

These rulings are both necessary and proper to insure that the State of Utah through the Board of Regents may continue to properly administer its system of higher education. For the reasons as set forth above, this Court should affirm the lower court's ruling that appellants do not qualify as residents of the State of Utah for tuition purposes.

Dated this 22nd day of February, 1982.

Respectfully submitted,

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MICHAEL D. SMITH
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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Respondents, postage prepaid, to Lisa J. Remal, Utah Legal Services, Inc., Attorneys for Appellants, 385 - 24th Street, #522, Ogden, Utah, 84401, on this the 22nd day of February, 1982.

Sandra Sundquist