1972

The State Board of Education v. the State Board of Higher Education, University of Utah, and Utah State University of Agri-Culture and Applied Science : Petition For Rehearing

Utah Supreme Court

IN THE SUPREME CO
OF THE STATE OF U

THE STATE BOARD OF EDUCATION,
Plaintiff-Respondent,
vs
THE STATE BOARD OF HIGHER EDUCATION,
Defendant-Appellant,
UNIVERSITY OF UTAH, a corporate body politic, and UTAH STATE UNIVERSITY OF AGRICULTURE AND APPLIED SCIENCE,
Plaintiffs in Intervention and Respond

PETITION FOR RE
BRIEF IN SUPPOR

Appeal from the Third Judicial
Salt Lake County,
Honorable Gordon

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THE STATE BOARD OF EDUCATION,
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Defendant-Appellant,
UNIVERSITY OF UTAH, a corporate body politic, and UTAH STATE UNIVERSITY OF AGRICULTURE AND APPLIED SCIENCE,
Plaintiffs in Intervention and Respondents.

PETITION FOR REHEARING
Case No. 13003

The Plaintiff, State Board of Education, petitions the Court for a rehearing in the above-entitled case on the following grounds:

1. The Court erred in holding that "the State Board of Education made no attempt to exercise control and supervision over post high school institutions except for the administration of certain junior colleges and technical schools, which from time to time have been placed under its jurisdiction by the legislature."

2. The Court erred in holding that "Since statehood the Constitution has been construed by the legislature as placing the control and supervision of public schools other than institutions of higher learning with the State Board of Education."

3. The Court erred in holding that the provisions of Article X, Section 8 and Article X, Section 2 are in conflict.

4. The Court erred in holding that the acquiescence of the State Board of Education gave different meaning to the Constitution than its words clearly state.

5. The Court erred in holding that no actual conflict has arisen and there is not any justifiable apprehension that there will be.

DATED this 5th day of March, 1973.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE BOARD OF EDUCATION,
Plaintiff-Respondent,
vs
THE STATE BOARD OF HIGHER EDUCATION,
Defendant-Appellant,
UNIVERSITY OF UTAH, a corporate body politic, and UTAH STATE UNIVERSITY OF AGRICULTURE AND APPLIED SCIENCE,
Plaintiffs in Intervention and Respondents.

Case No. 13003

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

ARGUMENT

POINT I

THE COURT ERRED IN HOLDING THAT "THE STATE BOARD OF EDUCATION MADE NO ATTEMPT TO EXERCISE CONTROL AND SUPERVISION OVER POST HIGH SCHOOL INSTITUTIONS EXCEPT FOR THE ADMINISTRATION OF CERTAIN JUNIOR COLLEGES AND TECHNICAL SCHOOLS, WHICH FROM TIME TO TIME HAVE BEEN PLACED UNDER ITS JURISDICTION BY THE LEGISLATURE."

The clear implication of this statement in the Court's opinion is that the involvement of the State Board of Education with institutions of higher learning has been minimal. However, an examination of legislative enactments shows that the State Board of Education served as the Board having "manage-

ment and control" of Weber College for thirty (30) years following its establishment in 1931 (Laws of Utah 1931, Chapter 58) until 1961 when the "government of the college and the management of its property and affairs . . ." was transferred by the Legislature to a Board of Trustees (Laws of Utah 1961, Chapter 115).

The State Board of Education was also the Board given "management and control" of Carbon College (now College of Eastern Utah) at the time of its creation in 1937 (Laws of Utah 1937, Chapter 77) and retained that capacity for over twenty (20) years until deprived of that function by the Legislature in 1959 (Laws of Utah 1959, Chapter 87).

Dixie College was established by the Legislature in 1933 and its "management and control" was also placed in the State Board of Education (Laws of Utah 1933, Chapter 50) where it remained until the herein challenged Act stripped the State Board of Education of its last remaining constitutional authority (Laws of Utah 1969, Chapter 138).

The Technical Colleges at Provo and Salt Lake City have been under the "management and control and supervision" of the State Board of Education since 1947 (Laws of Utah 1947, Chapter 76) and the State Board of Education was designated as the State Board for Vocational Education as early as 1919 (Laws of Utah 1919, Chapter 86).

Only the Southern Utah State College at Cedar City, of the institutions of higher education established since statehood, has not spent the majority of its existence under the management and control of the State Board of Education. This can

be explained by the fact that this school has always existed either as a part of the University of Utah and Utah State University, both of which institutions have been considered as having constitutional existence of their own under Article X, Section 4.

Even as to the University of Utah and Utah State, the involvement of the State Board of Education has been substantial. The President of the University of Utah and the principal of the Agricultural College were members of the State Board of Education in the days following statehood. Also, in 1925 the Legislature codified certain responsibility of the State Board of Education in the following language:

> "The general control and supervision of the public school system is vested in the State Board of Education, which Board shall adopt rules and regulations to eliminate and prevent all unnecessary duplication of work or instruction in any branch or division of the public school system and it shall require the governing boards of such branches and divisions of the public school system to put the same into operation."

There can be no doubt that this language included the institutions of higher learning and was, in all probability, aimed primarily at those institutions. The ensuing study by the State Board of Education certainly included them, which hardly bears out the Court's statement that "the State Board of Education made no attempt to exercise control and supervision over post high school institutions . . ."

The State Board of Education, quite contrary to this assumption did assert its constitutional power of supervision and control over the University of Utah by intervening in a suit commenced by the University of Utah against the Board of

Examiners in the Third District Court of Salt Lake County on February 11, 1954, Civil Number 92438. During the course of that litigation, the parties stipulated and agreed that the University of Utah was subject to the "general control and supervision" of the State Board of Education.

The specific language from the Stipulation and Judgment is as follows:

> "The State Board of Education has constitutional power and authority and is required to exercise general control and supervision over the University of Utah and its relation to other institutions of higher learning and in its relation to the elementary, high schools and other branches and phases of the state school system; that the State Board of Education in exercising general control and supervision of the public school system is authorized and required to adopt rules and regulations to eliminate and prevent unnecessary duplication of work or instruction in the plaintiff university and other departments, branches and divisions of the public school system; that specific control and supervision of the University of Utah is vested in the Board of Regents and the President of said University."

While the case was not appealed and the status of the judgment as to res judicata may be questioned, it certainly proves that the Board of Education did not sit idly by and never assert its constitutional authority and responsibility.

The Court having erred in stating a primary fact upon which its opinion is based should grant a rehearing in the matter and hear further arguments upon the issues raised.

POINT II

THE COURT ERRED IN HOLDING THAT "SINCE STATEHOOD, THE CONSTITUTION HAS BEEN CONSTRUED BY THE LEGISLATURE AS PLACING THE CONTROL AND SUPERVISION OF PUBLIC SCHOOLS OTHER THAN INSTITUTIONS OF HIGHER LEARNING WITH THE STATE BOARD OF EDUCATION."

To the contrary, the Legislative enactments cited above indicate that the Legislature since statehood has vested control and supervision of most of the institutions of higher learning in the State Board of Education and that, except for those institutions which have independent constitutional existence, it has only been in recent years that the Legislature has indicated its desire to place the control and supervision of the institutions of higher learning elsewhere than in the State Board of Education, culminating in the Higher Education Act of 1969 which transferred those constitutional duties to the State Board of Higher Education and used almost verbatim, constitutional language to accomplish the transfer.

POINT III

THE COURT ERRED IN HOLDING THAT THE PROVISIONS OF ARTICLE X, SECTION 8 AND ARTICLE X, SECTION 2 ARE IN CONFLICT.

Article X, Section 8 reads as follows:

> "The general control and supervision of the public school system shall be vested in the State Board of Education, the members of which shall be elected as provided by law."

Section 2 of Article X is a definition section and defines the phrase "public school system", which phrase is then included in Section 8.

Section 2 defines the phrase "public school system" as follows:

> "The public school system shall include kindergarten schools; common schools, consisting of primary and grammar grades; high schools; an agricultural college; a university; and such other schools as the Legislature may establish . . ."

All parties to this action agree that the newer institutions of higher learning in the State are other schools which the Legislature has established.

It is difficult to imagine how a conflict can arise between Section 8, which sets forth powers of the State Board of Education over the "public school system," and Section 2, which defines what is meant by the phrase "public school system." A definition of a word can hardly conflict with the word itself. To the contrary, the two sections taken together are quite clear in setting forth the intent of the framers of the Constitution that all of the schools set forth by name in Section 2 and other schools which the Legislature may see fit to establish would exist under the control and supervision of the State Board of Education, a concept to which this Court gives lip service by four justices but failed to establish as law when it reversed rather than affirmed the decision of the lower court in this case.

POINT IV

THE COURT ERRED IN HOLDING THAT THE ACQUIESCENCE OF THE STATE BOARD OF EDUCATION GAVE DIFFERENT MEANING TO THE CONSTITUTION THAN ITS WORDS CLEARLY STATE.

As set forth above, the Petitioner does not agree with the Court's ruling that there was any long acquiscence on its part in any decision, legislative or otherwise, to grant control and supervision of the State's institutions of higher learning to any other body. However, even assuming that fact arguendo, the law is clear that this would not affect those duties and responsibilities assigned to the State Board of Education by Article X, Section 8 of the Constitution.

As this Court stated in *Hansen v. Legal Services Committee*, 19 Utah 2d 231, 429 P.2d 979, long-standing interpretation of a constitutional provision by the Legislature ". . . hardly could be pointed up to change the basic, clear, unmistakable phraseology of the Constitution."

This general rule of constitutional construction is that "Wherever the purpose of the framers of a constitution is clearly expressed, it will be followed by the courts." 16 Am. Jur. 2d Constitutional Law §64. And again, "The rule is sometimes stated more completely that a constitutional provision which is positive and free from all ambiguity must be accepted by the courts as it reads, and in such a case no construction is permissible." 16 Am. Jur. 2d Constitutional Law § 84.

The law is clear and well settled that whatever effect acquiscence has in construing a provision, it is looked to only in the event the provision is ambiguous or the meaning not clear. As stated by the Supreme Court of Wisconsin in the case of *Board of Trustees of Lawrence University v. Milwaukee County,* 136 NW 619,

> "It is an absolute requisite, however, in the application of the doctrine, that the law so construed must be doubtful, ambiguous or uncertain. It can have no force against plain language. 'A customary violation of the plain language of the law gives no authority for continuing such violation.' . . ."

This is particularly true in cases such as that now before the Court for

> ". . . no acquiscence for any length of time can legalize a usurpation of power where the people have plainly expressed their will in the Constitution and established judicial tribunals to enforce it. It has been pointed out that a power is frequently yielded to merely because it is claimed, and that it may be exercised for a long period in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without anyone being sufficiently interested in the subject to raise the question. Such circumstances cannot be allowed to sanction a clear infraction of the Constitution. A corresponding application of these principles is found in the established rule that nonuser will not defeat a power to exercise rights expressly delegated in a written constitution." 16 Am. Jur. 2d, Constitutional Law § 84.

The facts in this case show that there has not been a long period of acquiscence and that it has been only in recent years that the control and supervision of the institutions of higher learning have been removed from the State Board of Education by legislative Fiat and it was not until the Higher Educa-

tion Act of 1969 that a grant of power to another board was so complete that a conflict arose between that entity and the State Board of Education under any possible reading of the term "general control and supervision." But the period of time between 1969 and the filing of the instant action can hardly be said to constitute long acquiescence.

POINT V

THE COURT ERRED IN HOLDING THAT NO ACTUAL CONFLICT HAS ARISEN AND THERE IS NOT ANY JUSTIFIABLE APPREHENSION THAT THERE WILL BE.

Since the Higher Education Act of 1969 was passed, conflict has arisen between the Board of Higher Education, the institutions of higher learning and the State Board of Education as to the proper role for each and as to who, in such dispute, has the ultimate power and responsibility over a particular function or institution.

The Constitution grants general control and supervision to the State Board of Education. A conflict arises on the face of the Higher Education Act of 1969 because that Act vests in the Board of Higher Education the "control", management and supervision" (53-48-4 UCA 1953) and also places in that body the responsibility for master planning, assigning roles, coordination between institutions, and construction and use of facilities and approving changes in curriculum, all of which are in direct conflict with the constitutional grant of general control and supervision to the State Board of Education.

A specific and direct conflict arises under Section 53-48-4 with respect to the technical colleges. The last paragraph of that section provides as follows:

> "In order to facilitate proper co-ordination and direction of high school, area vocational center, and technical college vocational training programs, the Utah Technical College at Provo and the Utah Technical College at Salt Lake shall remain under the management and control of the state board for vocational education. With respect to the Utah Technical College at Provo and the Utah Technical College at Salt Lake, the state board of higher education shall have jurisdiction and shall exercise the powers and responsibilities specified in sections 53-48-9, 53-48-10, 53-48-12, 53-48-13, 53-48-14 and 53-48-17; provided, that nothing herein shall affect the power and authority vested in the state board for vocational education to apply for, accept, and manage federal appropriations for the establishment and maintenance of vocational education."

Sections 9 and 10 give the higher board authority to prescribe a system of accounts, prepare budgets and request state appropriations for the institutions. Section 12 provides for establishment of institutional roles by the Board of Higher Education. Section 13 grants to the new board control of curriculum and programs leading to a degree. Section 17 places in the new board the authority to control all construction and purchases of facilities for the technical colleges.

A very real and continuing controversy arose as to the authority and responsibility of the two boards over the control and supervision of the technical schools. The State Board of Education serves also as the State Board for Vocational Education and under Section 4 quoted above, is to have "management and control" of the technical colleges. However, control of fiscal and budget matters, curriculum and programs,

the granting of degrees, and control over all construction and purchase of facilities is then given to another board. Under such a division of responsibility, many conflicts arise; such as, who does have responsibility for initiating new programs of vocational education, which board authorizes the issuance of bonds for new facilities, and who controls the fiscal management of the technical institutions.

These specific conflicts, which have arisen and exist on a continuing basis, gave birth to the present litigation and must be viewed as a source of continuing litigation since the provision of the statute and the current opinion of this Court offer no guides to their solution.

It is to the credit of the members of both boards that conciliation of these conflicts during the present litigation has prevented the institutions from suffering irreparable harm during this period of conflict. But, this can hardly be taken as meaning there is an absence of conflict.

If the two boards are to coexist, some guidance from this Court with respect to the meaning given the words "general control and supervision" as they appear in Section 8 of Article X of the Constitution and how they can be reconciled with the provisions of the Higher Education Act of 1969 is essential.

Respectfully submitted,

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