1967

Curtis I. Gord v. Salt Lake City, A Municipal Corporaton, et al. : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

CURTIS I. GORD,
Plaintiff and Respondent,

vs.

SALT LAKE CITY, a municipal corporation, et al.,
Defendant and Appellant.

Case No. 10857

RESPONDENT'S BRIEF

Appeal From the Judgment of the Third District Court of Salt Lake County Honorable Stewart M. Hanson

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STATEMENT OF THE NATURE OF THE CASE

This is an action brought by plaintiff upon his verified petition for a Writ of Mandamus compelling defendants to reinstate plaintiff in his employment at the Salt Lake City cemetery. An Order granting an Alternative Writ of Mandamus was issued out of the Third Judicial District Court, in and for Salt Lake County, at the initiation of the action on February 3,

1967. A hearing was held on February 9, 1967, at which the Honorable Stewart M. Hanson, Judge ruled that a Peremptory Writ of Mandate to compel defendants to reinstate plaintiff as a city employee be issued and made permanent. The City appeared at this hearing, filing no pleadings nor producing any evidence to contravene Respondent's petition. On the 21st day of February, 1967, defendant's motion for rehearing was denied but an Order holding the judgment in abeyance was issued by Judge Hanson in favor of defendants.

RELIEF SOUGHT ON APPEAL

The Respondent seeks affirmance of the trial court's decision.

STATEMENT OF FACTS

Respondent objects to the recitation of certain facts set forth in Appellant's Brief at Pages 2 and 3, since all matters relating to the reason for his discharge are outside this record, excepting his salaried employment at the Salt Lake City Cemetery. No record was made of the incident concerning Respondent's discharge, nor is it available for review. Only the fact that the Appeal Board voted to recommend Respondent's reinstatement with a penalty of fourteen days lost pay, in lieu of discharge, is of record. (Plaintiff's Exh. 2 and 3).

STATEMENT OF ISSUES

The statement of issues as set forth in Appellant's Brief is adequate except that additional Legislative history should be cited.

The Legislature in 1945 enacted a statute providing for retirement of appointed officers and employees of the cities of the first class with pensions and retirement benefits, and provided, among other things, that:

> "Should the services of any appointed officers or employees be terminated by discharge or resignation, such officer or employee shall be refunded not less than all monies withheld from his salary or wages; and should such officer or employee thereafter be re-employed by the city, he shall repay to the city the amount refunded to him and restored to the position in the pension-retiremen system which he held at the time of his discharge or resignation." (Laws of Utah, 1945, Chapter 24).

It is important to point out that 49-2-5, Utah Code Annotated, 1953, as amended, came into law as a proviso to protect the pension-retirement program of appointed officers and employees of all major municipalities. The law also stems from a grant of power contained in 10-6-90, Utah Code Annotated, 1953, as amended, authorizing the Mayor, as the chief executive officer, to employ qualified individuals, fix their salaries within the schedule adopted by ordinance, subject, however, to 49-2-5.

ARGUMENT

POINT I.

TRIAL COURT DID NOT ERR IN ITS INTERPRETATION OF SEC. 49-2-5, UTAH CODE ANNOTATED, 1953, IN THAT TO GIVE TO THE APPEAL BOARD THE FINAL DECISION DOES NOT VIOLATE ART. VI, § 29 OF THE UTAH CONSTITUTION.

Appellant complains that the Appeal Board is weighted with a majority of members selected by city employees and thus runs contra to Constitutional mandate Art. VI, § 29. Under the 1947 Act, an opposite majority held forth. Appellant's argument is untenable.

In *Logan City, State Water Pollution Control* and *Backman,* cited by Appellant, municipal functions and prerogatives were involved. But the term "municipal function" was never intended to apply to the case at issue. The discharge, transfer or termination of a city employee involves only ministerial or administrative functions. The Constitution principle cited by Appellant has not been construed as to deprive a municipal council of the power of delegating such functions to subordinate boards or officials. 37 *Am. Jur.* p. 733.

The fact that the city has the power to hire does not mean that it has the power to fire in every case, or that it is required to so act. Here the State Legislature has expressly authorized the delegation of powers

to hear discharge cases by cities to appeals boards. The protection given such employees is general law, and it applies to all these city employees. It is not a grant to a special commission or private corporation for profit, to levy taxes, or to impede the city's municipal function.

Appellant's interpretation is too narrow and restrictive to meet the problems of modern city management, for not even the strongest form of Mayoralty government could begin to cope with the personnel problems which arise daily. Salt Lake City's own Ordinances recognize the advantages of such Boards and have adopted reasonable rules of procedure to insure due process of law. (See Ordinances printed in Appendix.)

The public purpose intended to be protected by the Utah Constitution, Art. VI § 29, has no relationship to the instant case.

POINT II.

TO PROPERLY PERFORM ITS MUNICIPAL FUNCTIONS, THE SALT LAKE CITY COMMISSION HAS PROPERLY DELEGATED THE POWER TO HEAR DISCHARGE CASES OF APPOINTED OFFICERS AND EMPLOYEES.

The final decision as to employees' discharge is correctly left with the Appeal Board, where it should be, for the protection of the aggrieved employee.

It should be noted that the original function of the Appeal Board, pursuant to the 1947 law, was to "make investigations, take and receive evidence bearing upon the cause for such discharge, dismissal or transfer, and make findings and recommendations in regard thereto to the governing body of said city." (Laws of Utah 1947, Chapter 19, Section 5.) Thus, the original function of the Appeal Board according to the 1947 Act was merely to recommend action to the City Commission. In 1955, Senate Bill No. 57 was introduced to amend 49-2-5. The title of that bill is extremely helpful in interpreting the purpose of the amendment. The title reads:

> "An act to amend Sec. 49-2-5, Utah Code Annotated 1953, providing for tenure of office and covering discharge or transfer of appointive officers and employees of cities other than members of the police, fire or health departments; *providing for an appeal from discharge or transfer; creating a Board of Appeal with power to fully hear the matter and give a decision.*" (Emphasis supplied.)

It should be noted that the title provides that a Board of Appeal shall have the power to "fully hear the matter and give a decision." One amendment which this provision made to the previous law appears in Sec. 49-2-5. The third paragraph of Sec. 49-2-5 provides a right to counsel, a public hearing to confront the witnesses whose testimony is to be considered, and to examine the evidence to be considered by the Appeal Board.

The second paragraph of Sec. 49-2-5 added a provision to the 1947 law providing that "the Appeal Board shall forthwith commence its investigation, take and receive evidence and *fully hear and determine the matter which relates to the cause for such discharge or transfer.*" (Emphasis supplied.) Such language supports the position that the Appeal Board was no longer an investigative or recommending body, but rather, was to have full power to decide the issue.

Finally, it seems obvious that since the decision of the Appeal Board, as provided in the fifth paragraph of Sec. 49-2-5, is to be forwarded to the employee by the City Recorder, and he may immediately resume employment the next day after receipt of notice of reinstatement, that the case of discharge is to be determined by the Appeal Board.

It is obvious that nothing in the present law allows the employer to perfect an appeal from an adverse determination of the Board and it seems difficult to understand why an employee would want to appeal a favorable determination.

There are certain ambiguities in the law, but it is clear that the Legislature really did not intend to give the governing power to over-turn reinstatements ordered by its own Appeal Board.

POINT III.

THE COURT DID NOT ERR IN ITS INTERPRETATION OF SECTION 49-2-5, UTAH CODE ANNOTATED 1953, AND PROPERLY ISSUED THE WRIT OF MANDATE.

The same legislative history cited by Appellant supports Respondent's case and the trial court's ruling.

Deletion of the words "and shall be final" from the first proposed Bill in 1955 and deletion of the word "final" from "final decision" in the title of the Act does not negate the Legislature's clear intention to "Create a Board of Appeals with power to fully hear the matter and give a decision." Since ultimate discharge had to be by concurrence of a majority of the city governing body, it is obvious that an unfavorable decision to the employee was not intended to be final and the employee was entitled to perfect his further appeal to the city governing body; otherwise, the concurrence of at least "a majority of the membership of the governing body of said city" is a meaningless mandate. If on the other hand, the Appeal Board did not uphold the discharge, then the employee prevailed, and the case was over. Why must the employee be required to perfect a further appeal from a determination in his favor? Such being the result, then the Board's decision was final.

The trial court concluded:

"It has the duty to interpret Sec. 49-2-5, in order to give effect to the Legislautre's intent. To give said statute the construction which defendant contends would lead to an absurd and futile result and be plainly at variance with the policy of the statute. Two provisions of said statute bear upon each other and are inconsistent with the policy of the statute as a whole. Unless these provisions are explained and modified, the plain purpose of the statute is destroyed and an absurd injustice results." (R. 23, 24).

In this ruling the Court followed well-settled Utah case law:

In *Masich v. U. S. Smelting, Refining and Mining Co.*, (1948) 113 Utah 101, 191 P 2d 612, at 616, this Court said:

"One of the cardinal principles of statutory construction is that the Courts will look to the reason, spirit, and sense of the legislation as indicated by the entire context and subject matter of the statute dealing with the subject."

In *Washington County v. State Tax Comm.*, (1943) 103 Utah 73, 133 P 2d 564, this Court said:

"But a statute is passed as a whole, not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section, so as to produce a harmonious whole."

In *Taft v. Glade* (1948) 114 Utah 435, 201 P 2d 285, this court said:

> "It is our duty interpreting a statute to give effect to legislative intent as expressed by the wording of the statute. If reasonably possible, effect should be given to every part of a statute and if the enactment is subject to one or more interpretations by reason of conflicting provisions, then that construction which will harmonize and give effect to all provisions is preferred."

And in *Worthen v. Shurtleff and Andrews, Inc.* (1967) .... Utah ...., 426 P 2d 223, this Court recently said:

> "Where there is such conflict in the provisions of statutes it is improper to place all of the emphasis on either provision to the exclusion of the other. They should be considered together and it is proper to examine into the background and purpose as well as to the language of the statute to discover what the legislative intent was as to which should have priority."

Had the Legislature intended to provide an appeal for the city, against an adverse decision of the Appeal Board, it would have been simple and easy for the Legislature to have so stated. Sec. 49-2-4 Utah Code Annotated 1953, provides: " . . . employees shall hold their employment without limitation of time, being subject to discharge or dismissal only as hereinafter provided (in 49-2-5)."

Thus the scheme of this tenure for permanent city employees with vested pension rights becomes clear. They can only be discharged by a final concurrence of a majority of the membership of the governing body

of the city; but if in the meantime they have won before the Appeal Board the issue is ended and there is naught to go before the governing body. Having reversed the discharge order the City Recorder certifies the decision to the employee affected and he goes back on the payroll, provided he shows up for work the next day, which Respondent did.

Judge Hanson therefore correctly concluded:

> "It is clear to this Court that the Legislature meant 'In the event the Appeals Board shall not uphold such discharge or transfer, the case shall be closed and no further proceedings shall be had. In the event the Appeal Board does uphold such discharge or transfer, then such officer or employee may have 15 days thereafter to appeal to said governing board whose decision shall be final.' The Court has not re-written this statute, it has merely placed the word "not" where it properly belongs in the two sentences, removing it out of the second and placing it into the first." (R. 24).

This common sense interpretation comports with due process of law, good procedure, and making the entire statute a harmonious whole. And there is precedent for such interpretation in *Johnson v. United States Gypsum Co.*, (1950) Ark. 229 S.W. 2d 671, where the Arkansas court held:

> "The words of the statute (in issue) were: In cases of appeal to the Supreme Court, the transcribed notes of the stenographer shall be treated as a bill of exceptions or as depositions in the case until the same is approved by the

Chancellor trying the case and such approval must be given during the term or within the time fixed for such approval by the court."

"We have italicized three words (as above) merely to show that there is an obvious omission or typographical error in the wording of the Act. The Legislature evidently meant that the transcribed notes shall not be (instead of 'shall be') treated as a bill of exceptions or as depositions until approved by the Chancellor, or perhaps that they shall be so treated when (instead of 'until') approved by him. When a word in a statute is omitted or misused, it is the duty of the courts to disregard the error if the context plainly indicates the legislative intent. . . ."

The interpretation given the statute by the City attorney destroys the entire statutory scheme, while the trial court's construction saves and harmonizes all parts of the Act.

CONCLUSION

The City's right to hire does not necessarily carry with it the right to discharge. The protection given these employees is clear from 49-2-4 and 5. Job tenure is an important factor, not only to the individual, but also to insure stable and efficient government. Since 1947, in the State, employees have been protected from dismissal for their religious and political beliefs; since 1955 they have been shielded because of membership or non-membership in unions; since 1965 the right has been extended to include race, creed and color. It is just

too late in the century to buy Appellant's thesis that employee Appeal Boards violate constitutional rights of city governing bodies. A rule of law has replaced arbitrary employer unfair practices in employment in industry and in government. Banishment from one's job can only be sustained by showing just cause and procedural fairness, where it concerns a permanent city employee who has acquired vested job and retirement rights. We submit that the trial court's decision should be affirmed.

Respectfully submitted,

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Dated: June 5, 1967

APPENDIX

SEC. 25-11-1. SCOPE OF CHAPTER. It is the purpose of this chapter to establish uniform rules and regulations governing personnel administration in all departments of city government, provided, however, that the provisions hereof shall not apply to elective officials, their administratice assistants, their personal secretaries, heads of departments, nor to civil service personnel of the police, fire and health departments.

SEC. 25-11-2. STATEMENT OF POLICY. No employee covered by this chapter shall be discharged or transferred to a position with less remuneration because of his politics or religious belief, or incident to, or through changes, either in the elective officers, governing body, or heads of departments.

SEC. 25-11-3. DISCHARGE OR TRANSFER. In all cases where any employee is discharged from one position to another for any reason, he shall have the right to appeal such discharge or transfer in accordance with Section 49-2-5, Utah Code Annotated 1953.

SEC. 25-11-4. APPEAL BOARD. There is hereby created an appeal board to consist of five members, three of whom shall be chosen by and from the appointed officers and employees, and two of whom shall be city commissioners, said members to hold office for a term of two years and to be chosen as follows:

(1) The three appointive officer and employee members shall be chosen by ballot, each appointive officer or employee of the city being entitled to cast one vote for each member to be chosen. A general meeting of the appointive officers and employees of the city shall be held on the second Tuesday of January,

of each even-numbered year, at which meeting the said officers and employees shall elect three appointive officer and employee members to serve on said appeal board. At least ten days prior to the holding of said meeting, the city commissioners shall appoint some appointive officer or employee to act as secretary, posting notice thereof in a conspicuous place in each of the city departments continuously for at least five days prior to the date of said meeting.

The three appointive officers and employees shall be each from different statutory departments and no person from any department shall be eligible for election if any other person from the same department receives a higher number of votes in the balloting, even though such person may receive more votes than a person from a different department. Except for this qualification, the three persons receiving the highest number of votes at said meeting shall be declared chosen as the appointive officer and employee members of said appeal board. Bi-annually thereafter, the appointive officer and employee members of said appeal board shall be chosen in similar manner and at similar time.

(2) On the second Tuesday of January of each even-numbered year, two city commissioners shall be appointed by the city commission as a whole.

(3) In the event a vacancy occurs in the appointive officer and employee membership of said appeal board, the remaining appointive officer and employee member or members may fill such vacancy by appointment, the appointee to hold office until the next election. In case of a vacancy in the city commission membership such vacancy shall be filled by appointment by the city commission as a whole. A vacancy shall occur whenever any member resigns or dies or refuses to act or his services with the city are terminated.

SEC. 25-11-5. EMPLOYEE GRIEVANCES. It shall be the policy of Salt Lake City to adjust grievances of employees promptly and fairly. Within the framework of existing laws and regulations, every effort shall be made to adjust grievances in a manner mutually satisfactory to employees and management. Any employee who believes that he has received inequitable treatment because of some condition of his employment, may personally or through his representative, appeal for relief from that condition. In any grievance not involving discharge or transfer the following procedure shall be followed:

An employee or his representative is expected to discuss any grievance initially with his immediate supervisor. Then, if the matter is not settled, the grievance may be discussed with the division head or with the head of the department. If the grievance arises out of a matter over which the supervision, division head, or department head has no control, the employee or his representative in his behalf, may carry such grievance to the board of commissioners. Supervisory personnel at all levels are responsible for receiving and acting upon employee complaints. In the presentation of grievances at any supervisory level, employees are insured freedom from restraint, interference, discrimination or reprisal.