1982

Robert B. Hansen v. David L. Wilkinson : Brief of Appellant

Utah Supreme Court

Mark S. Gustavson; Attorney for Plaintiff-Appellant;
Don S. Coleman; Attorney for Defendant-Respondent;

IN THE SUPREME COURT

OF THE

STATE OF UTAH

ROBERT B. HANSEN, Plaintiff-Appellant, vs. DAVID L. WILKINSON, Defendant-Respondent.	Case No. 18224

BRIEF OF APPELLANT

Appeal from Order of District Court of
Salt Lake County dismissing complaint
with prejudice
Honorable Jay E. Banks, Judge

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NATURE OF CASE

This is an action for reinstatement to the staff of the Attorney General's office pursuant to Sec. 67-5-11 of Utah Code Annotated 1953, based on plaintiff's status as a career attorney prior to his election as the Attorney General.

STATEMENT OF FACTS

Plaintiff was employed by the Attorney General's office in November 1968 (R. 2). On May 30, 1975, he was placed on probationary career status (R. 7). On January 16, 1976, he achieved permanent career status (R. 8). Plaintiff became the Attorney General of Utah in January, 1977, as a result of being so elected in November, 1976 (R. 2). After defendant became Attorney General in January, 1981, as a result of being elected Attorney General in November, 1980, the plaintiff sought on

various occasions to exercise his right to reinstatement on the Attorney General's staff and was ultimately denied (R. 9).

DISPOSITION BELOW

The defendant filed a Motion to Dismiss on June 24, 1981 (R. 10, 11). On December 22, 1981, that motion was granted and an order was made dismissing the complaint with prejudice (R. 80, 81). The grounds for the dismissal were not specified but the dismissal order referred to the memoranda submitted by both parties.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the order referred to above vacated and the case remanded to the lower court to try any factual issues involved in this case and to order judgment on the merits in accordance with the facts and the law.

POINT I

APPELLANT HAS A STATUTORY RIGHT TO BE REINSTATED TO THE STAFF OF THE ATTORNEY GENERAL BASED ON SEC. 67-5-11, U.C.A. 1953.

Appellant asserts that his right to be reinstated to the staff of the Attorney General is expressly provided for in Sec. 67-5-11 which states as follows:

> An attorney in a career status accepting appointment to a position in state government which is exempt from the merit provisions of Chapter 13 of Title 67 shall upon termination of such appointment or employment, unless he is discharged for cause, be reinstated in the career status in the office of the attorney general at a salary not less than that which he was receiving at the time of his appointment, and the time spent in such other position shall be credited toward his seniority in the career service. (Emphasis added.)

Respondent contends that the above cited statute is not applicable to appellant because he was serving in an elected position prior to the termination of his term. Respondent also contends that the key term in Sec. 67-5-11 is "appointment." Appellant submits that the key phrase is "appointment or employment" which clearly includes elected as well as appointed career attorneys. By isolating the term "appointment" out of context respondent has erroneously restricted the scope of the statute.

Respondent contends that appellant's cause turns on the alleged necessity of adding the words "or is elected" to U.C.A. 67-5-11. Appellant insists that no such addition to the statute is necessary and relies upon the express alternative phrase ". . . or employment . . . ," which phrase the respondent totally ignored in his initial memorandum (R. 12-31). In his response memorandum respondent says that the meaning of "or employment" means "that employment engaged in by the attorney in the position to which he accepted appointment" (R 58). In other words, "or employment" means the same as "appointment" which then renders them redundant and thus meaningless.

No principle of statutory construction is more fundamental than that which requires a comprehensive interpretation which gives meaning to each word or term used in the context of the balance of the statute. Here respondent's construction gives no meaning to the underlined alternative in " . . . appointment or employment." The phrase ". . . appointment or employment . . ." can only be consistently read with the balance of the statute by treating the words " . . . or employment . . . " as altering the earlier recited phrase referring to appointment. It's almost as though one can read the mind of the draftsman in re-reading the section and adding the term "or employment" to be sure that all the positions referred to, some of which are elective and some appointive, were covered.

Since no one can obtain and hold any of those positions defined as exempt from the provisions of the merit system (U.C.A. 67-13-1 et. seq.) except by appointment or election, the holder of such position "upon termination of such appointment or employment . . ." who is not appointed must be elected.

The District Court's construction of Sec. 67-5-11 in question is flawed because it fails to take into consideration the purpose of the Career Service Act. One of the most cardinal rules of statutory construction is to interpret a statute's language in the manner most consistent with the purpose of the statute so as to carry out the legislative intent. The specific purpose of the Career Service Act is spelled out clearly in Sec. 67-5-7 where it expressly states that its purpose is to "establish a career service system for attorneys employed by the office of the attorney general that will attract and retain attorneys of proven ability and experience who will devote full time to the service of the state." Its method of accomplishing that purpose was three-fold: (1) make compensation competitive with private practice (salaries were raised an average of some 30% upon enactment of the law because the attorneys on career service could not thereafter practice law privately). Appellant, too, gave up his private practice upon being placed on career status (R. 7, 8); (2) provide job security (Sec. 67-5-12); (3) permit career attorneys to seek and hold political office without loss of their career status if the office was one that allowed this to be done (Sec. 67-5-13(2)).

Obviously, if the purpose of the Career Service Act is to develop a career service program to attract and retain high calibre attorneys, it would be very strange indeed to compel an attorney to elect between rising to the very top of his career organization, namely becoming the

Attorney General and losing the financial security of his career status or remaining in a subordinate role in order to preserve that security.

It should be noted that the Attorney General's Career Service Act grants to such attorneys an absolute right to become a candidate for political office. Sec. 67-5-13(2) states "upon application he 'shall' be granted leave without pay (emphasis added)." It is instructive, in order to draw necessary distinctions between merit employ ees and those persons subject to the provisions of U.C.A. 67-5-11, et. seq., to note that merit employees have no statutory right to a leave of absence to run for political office and be possibly thereafter in the employment of the State. See Sec. 67-19-19(1)(a). It is inconsistent for the legislature to grant attorneys preferred treatment with respect to becoming political candidates and then restrict their right to reinstatement after serving in an elective office to those rare situations in which a person is appointed to fill a vacancy in an elected office. Rather, we are compelled to employ the words " . . . or employment . . . " in U.C.A. 67-5-11 to permit the intended circumstance of the re-employment of a staff member of the Attorney General's office when that person was not selected by the electorate and was not therefore "employed" by the State.

Respondent argued below that the District Court would have to "alter the terms of the statutes" to rule in respondent's favor (R. 15). Respondent's case relies on no such judicial activism; present statutory provisions support respondent's position. In fact the District Court had disregarded the words "or employment" in granting the Motion to Dismiss. This was error.

Respondent is not arguing that "appointment" means "elected." Respondent simply points out that to accomplish the purposes for which this statute was enacted, it shouldn't and doesn't matter how the attorney came to serve in an exempt position. The first and most important consideration is that an attorney's service to the state is identical regardless of whether he is elected or appointed. Secondly, U.C.A. 67-5-11 addresses the exhaustive alternatives of an attorney who is terminated from a prior "appointment or employment." Thirdly, future benefit to the state based on that attorney's past experience would be the same whether that person was elected or appointed.

Most significantly, any apparent conflict between the literal wording of the first reference to attaining the office (appointment only) and the second reference (appointment or election) is not a real conflict. Both references should be harmonized because the first reference does not expressly exclude one who is elected, whereas the second clearly includes whose elected since one can attain such offices only by appointment or election. U.C.A. 67-5-11 clearly addresses the circumstance of any attorney who loses a prior state position, whether appointed or elected, and desires reinstatement on the attorney general's staff from which he emerged when he was "appointed or employed." Furthermore, whenever there are two conflicting provisions, the subsequent provision normally prevails. Where, as here, both references became law simultaneously, it can fairly be said that the second reference was the last legislative expression since it was both written after and read after the first reference. More importantly it is much more consonant with the entire purpose and intent of the subject law.

Respondent argued below that "the clear unambiguous meaning of the statute (67-5-11) does not include an elected office as being an office to which a career status attorney in the Attorney General's office can aspire and retain the right to reinstatement" (R. 17). However, there is no basis to believe that the legislature intended to exclude any of the exempt offices specifically enumerated in Sec. 67-13-6 from applying to Sec. 67-5-11, the controlling statute. To reach such a conclusion, the District Court erroneously read into it such an exception as "except the elected offices listed in Sec. 67-13-6(a)(1) and the first category of offices listed in Sec. 67-13-6(a)(2)." Surprisingly the respondent's interpretation adopted by the lower court excludes all elective offices in view of their contention that the subject statute "would bring into play Sec. 67-13-6(a)(2) but would not require reinstatement of those elected to office referred to in 67-13-6(a)(1)" (R. 14), particularly when respondent added the emphasis to the word "elective" when quoting from 67-13-6(a)(2) which includes "persons appointed to fill vacancies in elective positions." In other words, all of the elective offices listed in (a)(1) qualify for exemption under either (a)(1) or (a)(2). Clearly the position is exempt whether it's filled by election or appointment. If it doesn't matter to the legislature whether the office is attained by election or appointment for purposes of classifying exempt positions as to the Merit Act generally, then why should it matter to the legislature how that office is attained when it is applied to a narrow range of state employees, to-wit, career attorneys? In fact, as noted above, the argument should be afortiori in support of those offices being treated the same way whether obtained by

the elective or the appointive route in view of the preferential treatment of this category of employees with respect to their becoming candidates for elective office (see P. 5 above).

Respondent's memorandum conjured up a chamber of horrors if appellant prevailed because of the alleged confusion that would obtain from blurring the distinction between "election" and "appointment" (R. 17). As stated above, the term "appointment or employment" alleviates any concern that the distinction between the words "election" and "appointment" must be blurred by reversal of the order challenged by this appeal. Even if the second reference in 67-5-11 ("appointment or employment") did not exist so the issue was whether or not "accepting appointment" includes being elected to an office within the meaning of the quoted term as applied to as 67-5-11, the result would only be a precedent for the use of that term as it is applied to that particular statute. Words have different meanings in different contexts. This is especially true when dealing with different statutes. Therefore, the constitutional provisions and statutes listed on R. 18 will not be impacted one iota, regardless of how the terms in question here are interpreted.

Appellant certainly does not argue that to "elect" and to "appoint" are the same thing. Thus he has no quarrel with the definitions given those terms by the Supreme Courts of California and West Virginia quoted at length on R. 19 and 20. They simply are of no value in deciding the case at bar.

CONCLUSION

The District Court of Salt Lake County erroneously interpreted Sec. 67-5-11, U.C.A. 1953, to apply only to attorneys who are appointed to exempt positions. The Order of December 22, 1981, should be vacated and the case remanded to that court for further proceedings.

Respectfully submitted,

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