1982

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

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

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ROBERT B. HANSEN,

Plaintiff-
Appellant,

vs.

DAVID L. WILKINSON,

Defendant-
Respondent.

CASE NO. 18224

----ooOoo----

BRIEF OF RESPONDENT

----ooOoo----

APPEAL FROM ORDER OF THIRD JUDICIAL
DISTRICT COURT, THE HONORABLE JAY E. BANKS,
DISMISSING PLAINTIFF'S COMPLAINT

----ooOoo----

DONALD S. COLEMAN
Assistant Attorney General
115 State Capitol
Salt Lake City, Utah 84114
Attorney for Defendant-
Respondent

MARK S. GUSTAVSON
630 East South Temple
Salt Lake City, Utah 84102
Attorney for Plaintiff-
Appellant

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115 State Capitol
Salt Lake City, Utah 84114
Attorney for Defendant-
Respondent

MARK S. GUSTAVSON
630 East South Temple
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NATURE OF THE CASE

This is an action wherein Appellant seeks reinstatement in the office of attorney general. Although not specifically plead by Appellant, it appears to be an action in the nature of a mandamus.

DISPOSITION IN LOWER COURT

The Respondent filed a Motion to Dismiss Appellant's Complaint in the lower Court. That motion was heard by the Honorable Jay E. Banks on the 16th day of July, 1981. The lower Court granted Respondent's motion.

RELIEF SOUGHT ON APPEAL

Respondent, David L. Wilkinson, seeks affirmance of the Order dismissing Appellant's Complaint in the lower Court.

STATEMENT OF FACTS

This case was disposed of in the lower Court on a Motion to Dismiss. There was no evidentiary hearing. The facts alleged in Appellant's Complaint and attached exhibits and the exhibit attached to Respondent's Supplemental Memorandum in Support of the Motion to Dismiss provide the basis for the only facts before the Court.

The Appellant was hired in the attorney general's office in November 1968. He became the Deputy Attorney General under Vernon B. Romney in January 1969. (R. 2) In 1973, the Attorney General Career Service Act was passed [67-5-6 et seq. U.C.A. 1953 (as amended 1973)]. Appellant ran for the office of attorney general in 1976 and in November of that year was elected. He took office in January 1977 (R. 2). In 1980, Appellant sought reelection and was defeated in the primary election by the Respondent. Appellant discussed with Respondent or his agent the possibility of being rehired in the attorney general's office February 28, 1981. (R. 3) Appellant was advised by the Chief Deputy Attorney General on April 29, 1981 that Appellant's application for employment had been submitted to the screening committee but that his application was not one of the five to come out of said committee. (R. 9)

Appellant filed an appeal to the State Merit System Council on June 30, 1981. The appeal to the council was from the "Adverse Decision of Attorney General" (R. 38). The disposition of that appeal is not part of the record on appeal.

The Appellant has returned to private law practice. He is earning "more money than the salary he would be paid on the staff of the Attorney General's office." (R. 4)

POINT I

THE PROVISIONS OF SECTION 67-5-11 U.C.A. DO NOT REQUIRE THE RESPONDENT TO REINSTATE THE APPELLANT TO A POSITION OF EMPLOYMENT WITHIN THE ATTORNEY GENERAL'S OFFICE.

Section 67-5-11, U.C.A. provides:

> 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.

Appellant claims that he was an attorney in a career status position in 1976 when he ran for and was elected to the office of attorney general. He claims he left career status when be became attorney general and that he has the right to reinstatement to career status under the terms of 67-5-11.

It is undisputed that the Appellant was elected to the office of attorney general and not appointed. It is also undisputed that the position of attorney general is not a "merit" or "careeer status" position. Respondent submits that the lower Court correctly ruled that as an elected official the Appellant did not come within the provisions of

67-5-11 since this section applies to those "accepting appointment to a position in state government" and Appellant did not "accept appointment" to the position of attorney general.

In the first portion of 67-5-11, the class of attorneys entitled to reinstatement is identified. That class includes "An attorney in career status accepting appointment to a position in state government which is exempt from the merit provisions of Chapter 13 of Title 67...." The classification of those entitled to reinstatement is determined by this portion of the language of the statute. Those falling within the class are those who (1) had attained career status within the attorney general's office and (2) left career status to accept "appointment" to an exempt position under Chapter 13 of Title 67. The Appellant does not fall within the clear and unambiguous classification as established by 67-5-11 because he did not accept appointment to his position as attorney general but ran for and was elected to that office. Appellant concedes that the terms election and appointment do not mean the same thing. In his brief he states:

> Appellant certainly does not argue that to "elect" and to "appoint" are the same thing. Thus he has no quarrel with the definitions given to those terms by the Supreme Courts of California and West Virginia quoted at length in R. 19 and 20. They simply are of no value in deciding the case at bar.
> Appellant's Brief, p. 8.

Appellant takes the position that those officials elected to office are included in Section 67-5-11 not because they fall within the "appointed" terminology but because of the inclusion of the terms "or employment" in the statute. It must be noted at the outset that nowhere in 67-5-11 does the term "elected" appear. The words "or employment" do not appear in that portion of the statute that establish the class of attorneys entitled to reinstatement. The terms "or employment" are used in that portion of the statute which specifies the conditions that make the class eligible for reinstatement. The Appellant takes the position that the terms "or employment" must be read in the disjunctive and therefore must include elected officials. This position is untenable for the following reasons. First, if the terminology "or employment" as used in the context of 67-5-11 is to be construed in the disjunctive to expand the class of attorneys entitled to reinstatement, then the class would include all attorneys who left the attorney general's office to accept "employment." For example: The attorney who left the attorney general's office to accept employment within the private sector and then some years later decided he wanted to return to the attorney general's office would be entitled to reinstatement. The office of the attorney general would become unmanagable because attorneys in most

positions within the office would be subject to being "bumped" by some attorney who had years before left to accept other "employment." Clearly the provisions of Section 67-5-11 are not intended to be interpreted so that such circumstances would result. It is clear that the use of the terminology "or employment" must relate to the employment or work done by the person accepting the appointment. Second, there is a perfectly logical explanation for the use of the "or employment" terminology in this section. One may accept an appointment for a specified period of time , i.e. 2 years and then terminate his employment prior to the expiration of the term for which the appointment was made. In other words, he may quit before the two years is up. Under these circumstances the "appointment" period has not terminated (two years) but the employment engaged in pursuant to the appointment has terminated because the appointee has voluntarily ended it.

Finally, if the provisions of 67-5-11 required the reinstatement of elected State officers, the following scenario would be possible. A career status attorney could leave the attorney general's office, run for and be elected to the office of lieutenant governor two terms of four years, then run for and be elected to office of attorney general for two terms of four years, then when unsuccessful in his

bid for governor expect to be reinstated in the attorney general's office. After sixteen years of employment outside the office pursuing a political career he would expect a position to be available to him in the attorney general's office. Respondent submits such construction of 67-5-11 was never intended by the Legislature.

As heretofore mentioned, the term "election" or "elected" does not appear in Section 67-5-11. The term "appointment" appears three times. That the terms appointment and election are not synonymous is clear from a reading of Section 67-19-15 U.C.A. 1953 as amended 1979, wherein it is provided:

> (1) Except as otherwise provided by law or rules and regulations promulgated hereunder for federally aided programs, the following positions shall be exempt from the career service provisions of this act:
>
> (a) The governor, members of the legislature, and all other elected state officers;
>
> (b) Persons appointed to fill vacancies in elective positions, employees of the state legislature, employees of the state judiciary, members of boards and commissions, and heads of departments appointed by the governor, state and local officials serving ex officio, and members of state and local boards, and councils appointed by the governing bodies of the departments. (Emphasis added.)

This section establishes two classes of exempt positions. One class is comprised of elected officials [67-19-15(1)(a)] and the other class is composed of persons appointed to such positions [67-19-15(1)(b)]. The provision in the Attorney General's Career Service Act that is the subject of the instant action only refers to one of these two categories of exempt positions by providing: "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..." is entitled to reinstatement. (Section 67-5-11, supra.) It should be noted that 67-19-15 is the replacement for Section 67-13-6 which was repealed in 1979. The Attorney General's Career Service Act was not amended to reflect this change. This provision clearly references to positions filled by appointment under 67-19-15(1)(b) but does not make any reference to those holding positions to which they were elected [67-19-15(1)(a)]. Had the Legislature intended to include those holding elected positions among those entitled to reinstatement, surely they would have made reference to those being elected to office in 67-5-11. This is particularly true in view of the separation of the two classes in 67-19-15.

It would, Respondent submits, have been a simple matter for the Legislature to have drafted 67-5-11 to read "An attorney in career status who either accepts appointment or is elected to a position in State government which is exempt from the merit provisions of Chapter 13 of Title 67 shall ... be reinstated." The fact that the Legislature omitted the language including persons elected to such positions must be interpreted to mean that it was intended not to include elected officials within the scope of the reinstatement provision of 67-5-11.

Regarding the omission of words in a statute, the following pronouncement is made in Sutherland Statutory Construction:

> As said in a leading British case: "To discover the true construction of any particular clause of a statute, the first thing to be attendant to, no doubt, is the actual language of the clause itself as introduced by the preamble; second, the words or expressions which are obviously by design omitted; third, the connection of the clause with other clauses in the same statute, and the conclusions which on comparison with other clauses, may reasonably and obviously be drawn...." Vol. 2A, Sutherland Statutory Construction, Section 46.05, p. 56 (Emphasis supplied.)

It is further stated in that same treatise:

> Words may not be supplied in a statute when the statute is intelligible without the addition of the alleged omission ... where the omission is not plainly indicated.... Vol. 2A, Sutherland Statutory Construction, Section 47.38, p. 173.

In the instant case the statute is clear and not ambiguous. The addition of the word or words necessary to include attorneys being "elected" to positions in State government is not necessary to make the statute intelligible, and the omission of such a provision is not plainly indicated by the statute. Respondent submits that where such language is omitted from a statute, it must be presumed that such was intended by the Legislature unless such an omission would render the statute absurd or unintelligible.

The Supreme Court of the State of Utah has been very reluctant to alter the terms of the statutes of this State and has indicated that such changes, if they are to be made, are legislative matters and not for the judiciary. In the case of Gord v. Salt Lake City, 20 U.2d 138, 140-141, 434 P.2d 449 (1967), the Supreme Court stated:

> ... The enactment of the statute prescribing this procedure is the legislative prerogative. It carries with it the presumptions that it is valid, and that the words and phrases were chosen advisedly to express legislative intent. The statute should not be stricken down nor applied other than in accordance with its literal wording unless it is so unclear or confused as to be wholly beyond reason or inoperable....

As indicated in the above-cited case, the Utah Supreme Court has refused to read into statutes that which does not appear in their clear language. Under the statute, those career status attorneys that accept appointment to

positions in State Government are entitled to reinstatement. That statute does not refer to attorneys elected to such position. The Court should not add the term "elected" to the statute.

A further reason for finding that Appellant does not fall within the provisions of 67-5-11 is that this section applies to those "accepting appointment" to an exempt position. Appellant did not "accept" an appointment, he sought election to the position and was elected.

Appellant seems to argue that because Section 67-5-13 U.C.A. allows an attorney in career status to take a leave of absence without pay to participate in partisan political campaigns as a candidate that somehow the provisions of Section 67-5-11 must be interpreted to mean that if the candidate who has taken a leave of absence is successful and is elected to and takes office, his position in the attorney general's office must be held open for him. The pertinent provisions of that section are:

> (2) No attorney in a career status shall be a candidate for any partisan political office, but upon application to the attorney general he shall be granted a leave of absence without pay

but without loss of existing seniority to participate in a partisan political campaign either as an officer or as a candidate....
67-5-13(2) U.C.A. (Emphasis added.)

The above-cited statutory provision clearly applies only to those wishing to participate in partisan political campaigns. This section does not provide for reinstatement of those candidates who are elected to the office they seek. This statutory provision is not limited to candidates for State office but all partisan political offices. If Appellant's contention were to prevail and 67-5-13 required reinstatement of candidates who were elected after their term in office ended, it would expand the class of those entitled to reinstatement to include those elected to federal office such as senators and congressmen and those local offices that are partisan in nature such as county attorney or county commission. Had the Legislature intended to include attorneys elected to these positions either under 67-5-13 or 67-5-11, surely it would have provided for them in the language of the statutes that would not require tortuous manipulation of the wording. Since neither the provisions of 67-5-11 nor 67-5-13 provide for the reinstatement of career status

attorneys to a position in the attorney general's office who are elected to office, it is clear that the Legislature did not intend for them to be included within the class entitled to reinstatement.

POINT II

COMPARISONS BETWEEN STATE "MERIT EMPLOYEES" AND "CAREER STATUS ATTORNEYS" DEMONSTRATE APPELLANT'S CONTENTIONS ARE IN ERROR.

Appellant argues that attorneys in the attorney general's office under the career service program are given preferred treatment in that they are permitted to be a candidate for public office and retain their career status by taking a leave of absence. Respondent submits that a similar provision applies to all State merit employees. Section 67-19-19 provides:

> (1) The director of personnel management shall promulgate rules to provide for limitations upon the political activities of state officers and employees covered under career service provisions. These rules shall be drafted and interpreted to protect the officer or employee from political exploitation or abuse and to allow individual state officers and employees the broadest amount of personal political participation consistent with loyal service to their superiors in state government.

> The rules shall incorporate, among others the following provisions:
>
> (a) ....
>
> (b) No officer or employee in career service shall be a candidate for any political office, provided that upon proper application, an officer or employee may be granted leave of absence without pay, without loss of existing seniority or tenure to participate in a political campaign, either as an officer or as a candidate; however, time spent during political leave shall not be counted for seniority purposes as being in service.... (Emphasis added.)

The provision above quoted closely parallels the provisions of 67-5-13 in that both allow employees in career status a leave of absence to participate in a political campaign as a candidate. The provisions of 67-19-19 specifically indicate that the terms of the statute be interpreted to favor merit employee political participation. It must be emphasized that both 67-19-19 and 67-5-13 apply only to candidates for public office and has no application to those elected to public office.

The statutory provision regarding rehiring of all "career service" State employees that parallels the Attorney General's Career Service Act provisions of 67-5-11 is found in 67-19-17 and provides as follows:

> Any career service employee accepting an appointment to an exempt position who is not retained by the appointing officer, unless discharged for cause as provided by this act or by regulation shall:

> (1) Be appointed to any career service position for which the employee qualifies in a pay grade comparable to the employee's last position in the career service provided an opening exists; or
>
> (2) Be appointed to any lesser career service position for which the employee qualifies pending the opening of a position described in subsection (1) of this section....
>
> 67-19-17 U.C.A. (1953 as amended 1979) (Emphasis added.)

As in the attorney general's career service statute, (67-5-11), provision for those elected to exempt positions is conspicuously absent in the above-cited statute. Respondent submits that had the Legislature intended to include elected officials in the class of State employees entitled to reinstatement (attorneys or otherwise) it would have made reference to "elected" officials somewhere in one of these statutory provisions. One can only conclude that the omission was intended and that those elected to office were not intended to be included within the reinstatement provisions of either 67-5-11 or 67-19-17.

POINT III

APPELLANT WAS NOT AN ATTORNEY IN A CAREER STATUS POSITION PRIOR TO HIS BEING ELECTED ATTORNEY GENERAL.

Appellant was first employed in the attorney general's office in November 1968. He was appointed the

deputy attorney general in January 1969 and was in that position at the time the Attorney General's Career Service Act was enacted in 1973. (R. 2) He retained that position until his election to the office of attorney general in 1976. Section 67-9-1 U.C.A. (1953 as amended) provides:

> The Secretary of State, the State Auditor, the State Treasurer, the Attorney General and the superintendent of public instruction, and the district attorneys as provided in section 67-7-13 may each appoint a deputy, who may, during the absence or disability of the principal, perform all the duties pertaining to the office.... The appointment of the deputy shall be in writing and shall be revocable at the pleasure of the principal.... (Emphasis added.)

The provisions of the above-cited statute clearly indicate that the position of deputy attorney general within the attorney general's office is an "exempt" position. The person holding that position does so at the "pleasure" of the attorney general. In other words, he could be dismissed at any time for any reason or no reason. The enactment of the Attorney General Career Service Act 67-5-6 et seq. (Career Service Act) did not repeal the provisions of 67-9-1. There are no specific provisions in the Career Service Act that make the position of deputy attorney general a career position. Therefore, Appellant does not qualify for reinstatement in any event under the provisions of 67-5-11.

POINT IV

APPELLANT FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDY TIMELY, THEREFORE THE INSTANT CAUSE OF ACTION MUST FAIL.

This Court has held that where administrative remedies are available, they must be exhausted prior to the initiation of legal action. In Pacific Intermountain Express Co. v. State Tax Commission, 7 U.2d 15 at 19, 316 P.2d 549 (1957), this Court held:

> In appraising the effect of the statute relied upon by the parties, there are some fundamental rules which favor the position of the Tax Commission. Primary among these is the general rule that before one may seek a review of the action of an administrative body, he must exhaust his administrative remedies and thereby give the agency an opportunity to correct any error it may have made.

The Attorney General's Career Service Act contains the following provision:

> An attorney in a career status who is aggrieved by a decision of the attorney general may appeal the decision to the merit system council as provided for in section 67-13-3, which shall set a time and date for hearing of the appeal, and the attorney shall have a right to appear in person or by counsel.
> 67-5-12(3) U.C.A. (1953 as amended 1973)

Chapter 13 of Title 67 was repealed in 1979 by Chapter 139 Section 36 and now appears in the Utah Code as 67-19-1 through 67-19-29.

In the instant case the Appellant did attempt to appeal administratively the decision of the attorney general not to reinstate him. In a letter dated June 30, 1981 written by Appellant to the Utah State Merit System Council Appellant stated:

> Pursuant to Sec. 67-5-12 U.C.A. 1953, I hereby appeal the decision of Attorney General David L. Wilkinson not to reinstate me as assistant attorney general in that office in accordance with Sec. 67-5-11, 1953.
>
> Would you kindly set a time and place for the hearing of this appeal. It would be helpful if this were before July 16th as the District Court is hearing a related motion at that time. (R. 38)

As indicated in the above-mentioned letter, Appellant has made some attempt to utilize the administrative review process referred to in 67-5-12. The process as outlined in the statutory review procedure provides:

> No appeal shall be submitted under this Chapter unless (a) it is submitted within 20 working days after the event giving rise to the appeal....
> 67-19-24 U.C.A. (1953 as amended 1979)

In the instant cause, giving Appellant the benefit of the latest possible date of "the event giving rise to the appeal," Appellant failed to submit his appeal within the 20 day time period required by the statute.

Based on his allegations final notification of refusal to reinstate was given to Appellant on April 29, 1981. (R. 4, 9) Appellant's first attempt to appeal administratively the decision which aggrieved him was made by his letter dated June 30, 1981. There was a lapse of time exceeding 60 days between the "event giving rise to the appeal" and the appeal, a period well beyond the time within which said appeal must be submitted.

Respondent submits that (1) the Appellant is required to exhaust his administrative remedy prior to seeking judicial redress, and (2) his failure to timely seek administrative review is jurisdictional and fatal to the instant cause of action.

CONCLUSION

The statutory provisions allowing for reinstatement of career status attorneys contained in 67-5-11 clearly and unambiguously apply only to those "accepting appointment to a position in state government." If, assuming arguendo, the Appellant had achieved career status within the attorney general's office, he freely and voluntarily gave up career status to seek and obtain election to an elective noncareer status office. He knew when he became elected his term in office was four years and if not reelected the position would

end by operation of law. Appellant complains that he gave up his private practice to attain career status. If this is correct it was, of course, a decision he made presumably knowing its consequences. He also gave up career status to take elective office; again it must be presumed he knew the consequences of such a decision.

Respondent submits that the lower Court properly dismissed Plaintiff's Complaint and any one of the three bases presented to it are sufficient to support that decision, to-wit:

1. The statutory provisions (67-5-11) relied upon by Appellant do not apply to him as an elected office holder.

2. He failed to gain career status prior to being elected to the office of attorney general.

3. He failed to exhaust his administrative remedies timely.

Respondent respectfully requests this Court to sustain the decision of the lower Court dismissing Appellant's Complaint.

DATED this 21st day of April, 1982.

Respectfully submitted,

DONALD S. COLEMAN
Assistant Attorney General
Attorney for Respondent

CERTIFICATE OF MAILING

This is to certify that two copies of the foregoing Brief of Respondent were mailed first class, postage prepaid, to Mark S. Gustavson, Attorney for Plaintiff-Appellant, 630 East South Temple, Salt Lake City, Utah 84102, this 21st day of April, 1982.

Gerlinde Harris